



Title	Legal Positivism and Authoritarianism in Japanese Legal Tradition
Author(s)	Yasaki, Mitsukuni
Citation	Osaka University Law Review. 1968, 16, p. 1-12
Version Type	VoR
URL	<a href="https://hdl.handle.net/11094/5150">https://hdl.handle.net/11094/5150</a>
rights	
Note	

*The University of Osaka Institutional Knowledge Archive : OUKA*

<https://ir.library.osaka-u.ac.jp/>

The University of Osaka

# LEGAL POSITIVISM AND AUTHORITARIANISM IN JAPANESE LEGAL TRADITION<sup>†</sup>

Mitsukuni YASAKI\*

Judicial Logic  
Thought on Legislation  
The Changing Society and The Policy  
of The Occupation Authority  
How to Treat The Orders  
at The New Stage?  
Some Comparison to The German Case

It may perhaps sound ridiculous to say that civil liberty minded scholars hold an authoritarian view of law, or sociological jurists have a cryptal view of omnipotence of laws. It must be very contradictory. Our legal thinking, however, has been developed with the so much complexed context, partly due to the traditionally unbalanced development of the socio-cultural conditions in Japan, that the apparently ridiculous matters have often been made possible here since approximately 1890, as I have partly described it in my preceding paper.<sup>1)</sup> Indeed, the view of omnipotence of laws (in other words, the hard boiled legal positivism) combined with the authoritarianism has been still influencial, despite

† This is the second part of translation, though a bit modified in the content, of my paper, "Hōjisshōshugi" (Legal Positivism) in Japanese language, in: Series of Law in Contemporary World (Gendaihō-kōza), Iwanamishoten, vol. 13. The first part of that paper was translated in this Osaka University Law Review, No. 14, 1966, entitled, "Legal Postivism in Japan". As to the legal positivism I have written a book and several papers in Japanese, by changing aspects to deal with the subjects, as shown in the following Notes. At this time, the article is particularly concerned with legal thinking or attitude of this sort in Japan.

\* Professor of General Jurisprudence, Law Department, Osaka University.

1) Legal Positivism in Japan, Osaka University Law Review, No. 14, 1966. As to its relation to this paper, see the Note above. In that paper, '66, I made an analysis on several technical terms used here, such as view of omnipotence of laws, hard boiled legal positivism, authoritarian view of law and socio-cultural tradition. See the paper, especially at p.18ff. and furthermore my book, Legal Positivism, written in Japanese, publ. by Nihonhyōronshinsha, 1963, (which gave a basis for analysis in that paper) p.216ff.

of the remarkable appearance of the civil liberty minded and sociological jurisprudence in modern Japan. Now we shall look at a few instances to show some dramatic scenery on this problem, which happened during the short period of occupied Japan following the end of the Second World War.

### Judicial Logic

The most remarkable issue during this period is the Judgment of the Supreme Court, the Grand Bench (Daihōtei) in 1948, which dealt with the case of violation of the "Order concerning the prohibition to hold firearms, etc."<sup>2)</sup> In dealing with this case, the Supreme Court was forced not only to review the Order itself, but even the Urgent Imperial Order (Kinkyū-Chokurei) No. 542<sup>3)</sup> underlying and validating the Order said above. To understand the background, the Urgent Imperial Order was the one which was at first promulgated under the Art. 8 of Meiji (older) Constitution on Sept. 20, 1945, and later approved by Imperial Diet on Dec. of the same year. The main problem is that it delegated to Cabinet Orders (Seirei) really a wide range of legal power to provide the matter of affairs, including *punishments*, as never seen before. Why did it? There were surely the urgent necessities for Japanese Government on the one hand to promptly response and enforce the requisitions arising from the Occupation Authority authorized by the *Potsdam Declaration* and the surrendering documents. By what means? The Orders were issued as most appropriate means for this purpose (We shall cite below those Orders, certainly including the Imperial Order, with the addition of the expression "Potsdam" to designate the conditions authorizing them). On the other, how to legally justify those Orders within the legal system<sup>4)</sup> in Japan differed between participants of different types. How it raised the great controversy which in turn related to the topics of this paper, will be traced below.

