

# The New Comparative Political Process Theory

## Its Legitimacy and Applicability in Japan

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“Hence one may infer that judicial review, although not responsible, may have ways of being responsive.”

Alexander M. Bickel, *The Least Dangerous Branch*<sup>1</sup>

- I. John Hart Ely’s Process-based Approach
- II. Democracy’s Minimum Core and Schumpeterian Elitist Democracy
- III. Moral Legitimacy of Responsive Judicial Review
- IV. The Extent and Point at Which the Supreme Court of Japan Is Responsive
- V. Conclusion

In this paper, I briefly analyse (I) John Hart Ely’s process-based approach to judicial review, (II) the relationship between democracy’s minimum core and Schumpeterian elitist democracy, (III) the moral legitimacy of responsive judicial review, and (IV) the extent to which the Supreme Court of Japan has carried out responsive judicial review.

### I. JOHN HART ELY’S PROCESS-BASED APPROACH

The process-based approach to judicial review was first formulated by John Hart Ely in his *Democracy and Distrust*<sup>2</sup> and was introduced to Japan by Shigenori Matsui.<sup>3</sup> According to Ely, the US Constitution is concerned with processes writ small and large.<sup>4</sup> The former concerns procedural fairness in the resolution of individual disputes. The latter is itself subdivided. First, there are constitutional provisions intended to open channels for political change. Clauses guaranteeing the rights of political expression, association,

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1 A. BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) 19.

2 J. H. ELY, *Democracy and Distrust: A Theory of Judicial Review* (1980).

3 S. MATSUI [松井茂記], *二重の基準論 [A Double Standard Theory]* (1994).

4 ELY, *supra* note 2, 87.

and participation fall within this subdivision. Second, there are aspects of the US Constitution that endeavour to restrain a majority's ability to systematically outvote under-represented minorities.

More than a decade after Ely's publication, I wrote a critical review of the theory,<sup>5</sup> questioning mainly whether its conception of democracy was sufficiently legitimate to offer secure ground for judicial review in Japan. Essentially, Ely introduced the pluralist model of democracy from American political science, and argued that the proper role of judicial review is to maintain and reinforce such a democracy. He argued that the predominant theme underlying the US Constitution is pluralist:

“The original Constitution's more pervasive strategy, however, can be loosely styled a strategy of pluralism, one of structuring the government, and to a limited extent society generally, so that a variety of voices would be guaranteed their say and no majority coalition could dominate.”<sup>6</sup>

According to the pluralist model, democracy is an arena where manifold interest groups endeavour to influence the political process to achieve their respective interests. The transactions and compromises between interest groups bring about statutes and regulations as balance points for sundry forces. So-called “public interests” are these amalgams of particular interests and nothing more.<sup>7</sup> A claim that a given policy promotes public interests is merely an “effective device” to “reduce or eliminate opposing interests”.<sup>8</sup>

Behind these dry and scientific analyses, we can detect deep scepticism about the objectivity of value judgment.<sup>9</sup> Though the extent to which Ely

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5 Y. HASEBE [長谷部恭男], 政治取引のバザールと司法審査 [A Bazaar of Political Bargaining and Judicial Review], 法律時報 67(4) (1995) 62.

6 ELY *supra* note 2, 80.

7 A. F. BENTLEY, *The Process of Government: A Study of Social Pressures* (1995, originally published in 1908) 211–213. According to Bentley, ‘objective utility’ is ‘like the undiscovered and unsuspected gold under the mountain, a social nullity’ (*ibidem* 213). For a similar observation about the current US legislative decision-making, see M. TUSHNET, *Making Easy Cases Harder*, in: Jackson/Tushnet (eds.), *Proportionality: New Frontiers, New Challenges* (2017) 303. According to Tushnet, ‘To require that every provision in a complex regulatory scheme be fully defensible solely on the ground of principle is to place excessive demands on the legislative process’ (*ibidem*, 320).

8 D. B. TRUMAN, *The Governmental Process: Political Interests and Public Opinion* (1951) 50. It is noteworthy that A. M. BICKEL, Ely's teacher and colleague at Yale Law School, refers to Truman's and Robert A. Dahl's understanding of democratic process in his *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2<sup>nd</sup> ed., 1986) 18–19. This may suggest that when Bickel raised the issue of ‘counter-majoritarian difficulty’ (*ibidem* 16–23), he also presupposed a pluralist model of democracy.

himself<sup>9</sup> committed to the scientism of pluralist political theorists is uncertain, he obviously shared scepticism about the objectivity of value judgment in general.<sup>10</sup> In his view:

“[T]he selection and accommodation of substantive values is left almost entirely to the political process and instead [the Constitution] is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (writ small), and on the other, with what might capaciously be designated process writ large – with ensuring broad participation in the processes and distributions of government.”<sup>11</sup>

However, the assertion that it is better to avoid value judgments in judicial review is itself a value judgment, which is barely defensible. If democracy is nothing but a pluralist arena where manifold interest groups compete to attain their aims, it is difficult to see any point in policing and sustaining such a bargaining bazaar for particular interests. It is useless to argue that, although “interests” and “pressure groups” are deprecating words,<sup>12</sup> particular interests may include noble goals, because the distinction between noble and base interests is also a value judgment that has no place in Ely’s process theory.

