REZENSIONEN / REVIEWS

SATOSHI KIYONAGA, *Kikotsu no hanketsu* [The Courageous Judgment]

Shinchô-sha; Tokyo 2008; 204 pp.; ¥ 714; ISBN 978-4106102752

One of the more interesting recent books on Japanese law deals with the case in which Japan's highest court invalidated an election. This may puzzle those familiar with the postwar Supreme Court's mishmash of holdings in legislative malapportionment litigation. While these cases resulted in the Supreme Court concluding at various times that too great an imbalance in the number of voters represented by the geographically allocated seats in the Diet (the national legislature) was or might be unconstitutional, it has always stopped short of actually invalidating an election on constitutional (or any other) grounds.[1]

However, *Kikotsu no hanketsu* ("The Courageous Judgment") by journalist Satoshi Kiyonaga is about the time when Japan's Supreme Court of Judicature found a Diet election invalid due to excessive government interference in favor of certain candidates – in the middle of World War II, in the face of the fear of assassination and open threats from Prime Minister Hideki Tôjô.[2] This was a courageous judgment indeed and deserves whatever attention it can get.[3] Short though it may be, Kiyonaga's work is a valuable contribution to our understanding of the Japanese judiciary in wartime.

The book focuses on Justice Hisashi Yoshida, who led the panel of judges which investigated and decided the case. As such, it is partially a biography of how, born in 1884 into a household supported by a father who was first a greengrocer and then operated a rickshaw business, he came to study law – first at night school, then full time at what is now Chuo University. At first supporting his studies by working at a court, Yoshida ultimately became a judge. His advancement through the judiciary takes place against a background of Japan's political environment – a brief period of political liberality (the

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1 These cases have generated a great deal of constitutional scholarship in Japanese as well as English. See, e.g., W.S. BAILEY, Reducing Malapportionment in Japan's Electoral Districts: The Supreme Court Must Act, in: Pacific Rim Law & Policy Journal 6 (1997) 169. Extracts from this article and of translations of two Supreme Court cases are conveniently available in: K. PORT / J. MCALINN (eds.), Comparative Law: Law and the Legal Process in Japan (2003).

2 The book's subtitle is "The judge(s) who fought Tôjô Hideki."

3 According to Kiyonaga, a television drama was made based on the trial, and in some places he relies on the script from this drama to help visualize what may have happened in parts of the story where no records remain, *ibid.* 72-74.

so-called "*Taishô* Democracy"), followed by military campaigns overseas, the entrenchment of fascism and ultimately the country's disastrous war with the United States and other allied powers.

The first elections for Japan's House of Representatives, the Imperial Diet *Teikoku gikai*, were held in 1890, the year after the promulgation of the Meiji Constitution which created the chamber (together with an unelected House of Peers).[4] However, the franchise was limited to the small segment of the male population that paid taxes over a certain threshold. In 1925 the passage of a general election law extended the vote to all male adults, resulting both in a fourfold increase in the number of voters and the proliferation of proletarian parties devoted to expanding the interests of workers rather than the propertied classes who had previously dominated the elected government.

The first elections under this new system were marked by fraud and corruption extensive enough to be viewed as a serious social problem. In response, the government established "Election Purification Committees" (*senkyo shuku-sei i'in-kai*) in each prefecture together with a national umbrella federation. These committees, which used pamphlets and lectures to combat election fraud and voter abstention, also provided the Ministry of the Interior with a tool for controlling elections. The Committees could be used both to interfere with the campaign activities of communists or other candidates opposed to government policies, and to enlist nationalistic youth and veterans' groups to ensure that the "right" candidates won. Fearful of action by the Committees, Diet candidates increasingly refrained from criticizing the existing government.