2) Jūhō tō shōji kinshirei.

3) The Urgent Imperial Order No. 542 says that "Government is eligible to issue Order provided with necessary provisions and punishments, especially in occasions to carry the matters into effect, arising from requisitions made by the Supreme Commander of Allied Powers, as a result of the acceptance of Potsdam Declaration".

4) As well known, the great change was introduced to Japan in regard to her legal and political systems after the end of the Second World War, 1945. Before, we had the (old) Meiji Constitution, "Imperial" Diet, and Great Court of Judicature (Daishinrin), after, we have the New Constitution, Diet, and Supreme Court (Saikō Saibansho). But, the change from Japanese Empire to "Democratized" Japan—someone called it "August Revolution"—was certainly not made without great difficulties even in regard to its legal side, as to be shown below.

Turning to the starting point, let me cite a few paragraphs of that Judgment. "It is surely the very wide range of delegation of legislation which was admitted to the Orders by the Urgent Imperial Order. But, taking account of the facts that we are inevitably under the duty to sincerely realize and enforce the items of surrender which comes from the acceptance of the Potsdam Declaration and signature to the instrument of surrender, and that the prompt enforcement of those items was desired and yet, it must exercise a far-reaching influence, there was no other course but the Urgent Imperial Order which provided a range of legislation delegated to the Order in regard to 'occasions especially necessary to carry the matters into effect, arising from requisitions made by the Supreme Commander of Allied Powers, as a result of the acceptance of the Potsdam Declaration.' Accordingly, we can't hold it as violating the conditions provided by the Art. 8 of Meiji Constitution." The delegation of legislation to the Order by the Urgent Imperial Order is also valid even under the New Constitution of Japan. "Since the sincere enforcement of the items of surrender was nothing but the performance of the legal duty imposed by the instrument of surrender, the delegation does not come to violate the relevant provision of New Constitution<sup>5</sup>". As far as the Order at sake (concerning the prohibition to hold firearms, etc.) depends on the delegation above, it is also supposed to be valid, even though it includes provisions of punishment in question.

Merely following the Judgment as cited above, it may appear very successful to persuade us how the validity of that prohibiting Order is syllogistically deduced from the major premises, the "Potsdam" Imperial Order. But, what gives us a strange feeling at first glance is the expression in the Judgment "There was no other course but—." If we read frankly the first paragraph, it simply means that the wide range of the delegated legislation by the Potsdam Imperial Order is not against the conditions provided by the Art. 8 of Meiji Constitution. While doing it, however, the Judgment, by pointing out the urgent requisitions arising from the Occupying Authority, says that there was no other course but the Potsdam Imperial Order which delegated such and such. On the one hand, it says much in the way of *justifying itself*, such as "There was no other course but—." On the other, it assumes a *defiant* attitude, by speaking of no violation of the New Constitution. To sum up, what is now clear is that the Judgment talks in a roundabout way so that it puzzles us. Frankly speaking, it may perhaps be a proper idea of the Court that we can't help to delegate such a wide range of

---

5) Judgment of Supreme Court, June 23, 1948. A Collection of Criminal Supreme Court Cases (Saikō Saibansho Keiji Hanreishū), vol. 2, No. 7, p.725f.

legislation to the Order since the Supreme Commander requires so much at once. But, it does not always follow from this that the delegated legislation admitted in this way complies with the Constitution. While it is not always constitutional, the Court concludes it as constitutional. Isn't this a too much sophisticated way of reasoning?

