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CONSTITUTIONALISM AS A POLITICAL CULTURE

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Translator's Forward: These are not happy times in Japan. Its economy, at one time the most dynamic on the planet, has been in the dumps for over a decade. The population is both aging and declining. A "lost generation" of young Japanese has come of age amid diminished, and diminishing, expectations. The government, controlled as always by the Liberal Democratic Party ("LDP"), is rigid, bloated, corrupt, and deeply in debt. And there is no real reason to believe that the next decade will bring improvement in any of these areas.

Not surprisingly, as Japan's economic juggernaut has faltered, the tone of Japanese writing on Japan has moved from self-celebration to self-doubt. It was against this background that in 2000 Kamiya Masako³ compiled a collection of essays entitled "Re-reading the Japanese National Constitution."⁴ Included in the collection was Professor Annen's "Constitutionalism as a Political Culture."⁵

Professor Annen's essay stands out because it confirms the widely held suspicion that the commitment of the Japanese people to their national constitution is tenuous at best. He argues that the peace and prosperity of postwar Japan made the Constitution a tolerable, if only marginal, piece of Japan's social and political fabric. With prosperity fading and patience with Japan's security arrangements growing thin, Annen asks whether the Constitution itself could become a casualty. He answers the question more or less in the affirmative.

For an American reader, both the discussion and the conclusion are stunning. While Americans may disagree over any number of political issues, the discourse always assumes the continued validity and vitality of the United States Constitution. It is simply unthinkable that the Constitution would be discarded due to changing economic conditions or public apathy. Indeed, the Constitution and the national identity are so firmly intertwined that to abandon the former would be to extinguish the latter. Not so in Japan.

There are two explanations for the shallow roots of constitutionalism in Japan. First, Japan, unlike the United States, has a long national history that predates its constitution. For example, the genealogy of Japan's Imperial family can reliably be traced back almost two thousand years. Japan's political infrastructure was sufficiently developed by 710 A.D. that a great Imperial capital could be built at Nara. More recently, Japan was "reunified" in 1600 by the military government of Tokugawa Ieyasu. Thus the Constitution, promulgated in 1889, is a real latecomer.

¹ 安念潤司. This translation follows the Japanese practice of placing family names before given names.

² B.A., Japan Studies, University of Washington 1999; J.D., University of Washington School of Law 2002.

³ 紙谷雅子.

⁴ 日本国憲法を読み直す, NIHONKOKUKENPŌ WO YOMINAOSU.

⁵ 政治文化としての立憲主義, SEIJI BUNKA TO SHITE NO RIKKEN SHUGI.

The other reason the Constitution is not closer to the hearts of the Japanese people is that it did not originate with them but, rather, has always been a "gift" handed down from above; first from the Meiji emperor, and subsequently from the American occupying force at the end of World War II. One might imagine that if the United States Constitution were a "gift" from, say, King George, it would not be the touchstone of American political life. Similarly, Japanese are lukewarm to their constitution because it is not truly "theirs."

Assuming that Professor Annen is correct, Japan's constitution is not particularly important now and will be even less so in the future. The ramifications of this, of which there are many, are beyond the scope of this introduction. At the very least, the world outside Japan should realize that the underpinnings of Japan's "Peace Constitution" are rather wobbly.

Finally, a note on translation style. Japanese and English do not share common linguistic roots (though the Japanese have borrowed quite a bit of English vocabulary). Both sentence structure and grammar are quite different between the two languages. Therefore, a translation that slavishly follows the flow of the Japanese will produce unreadable English. Conversely, a translation rendered in smooth, idiomatically correct English may unacceptably deviate from the author's actual ideas. I have tried to split the difference between the two extremes.

Author's Forward: The western idea, expressed in terms of either "law" or "natural law," that the rights that flow from the law act to limit state power⁶ and ensure individual freedom, is part of Japan's imported culture. Through our well-known ability to receive and transform foreign culture, this has become the basis for modern constitutionalism. However, because the benefits provided by Japan's constitutionalism have only been the peace and prosperity demanded by the people, it is as if the Constitution has functioned without any relationship to the provision of individual freedom. Because Japanese are in fact profit-minded, they are likely to say that the Constitution is "already useless and unnecessary" as a check on political power and, on that basis, possibly discard it.