Pressure for politicians and citizens alike to conform to national policy grew stronger with the start of Japan's war with China in 1937, followed by the passage of the National Mobilization Act of 1938 and culminating in the "voluntary" dissolution of political parties in 1940 to create the *yokusan gikai taisei* [Supportive Diet Regime]. The elimination of political parties was intended to enable the Diet to focus all of its energies on winning the war without being distracted by partisan squabbling. All Diet members would be unanimous in their support for national policy; there would be no opposition or criticism.

Despite the totalitarian nature of this political climate, the House of Representatives was still an elected body and elections were still held. This meant that competition among political candidates remained, including politicians who continued to resist the fascists and their agenda, though subject to increasing restraints.

October 1941 saw the birth of a cabinet led by Hideki Tôjô, a general on active service and Minister of the Army in prior cabinets. His experience in government gave

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4 The provisions relating to the Imperial Diet are set forth in Chapter III of the Meiji Constitution *Dai-nihon teikoku kenpô* [The Constitution of the Empire of Japan] of 1889, Arts. 33 to 54; an English translation is available at *http://everything2.com/title/Meiji+Constitution (last accessed 20 May 2010); a German translation* is available at *http://web.archive.org/web/20070519022111/http://www.cx.unibe.ch/~ruetsche/japan/Japan2.htm* (last accessed 20 May 2010).

him the view that, despite the elimination of political parties, the House of Representatives still contained some obstreperous members who needed to be removed. This doubtless became an even more pressing concern after the commencement of war with the United States and other allied powers at the end of 1941. The next Diet election thus presented an opportunity to cleanse the government of dissent.

Fortunately, events had resulted in the election being delayed until April 30, 1942. This gave the government time to ensure that the right candidates won, using techniques already developed through the Election Purification Committees in prior elections. Lists of "approved" candidates were drawn up, as were blacklists. Approved candidates were given financial support (derived from provisional military funds). Blacklisted candidates (whose ranks included four postwar prime ministers) found themselves and their supporters subject to visits by the infamous *tokkô* special police. People who attended their speeches were questioned by the local constable and accused of being traitors. Posters for campaign events were confiscated.

This open and obvious interference resulted in a landslide victory for many of the approved candidates, though a number of blacklisted politicians were elected or re-elected nonetheless. One who was not, a proletarian candidate who had campaigned in a Kagoshima precinct where he was highly regarded among laborers and farmers, was so incensed by the blatant election rigging that he took action. Working surreptitiously with a lawyer and several other unsuccessful candidates he investigated some of the unlawful activities that had taken place and documented them in a petition that he submitted to the court just before the 30-day deadline mandated by law for challenges to the validity of elections. This petition was followed by other similar claims from other electoral districts.

The law at the time specified that the Supreme Court of Judicature had both initial and final jurisdiction over such claims. It was Justice Yoshida's fate to head the panel of judges that would make this final, conclusive determination. A threshold issue, however, was that the election law provided only limited grounds for invalidating an election, all of which were very narrow and applied almost exclusively to defects in polling formalities: the use of invalid electoral lists, failure to identify polling stations, use of unapproved ballot forms and so forth. The law simply did not anticipate any organized campaign of election manipulation led by the government itself. Thus, one view on the petitions was that while specific instances of unlawful conduct might be subject to criminal sanctions, a pattern of behavior in election campaign activities was not grounds for invalidating the election itself, particularly if the government was behind these activities. At an initial judicial conference, however, Yoshida rejected this notion:

> "Even if it was by the government, if it engaged in interference with the free and fairness of the election, it is a violation of the rules of the regulation and if that had an effect on the result of the election, the election should be adjudged invalid."[5]

5 KIYONAGA at 56 (all translations by reviewer unless otherwise noted).

This was a remarkable statement to for Yoshida to make before the trial had even started, an expression of an intent to invalidate an election if the claims of interference made in the petitions proved to be true. It is even more remarkable given the context – fascist Japan in the middle of a world war being waged by the very government responsible for the interference.