Second, this is also the case with the latter paragraph cited above. Here, Prof. Jirō Tanaka (now Associate Justice of the Supreme Court) found in this judicial reasoning a leap in logic as follows: The Judgment says that, since the Urgent Imperial Order is issued for the purpose of "performance of the legal duty imposed by the instrument of surrender", it complies with the New Constitution, accordingly it is valid. But, it must be more reasonable to think that the Court can't objectively pass a judgment upon a constitutionality of each possible Orders, unless reviewing each of Orders in terms of each Articles of the New Constitution by the way of case by case. Without doing it, the Court holds generally the Urgent Imperial Order as valid. This is an extraordinary story, indeed. Besides, the more we think of the special character of the delegated legislation by the Urgent Imperial Order which is under suspicious circumstances for an unconstitutionality according to the New Constitution, as it gives a *blank* delegation of legal power of *punishment*, the more our impression must be deepened. Thus, the following statement seems to be a correct answer to this question. "Since the sincere enforcement of the items of surrender means the performance of the legal duty imposed by the instrument of surrender, the validity of the Urgent Imperial Order as means for this purpose can't be changed even by those possibilities under which it may be against the provisions of the New Constitution—We *can't help* to think of this problem in this way with due regard to the position of our State in the international relations."

Considering the matter from this point of view, Prof. Tanaka continues to point out, the Urgent Imperial Order itself also comes to be unconstitutional, in so far as it includes such a wide blank delegation of legal power on the one hand. On the other, however, he still admits its validity despite of its unconstitutionality. Why is it possible to be valid at the same time while being unconstitutional? Because it "came from the supra-constitutional power", that is, the Authority of Allied Powers, and it "was issued as means to enforce the Authority's requisitions<sup>6)</sup>." In short, the Potsdam Imperial Order is surely held as justified, validated and legalized by the supra-constitutional power, but it does

---

6) Jirō Tanaka, On the Potsdam, Urgent Imperial Order in regard to its unconstitutionality, *Kōhō Kenkyū*, No. 1, 1949, p. 77—9.

not follow from this that the Order complied with the requirements of the New Constitution, consequently it is constitutional, valid and legal in terms of the New Constitution. Figuratively speaking, there were two levels of legal systems<sup>7)</sup> in Japan at that time. Its validity on the one level is not accompanied by its constitutionality on the other level, but by its unconstitutionality. Whereas, the Judgment identifies the both levels. Here is a leap in the judicial logic.

As to how to think of this judicial logic, it reminds us at once the hard boiled legal positivism and the authoritarian view of law. In the very ground of the Supreme Court Judgment, we find both taking root, i.e., the authoritarianism saying that there was no other course to obey the Authority at that time, and the authoritarian view of law saying that the law is what the political power commands us. Those are well to be said as a kind of the presupposition for the conceptual (or mechanical) jurisprudence forthcoming, which, by viewing the law not only as a system, but as a logically (or mechanically) ordered closed system, hold its judicial conclusion as deduced from both, the major- and minor premises merely by logical reasoning. Indeed, this connected type of legal thinking and view, as well known, has often been called the hard boiled legal positivism or the view of omnipotence of laws. To speak paradoxically, the Supreme Court Judgment as cited above suggests us the very crucial points for our subject matter. We are now to turn to the idea of the same sort, but in the different stage. This is the governmental idea in the Diet in connection with the legislative process of that Urgent Imperial Order.

---

7) It sounds unnatural to mention to two levels of positive legal systems as municipal systems in Japan, let alone the international legal system on the one hand and the customary law living in social communities (such as like "living law" emphasized by late Prof. E. Ehrlich) on the other. Rather, it would be more natural to assume one municipal legal system being valid there. It offers a good enough basis to Prof. Hans Kelsen for his idea of "Basic norm" for unifying vast fields of positive legal rules, or to Prof. H. L. A. Hart for his idea of "Ultimate rule of recognition" for unifying them likely to Kelsen, but to be found in the *practice* of courts, officials and private persons (Hart, *The concept of law*, 1961, p. 107) unlikely to Kelsen. But, Japanese legal system we are now analyzing makes an exception to this ordinary system, like those which are also very exceptional due to Occupation or deep dimension of change in their own social systems. So far, we may find here a fundamental jurisprudential question raised, as to how to find and treat "ultimate rule of recognition" (according to Prof. Hart) under such a circumstance, either in the side of practice oriented to the Potsdam Orders, or to the New Constitution. As pointed out by Prof. Graham Hughes, it raises a serious problem which I will deal with in another paper (Hughes, *Jurisprudence*, in: *Annual survey of American law*, printed by New York University School of Law, 1966, p. 649).