Moreover, such a pluralist model of democracy may be unique to a large-scale case such as the US, in which individuals belong to multiple associations where they may lose in one political decision and win in another. As James Madison indicates,<sup>13</sup> when the electorate is sufficiently large, a solid majority faction is less likely to emerge. However, if winners and losers are fixed according to some demarcation and a minority faction remains oppressed, the political arena will soon implode.

Ely perceived such a risk and advocated active interventions by the Court to secure the interests of “discrete and insular” minorities.<sup>14</sup> According to Ely, in the famous *Carolene Products* footnote,<sup>15</sup> Justice Stone refers to “the sort of ‘pluralist’ wheeling and dealing by which the various minorities that make up our society typically interact to protect their interests”, with “insular and discrete” minorities being those “for which such a system

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9 P. CRAIG, *Public Law and Democracy in the United Kingdom and the United States of America* (1990) 60.

10 ELY, *supra* note 2, 58, 65, and 67.

11 ELY, *supra* note 2, 87.

12 BICKEL, *supra* note 8, 18.

13 J. MADISON, *The Federalist Papers*, No. 10, which Ely cites in *supra* note 2, 80. This Madisonian pluralist conception may be backed by the unique American political culture that promotes the emergence of a number of associations. See A. DE TOCQUEVILLE, *De la démocratie en Amérique, tome II* [Democracy in America, vol. II] (1961) 154–158 [II.V].

14 ELY, *supra* note 2, 81–82, 103, and 151.

15 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

of ‘defense pact’ will prove recurrently unavailing”.<sup>16</sup> However, it is doubtful whether this American pluralist culture can be transported to other countries, where a limited number of interest groups may continuously dominate the political process. Furthermore, society is full not only of “discrete and insular” minorities but also dispersed and diffused losers, who have difficulties in mobilising political resources due to collective action problems.<sup>17</sup>

Reflecting on my review of the process-based theory almost 30 years later, I now suspect I assumed too strong a link between the rationale for judicial review and its scope and strength. The process-based approach has recently been revived and expanded as comparative political process theory (CPPT),<sup>18</sup> prominent scholars of which worldwide participate in this symposium. One of the merits of CPPT is to highlight that the link between the rationale for judicial review and its scope and strength is not straightforward. Judicial review can and should be responsive to various contingent factors, and their tools should be tailored on a case-by-case basis.<sup>19</sup>

## II. DEMOCRACY’S MINIMUM CORE AND SCHUMPETERIAN ELITIST DEMOCRACY

Per the process-based approach, the main function of judicial review is maintaining and reinforcing democracy. Its legitimacy is derivative, and depends on that of the democratic political process, which judicial review aims to guarantee. Though Ely’s conception was problematic, as I described, we do not have to fixate on his model of democracy, particularly if it is unique to the American political process. Thus we ask, which model of democracy should we choose as sufficiently legitimate to indicate an appropriate and realistic scope and strength for judicial review?

As Rosalind Dixon points out in her landmark book *Responsive Judicial Review*,<sup>20</sup> democracy can be understood both thinly and thickly. At the

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16 ELY, *supra* note 2, 151.

17 See B. ACKERMAN, *Beyond Carolene Products*, Harvard Law Review 98 (1985) 713; S. GARDBAUM, *Comparative Political Process Theory*, International Journal of Constitutional Law 18 (2021) 1429, 1443.

18 See GARDBAUM, *supra* note 17, which argues that the courts should not only perform the roles Ely advocates but also counter various political market failures, such as, legislative failures to hold the executive accountable, government capture of independent institutions, capture of the political process by special interests, outright dysfunction of the political process, and non-deliberativeness of the legislature (*ibidem*, section 3).

19 GARDBAUM, *supra* note 17, 1456.

20 R. DIXON, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (2023) 60–61.

thinnest, constitutional courts should safeguard the minimum core of constitutional democracy. This seems equivalent to Schumpeterian democracy, where political leaders endeavour to acquire and maintain political power by means of a competitive struggle for the people's vote; on the flip side, the populace is equipped with political rights to remove leaders they disapprove of at regular, free, and fair multiparty elections.<sup>21</sup> There is no monopoly on political power, and institutional checks and balances guarantee these conditions.