It was, however, a statement that contained several "ifs." For the court to pursue the merits of the case, fact finding would be necessary. In normal times this would have involved the cross-examination of witnesses in the Supreme Court of Judicature's courtroom. In wartime, however, it would have been difficult to have all of the witnesses, many of whom were located in Kagoshima and expected to number over 200, travel all the way to Tokyo to testify. Instead, in March of 1943 Yoshida and the four subordinate judges on his panel set off to conduct proceedings in Kagoshima. While at this stage of the war there may have been some fear of U.S. air raids, these had not yet begun in earnest, even in southern Japan. The bigger fear was political assassination; Yoshida prepared a will before he departed, but he addressed the risk in a slightly modified version of the *bushi-dô* ethic which prevailed at the time:

> "It is fine for me to die. For a judge to be killed while investigating a case is no different from a soldier being struck by a bullet and dying in a war. It is not to be regretted."[6]

In Kagoshima, Yoshida and his colleagues gathered evidence and heard witness testimony describing the systematic efforts devoted to influencing the results of the election in the district. This may have involved a degree of bravery on the part of witnesses who may have been subject to pressure not to testify.[7]

Yoshida also summoned the governor of Kagoshima Prefecture for questioning. At issue were postcards sent in the name of the governor, who was also chairman of the prefectural education committee, to the principal of every school in the prefecture, instructing them to support specified approved candidates. Under harsh questioning by Yoshida, the governor unconvincingly denied any involvement in sending the postcards, asserting that a deputy must have sent them without his knowledge. Yet the mere fact that he was questioned is an indication of Yoshida's courage: unlike prefectural governors in postwar Japan who under the constitution must be chosen by direct elections, governors during and before the war were high-level officials working for and appointed by the Ministry of the Interior.[8] Yoshida was thus directly confronting a high-level official who was also nominally a direct appointee of the Emperor.

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6 *Ibid.* at 81.

7 Kiyonaga describes a scene from a television dramatization (see supra note 2) in which Justice Yoshida orders two secret policemen observing the trial to leave the courtroom on the grounds that their presence was preventing witnesses from testifying freely, KIYONAGA at 92-95. As Kiyonaga notes, however, there are no records reflecting this incident or any other overt efforts to exert pressure on witnesses.

8 Art. 93 of the Meiji Constitution of Japan.

Yoshida and his colleagues returned to Tokyo in July of 1943. By this time pressure was already building on the judiciary to bring a quick and suitable end to the distraction of the election cases (of which the case being investigated by Yoshida's panel was just one). Some of this pressure came from within the judiciary itself: no less a personage than the Chief Justice of the Supreme Court of Judicature wrote in a legal publication an essay espousing the view that:

> "We must win [the war] at any cost. Winning alone will be good. All the people and resources of our country must advance towards this goal, are advancing towards this goal…the law must also advance towards this goal. Laws which fall behind the changes in people, hearts and things are mere wastepaper which should be discarded in the rubbish bin without further thought. The law must make sudden changes in direction, and it is doing so. The concentration of people, hearts and strength are driving the law towards the goals of the war."[9]

This sort of language was already echoed in the frequent demands by Justice Ministry officials that judges conform to wartime conditions and help clamp down on expressions of anti-war and anti-military sentiment.

Yoshida and his family were also subject to surveillance by the secret police. Whether coincidentally or not, the governor questioned in Kagoshima was reassigned to Tokyo as police commissioner, occupying an office almost across the street from the Supreme Court of Judicature. After the war, Yoshida's wife described their house as being at one point surrounded by *kenpei* (military police).