### Thought on Legislation

A Minister of State, Jōji Matsumoto answerd as follows in the Meeting of the Special Commission, the Eighty Ninth Imperial Diet in 1945, where serious questions were raised on the character of that Order, No. 542. "This Urgent Imperial Order gives a wide range of delegation of legal power. But, there is no other course for us but this Order, because we are inevitably under the duty to carry into effect the Directives of the Commander of Allied Powers, in so far as we accepted the Potsdam Declaration."—"Genenrally speaking, I think, it is not always a proper way for the legislation. But, considering such an extraordinary circumstance, I believe, there is no other course for us but this Order, and undoubtedly we can admit the Order as legal<sup>8)</sup>." To compare his idea with the Judgment of the Supreme Court, one may perhaps be surprised to find the similarity between here and there. For instance, his answer clearly explains the same idea, "there is no other course for us but this, such and such", prior to that Judgment. This is also the case with his logic of its justification. Then, how about the word "legal"? First of all, it seems perhaps to properly indicate the Order's compliance with the Constitution. He himself, too, mentioned to this point. "This Urgent Imperial Order is issued on the ground of the Constitution for the purpose to carry into effect the Directives of the Headquarters<sup>9)</sup>." While the word "legal" is used under such a connotation, we are again faced with the other idea, "there is no other course for us but this—<sup>10)</sup>." If the Order was actually legal, there was no need to speak of "no other course but—." What is the basic way of thinking underlying his unstable state of mind? Likely to the Judgment above, one may well to find here the hard boiled legal positivism backed up by the authoritarian viewpoint, even though it be latent.

### The Changing Society and The Policy of The Occupation Authority

We have examined the Judgment as well as the answer made by the judicial

8) Record of Committee's Meeting,—The Second Meeting, Dec. 13, 1945. I cited it from Tatsuo Satō's, "A personal note on the Potsdam Orders", No. 1, in: *Jichi Kenkyū*, vol. 28, No. 2, p. 15, Feb. 1952.

9) Satō, *op. cit.*, p. 23.

10) It is interesting to remember that Mr. T. Satō, who was in charge of the legislative section in Government at that time, mentioned, as a matter of fact, to the dual character of "legality" at satake. *Ibid.*, p. 25 f.

and governmental side by paying a special emphasis on their logically unreasonable logic or idea, which in turn was accomplished by the hard boiled legal positivism, etc. Let alone the legal positivistic or authoritarian view, however, it is certain that the terribly complexed social situation and policy in actuality at that time, too, proved an incentive to that logic or idea. Certain conditions surrounding the New Constitution may afford the key to understanding the situation.