Joseph Schumpeter's idea of democracy was influenced by Max Weber,<sup>22</sup> whose conception of it was sober and bleak. Weber did not take the principle of popular sovereignty at face value. For him, "the will of the people" was merely a fiction.<sup>23</sup> In a *Machtstaat* [major state] like Britain, the US, and Germany, every social section, including the government, is inevitably and increasingly bureaucratized. Political parties are generally transformed into organized parties, in which members blindly follow their charismatic leaders, who agitate the masses to acquire political power. According to Weber, "The 'mass' as such (no matter which social strata it happens to be composed of) thinks only as far as the day after tomorrow". As we know from experience, the masses are always exposed to monetary, purely emotional, and irrational influences.<sup>24</sup>

Therefore, in a *Machtstaat*,

"the only choice lies between a leadership democracy with a 'machine' and democracy without a leader, which means rule by the 'professional politician' who has no vocation, the type of man who lacks precisely those inner, charismatic qualities which make a leader".<sup>25</sup>

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21 DIXON, *supra* note 20, 3 and 28. When GARDBAUM describes government capture of independent institutions or outright dysfunction of the political process, he seems to presuppose a similar conception (GARDBAUM, *supra* note 17, section 3). For the concept of Schumpeterian democracy, see J. A. SCHUMPETER, *Capitalism, Socialism, and Democracy* (3<sup>rd</sup> ed., 1975) 269. A typical example of judicial review defending the democratic minimum core is the Taiwan Constitutional Court's Interpretation No. 261 (1991) holding that old representatives, who had retained their seats since the authoritarian era, should retire by the end of 1991 and that the government should schedule a nation-wide election.

22 A. ANTER, *Max Weber's Theory of the Modern State: Origins, Structure and Significance* (Tribe trans., 2014) 74.

23 M. WEBER, Letter to Robert Michels, 4 August 1908, in: *Briefe 1906–1908*, Max Weber-Gesamtausgabe II/5 (ed. by Lepsius/Mommsen, 1990) 615. He wrote that "„Wille des Volkes“ ‚wahrer Wille des Volkes‘ [...] sie sind *Fiktionen*" (*ibidem*) (original emphases).

24 M. WEBER, *Parliament and Democracy in Germany under a New Political Order*, in: *Weber, Political Writings* (ed. by Lassman/Speirs, 1994) 230.

Thus, only a small number of charismatic leaders can be free and autonomous in a large-scale democracy, while other agents such as bureaucrats, party members, and ordinary citizens are merely objects of command or manipulation.<sup>26</sup>

The Weberian view of democracy is not pluralist, but elitist, and at most elite pluralist. However, acute scepticism similar to that behind pluralism underlies his democratic model. Weber observed that as the old Christian worldview was utterly destroyed and fractured, multiple worldviews now fiercely conflict with each other. As objective value judgments become impossible, any value judgment is inevitably subjective. In this disenchant-ed world, each person must choose which daemon they should follow and construct their own system of values on its basis.<sup>27</sup> This is the destiny of modern individuals. Weber states that:

“Admittedly, the assumption that I am putting forward here is always based on this one fundamental fact: a life that is self-contained and understood on its own terms can only acknowledge that those gods are forever warring with each other – or, in non-figurative language: [it must acknowledge] that the ultimate *possible* standpoints towards life are irreconcilable, and that the struggle between them can therefore never be bindingly resolved; – in other words, that it is necessary to *decide* which one to choose.”<sup>28</sup>

As Alasdair MacIntyre mentions,<sup>29</sup> Weber is evidently influenced by Friedrich Nietzsche, who bombarded Germany and the rest of Europe with his argument that no objective knowledge of good and evil is possible and that all values are human creations, the recognition of which results in a “revaluation of all values”, a liberation from all traditional moral values.<sup>30</sup> Individuals cannot but consciously create their own value system from scratch, but only a few “aristocratic” great men with “the will to power” actually accomplish this.<sup>31</sup> Thus, Weber observes that in the political sphere of a

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25 M. WEBER, The Profession and Vocation of Politics, in: Political Writings, *supra* note 24, 351.

26 WEBER, *supra* note 24, 220–221.

27 M. WEBER, The Meaning of ‘Value Freedom’ in the Sociological and Economic Sciences, in: Weber, Collected Methodological Writings (ed. by Bruun/Whimster, trans. by Bruun, 2012) 314–315. See also M. WEBER, Between Two Laws, in: Political Writings, *supra* note 24, 78–79; M. WEBER, Science as a Profession and Vocation, in: Collected Methodological Writings, this note, 2012) 348.

28 WEBER, Science as a Profession and Vocation, *supra* note 27, 350 (original emphases).

29 A. MACINTYRE, *After Virtue* (3<sup>rd</sup> ed., 2007) 26 and 113–114.

30 See, for example, F. NIETZSCHE, *Ecce homo* (4<sup>th</sup> ed., 2019) 100 [Morgenröte 1].

31 See, for example, F. NIETZSCHE, *Also sprach Zarathustra* (1994) 299–310 [Vom höheren Menschen].

*Machtstaat*, only a limited number of leaders can choose which daemons they should follow.