Further pressure came in October of 1943 when another panel of the Supreme Court of Judicature issued its judgment in two similar election cases originating from Nagasaki and Fukushima. This panel conducted a much more limited investigation than Yoshida and rejected all of the petitioners' claims, saying in essence that just because some officials may have interfered in the election was not enough of a reason to find it invalid.[10] Yet this judgment did contain one saving grace in that it did not use procedural grounds – the fact that the election law only provided for the invalidation of an election on grounds of defects in election formalities – to reject the petitioners' claims, but rather confirmed that even though not specified, "interference with an election" could be grounds for a court to invalidate an election (even though the court did not do so in these particular

9 Quoted in KIYONAGA at 113-114. This may seem a surprisingly fascistic statement for a chief justice of a nation's highest court, and Kiyonaga himself asks rhetorically whether these "are the words of a person following justice." It is worth remembering, however, that the late Chief Justice of the United States, William H. Rehnquist, wrote an entire book on the need of governments to curtail civil liberties during wartime, using a quote of Abraham Lincoln as the title. W. REHNQUIST, All the Laws But One: Civil Liberties in Wartime (2000).

10 This type of reasoning – "bad things may have happened, but in balance the way things are is the way things should be" – may seem familiar to some observers of postwar Japanese judicial behavior.

cases). Yoshida's colleagues had effectively adopted the theoretical view he expressed at the initial judicial conference, even if they had not put it into practice.

Then, in February of 1944 the pressure reached its peak at a gathering of top judges, prosecutors, Justice Ministry bureaucrats and the Justice Minister himself. Since the Meiji period, these leaders of the justice system would meet every fall to discuss practice issues and exchange views.[11] The meeting also included some formalities, the participants having an audience with the Emperor and then attending a lunch with the Prime Minister. Although fated to resign in a few months over the fall of Saipan in July of 1944, Tôjô Hideki was still Prime Minister, and he attended the lunch in full military regalia including his saber. While this lunch had in the past been a formality at which pleasantries were exchanged with the Prime Minister, according to a combination of accounts written by participants as well as published and secret (at the time) records, Tôjô used the occasion to deliver a scathing speech directed at the judiciary whom (according to one account) he referred to as "shameful" (*keshikaranu*).

The prior year when questioned in the House of Peers about the claims of interference in elections, Tôjô had answered that he considered elections to be a trivial concern when compared to the war. Now, saber literally rattling, he railed upon the assembled judges to get ahead with the program. There could be no judicial independence without victory in the war, and he expected the judges to do their part without following "pointless, harmful old habits." If they did not do so, he said:

> "If it is truly unavoidable, this government will, without delay, take extraordinary measures. I ask you gentlemen to pay due heed on this point."[12]

While it is not clear from records whether Yoshida attended this event, he would have quickly learned about what was to everyone attending a clear threat by Tôjô to the judges in general and probably Yoshida in particular not to make decisions contrary to the government's interests.

As the war progressed and Tokyo became a regular target of air raids, even judges found themselves conscripted to dig air raid shelters. Even they were probably luckier than many of their colleagues: approximately 200 judges and prosecutors had been drafted and sent abroad to serve as legal officers in the military, with an even greater number of court personnel also being subject to conscription. Some courts around the country had already been closed down before the bombings started to interfere with their operations. The system of intermediate appeals had been suspended, as was the use of juries in criminal trials.[13]

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11 This tradition continues in the postwar period though only with judges. Prior to this, judges were, together with the prosecutors, hierarchically subordinate to the Justice Ministry, KIYONAGA at 129.

12 *Ibid.* at 135.

13 Recently Japan introduced a controversial jury-like system (the *saiban-in* [lay judge] system) of citizen participation in criminal trials. This system commenced operation in May of 2009.

Despite these hardships, the pressure directed at Yoshida personally and the increasing interference of the military in trials in general, proceedings in the Kagoshima election case continued.[14] Sadly, there are few if any surviving records of the evidence submitted or the deliberations among Yoshida and his colleagues. But on the morning of March 1, 1945, just days after a major air raid on Tokyo, Yoshida left his house, telling his wife he might not be able to come home. His court had reached a decision.