The Constitution was promulgated and enforced in 1948, under the Occupation. Despite of the fact—Occupation, it is worth while to notice as epochmaking that the Constitution was accomplished at least for the definite purposes, anti-feudalism and anti-militarism by comparison to the Meiji Constitution. Up to that point, the Occupation power itself also played the role to help the direction forward for "democratization" immanent in the New Constitution. For instance, the reform or modernization of the half-feudalistic land-lord relationships, the premodern labor relationships, and the family system mainly dominated by the principle of "paterfamilias" are the byproducts of the Occupation in this role<sup>11)</sup>. Viewed in this light, it must be called a too much narrow minded nationalism to condemn the Occupation Powers merely by the fact of the "Occupation". It must be, however, equally a questionable attitude which merely made an effort to justify every given legal means as valid and constitutional, regardless of circumstances, whenever those were required by the Authority. This may become much more questionable and unreasonable, when we remember the Occupation Powers especially in its certain type of the opinion which keenly concerned with the serious relation between the Urgent Imperial Order and the New Constitution, and which tried to give a special emphasis on the side of the Constitution in doing its business, in order to prevent possible contradictions between them.<sup>12)</sup> In this connection, we need furthermore to notice the changing attitude of the Occupation Powers in its policy. One of the main Occupation policies was the "democratization", as far as the former half period of the Occupation was concerned. While the mass movement came to be more and more escalated along this line of policy, the Occupation Powers turned to the direction to suppress the movement with fear of its coming too much active or aggressive, particularly during the latter half period of the Occupation.<sup>13)</sup> Certain part of

11) Masayasu Hasegawa, Constitutional history of Showa era, 1961, Iwanamishoten, p. 255 ff.

12) T. Satō, *op. cit.*, No. 2, in: *Jichi Kenkyū*, vol. 28, No. 5, May, 1952, p. 4.

13) Yōzō Watanabe, *Constitution and contemporary law*, 1963, Iwanamishoten, p. 121.

the Potsdam Orders was also issued and applied as means for this purpose, one of the typical cases of which was related to the violation of the Cabinet Order No. 201 concerning the prohibition of acts of dispute of public servants. At first glance, words like "valid", "legal", and "constitutional" may sound simple and clear. But, even according to our observation above, it is very obvious that we should carefully interpret them within their social context where they are often used by different campaigns for some reasons to justify or rationalize each of their own ideas or opinion.

### How to Treat The Orders at The New Stage?

Such a way of thinking still remained even after the validation of the Peace Treaty between the U. S. and Japan in 1952, even though modified in its form of appearance. As an illustration, let's consider how the Potsdam Orders of this sort were renewed within the legal system at the new stage. During the Occupation, it appeared to Japanese that two level of legal systems were valid in Japan, that is, the constitutional system as the ordinary and the Potsdam legal system as the extraordinary. The Peace Treaty concluded produced an effect upon the end of the Occupation, which in turn was supposed to naturally lead to the end of the dualistic legal systems, i. e., to the monistic rule of the New Constitution. If so, it comes to be a great issue how to treat the Potsdam Orders in order to make them adapt to the Constitution, which again furnishes a battle-ground for much controversy between two groups of diametrically opposed opinions. According to the concise summary of Prof. Isao Satō, the one group of the opinion holding originally the Orders as unconstitutional, "argued that the Orders should be at once out of force, as soon as the New Constitution in its 'supreme legal rules' character were recovered by the Independence, while the other group of the opinion, supporting the Orders, argued that those, being modified, should be maintained still after the Independence, as possible it could be.<sup>14)</sup>" It was the latter opinion to which the Government stuck and took as a matter of fact. Thus, the Government decided to mainly adopt a course of renewal of the Orders as provided by Laws No. 81.

It is open to serious question, however, that this course was really proper and to be taken. For instance, some one pointed out the fact that there was no other

---

14) Isao Satō, Problems of constitutional interpretation, vol., 1, 1953, Yūhikaku, p. 320.

course but this renewal of the Orders in terms of the legal technique at that time.<sup>15)</sup> Is it good enough to satisfy us? To make an exchange of the Potsdam Orders for new group of laws, each of those new laws to come is surely to comply with the New Constitution. But there was a series of the Potsdam Orders, such as like the Order concerning to control social groups, etc., or the Order concerning the reserve police, which were strongly suspected of their unconstitutionality. Despite of this fact, the Government dared to make an exchange of the most Orders for new laws. If this is true, the governmental attitude may well be called the hard boiled legal positivism based on the bureaucratic authoritarianism. At this point, Prof. Masamichi Rōyama's remarks are very suggestive, for he wrote that "the worse traditional view of the authoritarian legislation since Meiji era still remains in this governmental attitude, such as like 'everything is justified, only if it is enacted into laws.'<sup>16)</sup>"