### III. MORAL LEGITIMACY OF RESPONSIVE JUDICIAL REVIEW

Without doubt, constitutional courts should protect the constitutional minimum core. As saving a patient's life is more critical than improving her health, courts should intervene when the preservation of the minimum core is in jeopardy. However, this is an extreme case. Under ordinary circumstances in normal societies, a more enhanced, thicker model of democracy seems appropriate to support the courts' activities.

Dixon's responsive judicial review seems to require the model of democracy that is responsive to people's needs and aspirations, and that does not close its doors to not only discrete and insular minorities but also historically oppressed, dispersed losers, who have faced many difficulties in achieving their interests in the political process. Because in this non-ideal world elected officials sometimes have no interest in attending to the needs and wishes of such people,<sup>32</sup> the courts should oblige officials to realise people's needs and wishes.

Thus, responsive democracy is the ultimate object and judicial review is the instrument or mechanism to actualise it. To carry out this task, the courts should be sufficiently prudent and pragmatic to consider the various contingent factors, including political configurations, racial and religious compositions, and the historical experiences of a given society.

Is this idea of democracy and judicial review sufficiently legitimate? It depends on how we understand the legitimacy of both these concepts. In terms of the legitimacy of judicial review, following Richard Fallon,<sup>33</sup> Dixon distinguishes "legal", "sociological", and "moral" legitimacy.<sup>34</sup> Legal legitimacy "refers to the degree to which judicial decisions conform with existing legal norms or constraints".<sup>35</sup> This definition provides little in the way of guiding our quest to determine whether responsive judicial review is legitimate, if "legal norms and constraints" here include constitutional norms and constraints. In this case, if judicial review is legitimate, it is legally legitimate. This is tautological. On the other hand, if "the legal legitimacy of the Constitution depends much more on its present sociological acceptance (and thus its sociological legitimacy) than upon the (questiona-

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32 ELY, *supra* note 2, 151.

33 R. H. FALLON JR., Legitimacy and the Constitution, *Harvard Law Review* 118 (2005) 1787, 1790.

34 DIXON, *supra* note 20, 97. FALLON, *supra* note 33, 1790–1791 and 1794–1801.

35 DIXON, *supra* note 20, 97. FALLON, *supra* note 33, 1794–1795.

ble) legality of its formal ratification”,<sup>36</sup> the legal legitimacy will be largely reduced to the sociological legitimacy.

Sociological legitimacy, which is “closely linked to Weberian notions of legitimacy”, signifies “an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest”.<sup>37</sup> In other words, when citizens believe that a judicial decision is legitimate, it is sociologically legitimate. Stating that there are three kinds of legitimacy for rulership, Weber denies that any of them is warranted by substantive reason. Any judgment about whether substantive reason exists would be a value judgment that should be excluded from Weber’s social science. All rule is “founded on a *belief*: the ‘prestige’ attributed to the ruler or rulers”.<sup>38</sup>

Such beliefs and perceptions are important factors for the courts when considering whether to avoid or exercise judicial review or what remedies should be provided. For the courts to survive political contingencies, they must pragmatically consider their sociological legitimacy.

However, this cannot be the deepest ground on which judicial review stands. Beliefs or perceptions may be erroneous and not warranted by sufficient reason. From the Weberian view of democracy, most members of society are soulless followers of charismatic leaders and the object of their manipulation and agitation. However, judicial courts are not supposed to be Machiavellian rhetoricians, but deliverers of justice founded on law and reason. The courts should be regarded by citizens as autonomous moral agents whose activities are not only perceived to be just but are indeed just. Any underlying pretention will eventually be exposed.

Moral legitimacy is the degree to which a legal decision is “morally justifiable or respect-worthy”.<sup>39</sup> Dixon states that a responsive judicial review focuses on the Rawlsian “minimal, political conception of legitimacy”. She is not as sceptical as Ely about the applicability of John Rawls’s philosophy to the theory of judicial review.<sup>40</sup> As she acknowledges, this conception of legitimacy is a moral one “that is largely *politically liberal* in nature”.<sup>41</sup>

Rawls’s political conception of justice stems from the recognition that this world is divided into myriad conflicting value systems, which are mutually opposing and irreconcilable.<sup>42</sup> He was post-Nietzschean, like Weber.

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36 FALLON, *supra* note 33, 1792.

37 DIXON, *supra* note 20, 97. See also FALLON, *supra* note 33, 1795.

38 M. WEBER, *Economy and Society: A New Translation* (ed. and trans. by Tribe, 2019) 401 [III.6. §13] (original emphasis).

39 DIXON, *supra* note 20, 98. See FALLON, *supra* note 33, 1796–1797.

40 Compare ELY, *supra* note 2, 58.

41 DIXON, *supra* note 20, 98 and note 13 (emphasis added).

42 J. RAWLS, *Political Liberalism* (1993) 3–4.

There is no mystery here because, as MacIntyre says, “The contemporary vision of the world [...] is predominantly [...] Weberian”.<sup>43</sup> However, unlike Weber, Rawls does not simply allow multiple conflicting values to fiercely quarrel; instead, he advocates construction of a fair social structure in which individuals with conflicting conceptions of good nevertheless cooperate and live in harmony.