The opinion delivered by Yoshida was electrifying. The election in the Kagoshima electoral district was void. It was void because of excessive government-instigated interference on behalf of specific candidates. Not only did the interference breach the election laws, but it might even violate the constitution. It was a remarkable opinion for a court serving under a fascist military regime in wartime.

To the extent it was any sort of victory for the judiciary it was a pyrrhic one – almost literally. More air raids came, and just nine days after the decision was issued, the Supreme Court of Judicature building was struck by incendiaries and reduced to a burnt-out shell. Many court records were destroyed in the process. By this time Yoshida had already resigned from the judiciary (for reasons unrelated to the Kagoshima case, he would explain unconvincingly, despite having resigned a mere five days after the decision was issued). In June of 1945, all adult males and females were drafted into a people's militia to fight the imminent allied invasion. A high-level military officer came to visit a court in Tokyo, ordering them to form squads and await orders. A judge asked what they should use to fight the Americans. "You have rocks or sticks, don't you?" was the answer. The military, it turned out, would not be defending Tokyo – they planned to retreat to Nagano with the Emperor. The atom bombs rendered this unnecessary.[15]

After his resignation Yoshida became a law professor, though immediately after the war he was also appointed to the soon-to-be-dissolved House of Peers. He continued to teach law at *Chû'o University* until the age of 80. He passed away in 1971 at the age of 87.

Given the destruction which followed immediately after it was issued, that a copy of Yoshida's courageous judgment has survived is somewhat miraculous, although it was never recorded in full in the volumes of reported cases published by the postwar

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See, e.g., "Lay judge system to start amid uncertainties, concerns," The Japan Times, 21 May 2009, available at *http://search.japantimes.co.jp/cgi-bin/nn20090521b1.html* (last accessed 20 July 2009).

14 Kiyonaga gives some examples of the many ways in which the military authorities interfered with justice. A man having an adulterous relationship with the wife of a soldier is charged with "unlawful entry of a dwelling" (the husband not being present to bring a charge of criminal adultery), pressure is imposed on plaintiffs seeking to foreclose against the home of a soldier serving overseas, and a court is "ordered" by the military to dismiss paternity proceedings against another soldier. In essence, the mere involvement of the military in any trial becomes an excuse for the military to intervene. KIYONAGA at 142-144.

15 The Hiroshima bomb completely destroyed the principal judicial facilities in that city, and killed over 50 judges, prosecutors and other court personnel. The Nagasaki bomb destroyed court buildings as well as the Nagasaki prison, the entire staff of which was killed.

Supreme Court for this case. A second-hand copy made from the copy issued to the plaintiff's lawyer was the only document available for a while, until an official copy was found almost by accident amongst the records of the judiciary itself. The speculation was that court employees struggled to save at least the most important records of Japan's highest court from the firebombing. One of these records may have been that of Yoshida's courageous judgment.

Kiyonaga's book is a deeply moving tale of the bravery of Yoshida and his fellow judges in the face of political pressure and threats to their careers and physical safety. He makes no effort to link their courage to developments in the postwar legal system. Yet those familiar with the postwar judiciary, particularly the Supreme Court, which some scholars have described as being "the most conservative constitutional court in the world,"[16] may be left wondering "what happened"? When did Japan's highest court lose the will – the courage – to make difficult, politically controversial decisions, such as invalidating unconstitutional elections? Would a judge like Yoshida ever make it to the Supreme Court through the judicial career system today?

Perhaps one clue is in Kiyonaga's paraphrasing of the words of a judge who mentored Yoshida early in his career: "*Judges are artisans, not bureaucrats*."[17] By their very nature bureaucracies – even judicial ones – are probably incapable of brave decisions. From that standpoint, Yoshida was an artisan indeed.

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16 See D.S. LAW, The Anatomy of a Conservative Court: Judicial Review in Japan, in: Texas Law Review 87 (2009) 1545 *et seq.*, referencing D.M. BEATTY, Constitutional Law in Theory and Practice (1995) 121.

17 KIYONAGA at 67.