The similar trend of the attitude may be also observed in the judicial judgments at that time which is particularly symbolized by the case concerning the violation of the Cabinet Order No. 325. Originally, this Order was to punish acts violating an aim of the Directive issued by the Supreme Commander to Japanese Government, but the vague statement, "acts violating an aim of the Directive—" raised from the first step a basic question whether it did violate the principle of "Nulla poena sine lege". Since the Peace Treaty was in full force, this Order came to be abolished by laws, there still remains, however, a problem how to treat cases which were still pending in court on the ground of violation of the Order above. How District Courts or High Courts were troubled very much by this new type of problem may be clearly shown by taking brief glimpses at how their judicial judgments were divided into extraordinarily different directions, that is, guilty or nonguilty or acquittal— This is "menso" in Japanese language which is not identified with nonguilty, but peculiar to Japanese criminal procedure—. As a matter of fact, this troublesome business was law-technically resolved by means of acquittal by the Supreme Court's Judgment in 1953.<sup>17)</sup> What is worth while to notice here, however, is judge's changing attitude in our changing society. Figuratively speaking, we may perhaps find with great interest a group of judges whose attitude, while having observed the Orders under the

15) See Messeurs T. Satō's and Toshiyoshi Miyazawa's opinions expressed in the round table discussion on "Where are you going, Potsdam Order?", *Jurist*, No. 1, Jan. 1951.

16) Masamichi Rōyama, Problem as to how to change Cabinet Order at the new stage, *Hōritsujihō*, vol. 24, No. 2, Feb. 1952, p. 2.

17) Judgment of Supreme Court, July 22, 1953. A Collection of Criminal Supreme Court Cases, vol. 7, No. 7, p. 1562 ff.

Occupation due to the Authorities, turns to severely criticize them soon after the end of the Occupation. Isn't this a proper, though extreme in its character, case to measure and judge our judicial officers' sense to the Authority, which in the instances above seems to lead to the opportunistic authoritarianism.<sup>18)</sup> To clarify the contrast, we shall refer to the case in Germany soon after the end of the Second World War.

### Some Comparison to The German Case

In 1945, German people was faced with the urgent task to reestablish the democratic state ruled by the law (so-called "Rechtsstaat"). This is the quite similar situation to ours. Only the difference is that a search and condemnation for people who helped and assisted the Nazi regime in its rise of power were much more consequent and severe in Germany than in Japan. This is especially true in regard to the Trial of the Minor War Criminals of the cooperators, not but for the Major such as like in Nuremberg and Tōkyō Trial. In order to do it legally, however, there must be some legal rules and their justification or rationalization—"legalism" according to Prof. Judith Shklar<sup>19)</sup>. The Occupation Authorities in the areas occupied by Great Britain, Soviet Union, and France wanted to apply the Law of the Controlling Committee (Kontrollratsgesetz) No. 10 for this purpose to punish the Minor of the cooperators. The Law No. 10 was enacted by that Committee after the end of the Nazi regime, in 1945. Conversely, cooperative acts of those people had been done during the Nazi period, that is, before 1945, or at latest before May, 1945. Here is a simple gap between the time when acts were actually done and the time when the Law was enacted to punish them. But this is really a great gap in terms of the criminal law. As it's well known, the principles of "Nulla poena sine lege", "Nullum crimen sine lege" include the prohibition of "ex post facto law", i.e., the doctrine appealing, "Do not apply the retroactive rules of the criminal law to the acts which were done before this retroactive legislation is enacted." Doesn't the application of the Law of Controlling Committee No. 10 violate the prohibition above? The Occupation Authorities in those areas tried to make German courts apply them for those cases. As a matter of course, it invited German lawyer's incisive criticism. One of the most leading criticism was offered by Hodo Fr. von Hodenberg, President of

18) See Ryūichi Hirano, On the judicial judgment concerning the Cabinet Order No. 325, Hōritsujihō, vol. 24, No. 8, Aug. 1952, p. 38.