For such a structure to function, it should be freestanding from the many comprehensive moral doctrines that instruct people on the meaning of this world, the value of human life, or ideal ways to live. Many religious and philosophical doctrines aspire to greater comprehensiveness. Instead, Rawls argues that a fair structure should be concerned exclusively with basic political, social, and economic institutions that sustain fair collaboration among the people. While society as a whole aims to reach consensus on the basic structure enabling such social cooperation, individuals are privately allowed to choose and pursue their own idea of a good way of life. In this sense, it is “political”.<sup>44</sup> If the basic structure is committed to a particular comprehensive worldview, it will unfairly favour those embracing that worldview and consequently cause grave social schisms.

The role of responsive judicial review based on Rawlsian political liberalism would not be restricted to making the political branches responsive to people’s needs and aspirations. It would include protecting everyone’s right to choose and pursue her own idea of a good way of life. If a majority attempts to systematically impose their values upon all of society, for example, a widely but not universally held moral view about how to live one’s life is enforced by legislation, the court should at least discourage such imposition, and in some cases invalidate it, though the concrete means the court employs might vary according to the politico-sociological environment.<sup>45</sup>

In other words, responsive judicial review should police the boundaries of public reasons that justify state action (or inaction) in a society where multiple incommensurable worldviews conflict with each other,<sup>46</sup> and such an understanding would be naturally reflected in how to calibrate standards of scrutiny applied to state actions. When Dixon addresses concrete cases

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43 MACINTYRE, *supra* note 29, 109.

44 RAWLS, *supra* note 42, 12–13.

45 The reason Japan’s current administration is reluctant to legalise same-sex marriage may be fear of alienating the right-wing faction of the ruling party, the Liberal Democratic Party (LDP), which embraces traditional family values.

46 Democratic decisions should be within the range of reasonable disagreement. See M. KUMM, Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review, *European Journal of Legal Studies* 1 (2007) 153, particularly 167–168 (discussing the ECHR case relating to gays in the military from the Rawlsian conception).

of abortion, sexual privacy, same-sex marriage and others in different countries, she seems to treat these questions not from the perspective of political liberalism but that of sustaining the court's sociological legitimacy.<sup>47</sup>

I believe she has yet to fully develop the implications of political liberalism for responsive judicial review. She may think that Rawlsian political liberalism has not yet become “an overlapping consensus among democratic theorists about what democracy requires *and* extant practices among democratic systems.”<sup>48</sup> However, if such overlapping consensus and extant practices are the prerequisite for a conception to become a secure foundation for the moral legitimacy of judicial review, that conception will dangerously approach democracy's minimum core. In other words, the thick conception of democracy is reduced to nothing more than its thin conception.

#### IV. THE EXTENT AND POINT AT WHICH THE SUPREME COURT OF JAPAN IS RESPONSIVE

The Supreme Court of Japan (SCJ) has been known to be quite deferential to the political branches in exercising its power of constitutional review, for which various explanations are offered. Since performing actual experiments is challenging, we cannot ascertain the determinant factor. Thus, only conjectures can be made.

Some scholars believe that the dominant Liberal Democratic Party (LDP) has long managed to populate the SCJ with conservative-minded justices.<sup>49</sup> Even if justices do not embrace ideologies that align with the LDP's, the SCJ may fear democratic backlash<sup>50</sup> if it delivers decisions that are incompatible with such ideologies. Courts cannot freely choose their political and social environments; instead, environments are usually imposed on them. However, the LDP itself was not always ideologically monolithic, although it recently became so under Prime Minister Abe's administration. For a long period, it was a coalition of various factions whose sole objective was remaining in power.<sup>51</sup>

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47 DIXON, *supra* note 20, 102–127. She refers to the “political and legal legitimacy” and “political and sociological legitimacy” of the courts (*ibidem*, 102 and 185); however, the “political” here seems sociological rather than moral.

48 DIXON, *supra* note 20, 62 (original emphasis). The Rawlsian idea of political liberalism would necessitate reaching an overlapping consensus to stabilise a co-existence between conflicting comprehensive moral doctrines. But is finding overlapping consensus among academic doctrines in fact necessary to construct a secure foundation for the moral legitimacy of judicial review?

49 See, for example, P. J. YAP and C.-C. LIN, *Constitutional Convergence in East Asia* (2022) 51–56.

50 As for democratic backlash, see DIXON, *supra* note 20, 194–199.

While<sup>51</sup> there are other possible explanations,<sup>52</sup> I basically subscribe to former Justice Tokiyasu Fujita's hypothesis that the main reason the SCJ is reluctant to invalidate state actions resides in its self-image as a *judicial* body.<sup>53</sup> According to Justice Fujita, the SCJ's primary task is regarded not as wielding the power of constitutional review or constructing a coherent jurisprudential doctrine, but offering appropriate solutions to each case at hand. It should be added that since the SCJ is not a Kelsenian-type constitutional court but the supreme judicial body of the land, constitutional review power is only one of the tools in its repository for delivering solutions appropriate to each case. In sum, the SCJ considers itself as a judicial rather than a constitutional court.<sup>54</sup>

Let me explain some of the theoretical background.<sup>55</sup> Laws are convenient instruments for both courts and citizens to dispense with autonomous practical reasoning when they encounter social problems or disputes. If they rely on laws instead of trying to reach appropriate solutions on their own, they can quite often easily solve problems and disputes. However, laws sometimes malfunction and provide unjustifiable answers. Even com-

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- 51 See, e.g., Y. HIGUCHI, *Entretien avec le professeur Higuchi: Le parcours de l'homme, la pensée du savant*, in: Higuchi, *Valeurs et technologie du droit constitutionnel: Recueil d'articles* (2022) 151–152. HIGUCHI states that the LDP in the 1970s was divided into five factions, which were actually five political parties. For a similar observation, see K. NEMOTO, Japan's Liberal Democratic Party: Changes in Party Organization under Shinzō Abe, in: Pekkanen/Pekkanen (eds.), *The Oxford Handbook of Japanese Politics* (2022) 160, 163–170.
- 52 For a brief overview, see Y. HASEBE, *Towards a Normal Constitutional State: The Trajectory of Japanese Constitutionalism* (2021) 256–58.
- 53 T. FUJITA, *The Supreme Court of Japan: Commentary on the Recent Works of Scholars in the United States*, *Washington University Law Review* 88 (2011) 1508, 1521–1522. FUJITA was appointed a SCJ justice in 2002 and retired in 2010. The importance of the role of the court as understood by itself is emphasised by Katharine YOUNG (K. G. YOUNG, *Constituting Economic and Social Rights* (2012) 168–172).
- 54 As Mark TUSHNET and Rosalind DIXON point out, “a fair amount of sub-constitutional adjudication” by the SCJ “results in substantively liberal decisions”. See M. TUSHNET/R. DIXON, *Weak-form Review and Its Constitutional Relatives: An Asian Perspective*, in: Dixon/Ginsburg (eds.), *Comparative Constitutional Law in Asia* (2014) 107–08. And at least until the first decade of the 21<sup>st</sup> century, the political branches were substantially responsive to such judicial initiatives. See, on this point, Nobuki OKANO's paper for this conference, *Function and Dysfunction of Catalytic Judicial Review in Japan*, in this issue, p. 77.
- 55 I here summarise my explanation given in HASEBE, *supra* note 52, ch. 18. My view draws heavily on Joseph RAZ's theory on the authority of law. See his *The Morality of Freedom* (1986) ch. 2 and 3 and *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (revised ed., 2001) ch. 10.

petent legislators inevitably overlook some unforeseen elements when producing legislation in universal terms.<sup>56</sup> In such hard cases, the courts must make recourse to their own practical reasoning, although they disguise this as interpretations of laws, including constitutional laws.<sup>57</sup> In other words, they usually feign exercise of exclusively judicial power; that is, they apply pre-existing laws to concrete cases. H.L.A. Hart states that:

There is no doubt, the familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases. But how seriously is this to be taken? There is of course a long European tradition and a doctrine of the division of powers which dramatises the distinction between Legislator and Judge and insists that the Judge always is, what he is when the existing law is clear, the mere “mouthpiece” of a law which he does not make or mould. But it is important to distinguish the ritual language used by judges and lawyers in deciding cases in their courts from their more reflective general statements about the judicial process.<sup>58</sup>

A Kelsenian-type constitutional court must make recourse to constitutional judgments in such cases because constitutional review power is its only tool to wield. However, since the SCJ is the supreme judicial body of a unitary, not federated, country, it can give authoritative interpretations to all sub-constitutional laws in solving hard cases, delivering new constitutional judgments only when necessary. Other institutional factors, including the SCJ having the final word on legislation’s constitutionality<sup>59</sup> and how difficult it is to amend Japan’s Constitution,<sup>60</sup> may also account for the SCJ’s cautious approach. Thus, the SCJ is responsive to its self-image as well as its competence. We may assume a close correlation between the SCJ’s self-image and its competence because the competence of the highest court is

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56 ARISTOTLE, *Nicomachean Ethics* (ed. and trans by, 2000) 100 [1137b].

57 Mattias KUMM points out that judicial assessment of “the justification for rights infringements is to a large extent an exercise of an institutionally situated form of general practical reasoning. [...] Given the structure of human rights norms, there is something misleading in the idea that judges *interpret* rights. Judges do not interpret rights, they assess justifications” (M. KUMM, *Is the Structure of Human Rights Practice Defensible?*, in: Jackson/Tushnet (eds.), *Proportionality: New Frontiers, New Challenges* (2017) 65 (original emphasis)).