19) Judith Shklar, Legalism, 1964, p. 151 ff.

Higher Court (Oberlandesgericht), Celle. His paper, very influencial both in legal theory and practice, aimed at to clarify the issue as to how the Law No. 10 was not to be applied in terms of the principle, "Nulla poena sine lege<sup>20)</sup>."

But, what is much more worthy of attention here is that his argument was drawn from his very tough and strong state of mind which tended to criticize thoroughly everything whenever it does not comply with the juristic logic, whatever it may be a program of the Occupation Authority. This may perhaps come from the German attitude, if I could generalize in this way, to search systematically for subjects in terms of logical consequency. It is also not a little remarkable to note that such a type of attitude was not only found in the side of people against the application, but in the side of people, such as late Prof. Gustav Radbruch<sup>21)</sup> in defending the application of the Law No. 10, so that the similarly backboned attitudes led to the much more heated controversy on it. By the way, it reminds us a remarkable contrast between German and Japanese lawyers or legally educated people. As mentioned above, some of Japanese lawyers, or legally educated politician were haunted with their opportunistic weakness under the Occupation which may well be symbolized by the premodern, ( or supra-) authoritarian attitude. To speak of the problem of the war crime must have been somewhat the unpleasant matter for German people, too, but it has still continued in the form of the war criminal trial, and yet it has not been cancelled by means of the prescription, application of which was given up after the discussion there in the event of 20 years after the end of the Nazi regime. How about the situation in Japan<sup>22)</sup>? It must, I think, be illustrated by the saying, "Ichi oku sō zange" (One hundred million of Japanese are to be responsible and regretful for their war). This saying seems to be very tricky, because to say all Japanese being responsible is to discharge them by generalizing a responsibility within a vague context and splitting it. Under such a state of feeling, the problem of the war criminal has been almost forgotten in Japan, as it well be said "Out of sight, out of mind". It does not follow from the said above, how-

20) Hodo Fr. von Hodenberg, *Zur Anwendung des Kontrollratsgesetzes Nr. 10 durch deutsche Gerichte*, Süddeutsche Juristenzeitung, 1947, S. 113 ff. Yasaki, Legal Positivism, (publ. by Nihonhyōronshinsha) p. 73 ff.

21) Gustav Radbruch, *Zur Diskussion über die Verbrechen gegen die Menschlichkeit*, Süddeutsche Juristenzeitung, 1947, S. 133 ff. Yasaki, *op. cit.*, p. 76, 97.

22) As to the contrast between Japanese and German people in regard to this problem, see Shklar, *op. cit.*, p. 111 ff. Edwin O. Reischauer, *The United States and Japan*, 3rd ed., 1965, translated into Japanese by N. Hayashi, p. 251 ff. Keiichi Sakuta, Responsibility for war crime and wish to peace, in: *Asahi Newspaper*, Aug. 11, 1965.

ever, that I agree with the procedure of the war criminal trial taken after 1945, here and there. It involves so many difficulties, as shown by critical studies. But, what I am aiming at here is to analyze some socio-cultural conditions underlying the authoritarian and the hard boiled legal positivism in Japan, by contrast to the German. By means of scheme of "sin-culture" and "shame-culture", Miss Ruth Benedict once pointed out the sharp contrast between cultures in the West and Japan.<sup>23)</sup> Perhaps, Japanese state of mind, that is, the shameculture to some extent, as very much concerned with condemnation by others from the outside, not but with their own conscience or conscientious criticism to themselves may afford the key to understanding why Japanese, despite of their modernization in their appearance, are tended to obey the Authority and its laws, that is, our major subject.

---

23) Ruth Benedict, *The chrysanthemum and the sword*, 1946.