58 H.L.A. HART, *The Concept of Law* (3<sup>rd</sup> ed., 2012) 274.

59 Art. 81 of the Constitution of Japan states that “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act”. The SCJ exercises what Stephen GARDBAUM calls strong-form judicial review. See S. GARDBAUM, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (2013).

60 See Art. 96 of the Constitution of Japan.

what the said court declares it is. There is a reciprocity between the two variables.<sup>61</sup>

To Dixon, the idea of responsive judicial review “may be understood as a call for quite a radical expansion in judicial power or notions of judicial creativity” for Japan.<sup>62</sup> For the reason stated, the SCJ may not radically expand the scope of its constitutional review power on learning about her theory, though it may encourage the SCJ’s activism at a sub-constitutional level. On the other hand, the SCJ has already shown signs of creativity.

In cases regarding malapportionment of MP seats, the SCJ has hitherto only declared that the statute in question is incompatible with the constitutional principle of “one person, one vote”, but has not invalidated elections held under it. The SCJ obviously tried to avoid clashing head on with political branches.<sup>63</sup> However, such passivity risks the SCJ being regarded as perpetually avoidant of invalidating elections held under unconstitutionally distributed seats. In a subsequent decision, several justices stated in their concurring opinions that if the statute declared unconstitutional were not rectified and the next general elections were held under it, such elections would be invalidated immediately or after a certain period.<sup>64</sup> These decisions indicate that the SCJ has endeavoured to open the process of political change with weak instruments accompanied by warnings of stronger ones.<sup>65</sup>

In the 4 September 2013 decision regarding unequal treatment of illegitimate children in intestate succession under the Civil Code, the SCJ employed the device of prospective effect to avoid radically destabilising the already established legal status quo.<sup>66</sup> Until then, the SCJ held that the relevant statute of the Civil Code was not unconstitutional, but several concur-

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61 See M. TROPER, *Le problème de l'interprétation et la théorie de la supralégalité constitutionnelle*, in: Troper, *Pour une théorie juridique de l'État* (1994) 293, 305–306.

62 DIXON, *supra* note 20, 276.

63 The Grand Bench decision of 4 April 1976, *Minshū*, 30, 223. The SCJ made recourse to the device of pure prospective effect when it did not invalidate the disputed elections.

64 The Grand Bench decision of 17 July 1985, *Minshū*, 39, 1100.

65 As to the balance one should strike between weak and strong remedies, see DIXON, *supra* note 20, 204–241.

66 *Minshū*, 67, 1320. In this ruling, the SCJ deemed unconstitutional the unequal treatment of illegitimate heirs under Art. 900 of the Civil Code, under which an illegitimate child could inherit by intestate succession from their parent’s estate only half of the portion inherited by a legitimate child. However, the ruling added that legal decisions and arrangements already settled under Art. 900 up to the judgment date remained valid, to avoid overturning established legal situations that retroactive effects of the ruling as a precedent could have brought about. See HASEBE, *supra* note 52, 240–241.

ring opinions manifested the latent view that this statute had already lost its rational grounds;<sup>67</sup> the SCJ preferred that the parliament change the law because a parliamentary statute would respond more flexibly to various contingent factors and not arouse issues around destabilising the established legal status quo. However, since the parliament did not move to rectify this problem, the SCJ eventually invalidated the statute. The SCJ reversed the burden of legislative inertia.

In some cases, the SCJ held that the Constitution imposed positive obligations on the parliament to secure the effective enjoyment of basic rights. In a 14 September 2005 ruling,<sup>68</sup> the Grand Bench held that the parliament negligently failed to enable Japanese nationals living overseas to participate in national elections and that the parliament should provide a legal institution allowing them to vote in future elections. In the Grand Bench decision of 15 March 2017,<sup>69</sup> the SCJ not only found a criminal investigation using a Global Positioning System without a judicial warrant to be illegal, but also expressly requested the parliament to enact a suitable statute for such investigations, which reflects the contents of the ruling. These decisions also indicate that the SCJ has tried to overcome democratic inertia<sup>70</sup> through various instruments.

Furthermore, in many cases the SCJ restricted the scope of applicability of statutes to save them from invalidation.<sup>71</sup> This restrictive saving construction has been effective for the court to restrain overstepping by the democratic majority. In several recent cases, the SCJ utilised the technique of “qualitative partial invalidation” of a statute, transforming the meaning of a statute to restore it to the pre-existing legal baseline the court assumed. When the SCJ believes there is a legal baseline that constitutes a focal point for the legal community, it considers whether the government offers sufficient justi-

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67 See the Grand Bench decision of 5 July 1995, Minshū 49, 1789.

68 Minshū 59, 2087. See HASEBE, *supra* note 52, 247–248.

69 Keishū 71, 13.

70 As to democratic inertia, see DIXON, *supra* note 20, 84–87.

71 See, for example, the Second Petty Bench decision of 7 September 2012, Keishū 66, 1337. In its ruling, the SCJ held that political expression by public officials prohibited under Art. 102 of the Government Officials Act should be understood to have the ‘substance of actually eroding the political neutrality of public duties’ and should not include actions that only ‘notionally’ erode it. See HASEBE, *supra* note 52, 261–267. In another example, the Grand Bench decision of 10 September 1975, in which the constitutionality of a local government’s edict prohibiting demonstrators on a public road from “disturbing traffic order”, the court held that while the wording of the edict was vague and unfortunate, as it could be reasonably interpreted to prohibit only such demonstrations intending to grossly disturb traffic order, such as meandering, it was still constitutional.

fication for the deviation of the statute in question from the baseline. If the government fails to offer it, the statute should be qualitatively invalidated to provide the party with a legal status resulting from the baseline.<sup>72</sup>

These precedents indicate that the SCJ has already exhibited its judicial creativity and accumulated not a few tools in its depot to respond to its politico-sociological environment and competence. Indeed, it has endeavoured to counter democratic dysfunction in Japan by calibrating its responses to political branches.

Assuming that the SCJ has simply been a lackey to the LDP-dominated administration is somewhat simplistic. Such an observation from a totally external perspective will merely exempt the SCJ from the responsibility of being a responsive judicial court. Japanese constitutional scholars cannot and should not take such an irresponsible view.<sup>73</sup>

## V. CONCLUSION

In *Responsive Regulation*, Ayres and Braithwaite advocated, among others, a “tit-for-tat” strategy as a means of effective regulation.<sup>74</sup> They argue that regulatory agencies can best secure compliance if they have various regula-

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72 See, for example, the Grand Bench decision of 11 September 2002, Minshū 56, 1439. In this case, the issue was the constitutionality of the Postal Act, which greatly restricted the amount of damages to be awarded when the loss was caused by negligence of Post Office officials. The court stated that since common carriers in general should compensate the entirety of damages in case the loss was caused by their grave negligence (see, for example, Art. IVbis para. 4 of the Hague-Visby Rules, amended by the SDR Protocol of 1979), and there was no reason why the postal service was unsustainable under this principle, the unconstitutional statute should be partially invalidated to return to this legal baseline – that is, the entirety of damages should be compensated if the loss was caused by grave negligence of Post Office officials.

In another decision of 16 December 2015, Minshū 69, 2427, in which the constitutionality of Art. 733 of the Civil Code stipulating that women had to wait for six months after their divorces before they could remarry was the issue, the SCJ held that because the purpose of this clause was to avoid the overlapping presumptions of legitimacy of children from two consecutive marriages, the waiting period should be reduced to 100 days, given that children born 200 days after the time of marriage, as well as those born within 300 days of the dissolution of a marriage, were presumed to be legitimate children born from the lawful wedlock (Art. 772 of the same Code). The Court therefore held that the clause should be partially invalidated to return to the baseline – that is, women could remarry after 100 days passed since the separations of their previous marriages.

73 This is of course a value judgment (HASEBE, *supra* note 52, 241–242).

74 I. AYERS/J. BAITHWAITE, *Responsive Regulation: Transcending the Deregulation Debate* (1992) ch. 2.

tory tools, from severe punishments to soft persuasions. While a strategy based entirely on persuasion and self-regulation will be exploited by economically rational actors, a strategy based mostly on punishment will undermine the goodwill of actors, who are primarily motivated by a sense of responsibility. As the motivations of the regulated are multiple and composite, regulatory agencies should employ different tools according to such motivations, thus inducing them to act responsibly. In sum, regulation should be interactive and responsive to the motivations and activities of the regulated.

Responsive judicial review seems to embrace a similar idea. The courts should undertake dialogue with the political branches by means of various remedies, from strong invalidation to weak persuasion, to induce the political branches to be responsive to people's needs and wishes.<sup>75</sup> In a society of a post-Nietzschean pluralism of values, responsive judicial review based on Rawlsian political liberalism rather than the perpetual and fierce Weberian struggles between gods would be more morally legitimate.<sup>76</sup> However, it remains to be seen if this approach succeeds in realising responsive democracy under the LDP administration, which has become increasingly monolithic and stiff-necked about politically sensitive issues, in particular since the Abe administration.

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75 There are differences, too. While the courts sometimes have to concede deference to political institutions, regulatory agencies have ultimately the upper hand over the regulated. The relationship between the courts and political institutions is horizontal, not vertical.

76 See Y. HASEBE/C. PINELLI, *Constitutions*, in: Tushnet/Fleiner/Saunders (eds.), *Routledge Handbook of Constitutional Law* (2013) 9, 12–14; HASEBE *supra* note 52, 94–97.