I. AS *TATAMAE*⁷, IT HAS BEEN SPREAD AROUND THE WORLD . . .

While *rikken shugi* is the Japanese translation of "constitutionalism,"⁸ these days the word has an unmistakable ring of antiquity to it. Isn't this word associated with *rikken seijūkai* and *rikken minseitō*, which are the former names of political parties and, even before that, the slogans of the

⁶ [The author uses the term *seiji kenryoku* (政治 権力) throughout the piece. *Seiji* is usually translated as "government" or "politics." *Kenryoku* combines characters meaning roughly "rights" and "power." Where the term is contrasted with the rights of individuals, "state power" might be the most appropriate translation. Trans.]

⁷ [The word *tatamae* (建前) is a loaded one in Japanese culture. It can be used as a value neutral term that simply means a theory or a principle. More often, though, the word has a derogatory connotation and is contrasted with the word *honne* (本音), or one's true motive. See BOYE LAFAYETTE DE MENTE, NTC'S DICTIONARY OF JAPANESE CODE WORDS 6-8 (1997). Thus, to suggest that constitutionalism has spread at the level of *tatamae* is to suggest that what has spread is not "true" constitutionalism. Trans.]

⁸ ["Constitutionalism" is rendered in English in the original text. *Rikken* (立憲) combines the symbols for "stand" or "establish" with the symbol for "constitution." *Shugi* (主義) is the general suffix used to indicate "-ism." Trans.]

civil rights movements of the Meiji Era.⁹ And it is not just the sound of the words [that evokes the response]. Constitutionalism has been passed down as part of the western political culture since the Middle Ages and, because of its origin, is quite old. However, while constitutionalism is one of the best gifts that the West has given to the world, it cannot be said that the whole world is enjoying the benefits of this gift. Even though it may seem old-fashioned, constitutionalism continues to be a serious topic in the twenty-first century.

Traditionally, constitutionalism has stood for the principle that state power must be limited through the operation of law. In modern society the underlying assumption is that the "law" that should limit political power is the Constitution itself. At the same time, the modern meaning of constitutionalism is that political power is exercised through the Constitution. In other words, the Constitution acts in principle to limit political power.

However, even if we say "by way of the Constitution" because, after all, the codes and rules have the name of the Constitution attached, the result is not necessarily good. In present day Japan, even if politics were conducted in accordance with Prince Shotoku's "17 Article Constitution,"¹⁰ it could not be said that Japan has a constitutional form of government. Constitutions have certain standard features. That is, first of all, rights centering around freedom of expression, freedom of religion, and the protection of private means of production (these are also called "human rights," "basic rights," and "basic human rights"). Second, a political system based on democratic principles is established. Also, third, because these contents become the supreme law of the land, they are immune to laws passed by the legislature. Because it has been given the status of "highest law," the supremacy of the Constitution must be protected by a Supreme Court with the authority to declare certain acts unconstitutional. With the conclusion of the second great war, we arrived at a point where there are standard features.

⁹ [The Meiji Era marked the end of over two and a half centuries of military rule in Japan. The political parties noted by the author flourished in the early part of the twentieth century, when it appeared that the Japanese might adopt something akin to a two-party system. However, it is worth noting that the biggest difference between the two parties was that one was beholden to the Mitsui industrial combine, the other to Mitsubishi. JOHN WHITNEY HALL, *JAPAN: FROM PREHISTORY TO MODERN TIMES* 316 (1968). Trans.]

¹⁰ [Prince Shotoku (574-622) is possibly the most revered of Japan's historical figures. He is usually credited with introducing Buddhism to Japan. He also wrote the 17 Article Constitution, which reads more like a statement of political philosophy than a blueprint for the operation of a state. Trans.]

The Japanese constitution is praised by the left wing as a particularly good constitution and demeaned by the right wing as being a particularly bad one. The difference is premised on the different way each side answers the question regarding the Constitutionality of the Special Defense Forces.¹¹ Without saying that specific parts of the Constitution are something Japan should be proud of (or embarrassed by), whether right or wrong, it is no more than a “typical” constitution of an advanced nation.

The current constitutionalism itself consists of three branches: human rights, democracy, and the supremacy of the Constitution’s rules and regulations. However, among these three branches the most important is human rights, i.e., liberty. Whether in the Middle Ages or the twenty-first century, the primary object of constitutionalism has been to protect individual freedom and limit state power through the operation of law. Democracy and the supremacy of constitutional rules, properly taught, are nothing more than means and devices for ensuring freedom. If democracy is established, it is anticipated that freedom will be regulated by the representatives of the people and they, themselves, would not approve foolish legislation that would choke off their own freedom.

According to the participants in the Meiji Era’s Popular Rights Movement, constitutionalism primarily meant representative government and that, naturally, political parties would be established. However, although they were representatives of the people, they [the legislators] might quite possibly, and foolishly, make laws that would limit their own freedoms. For example, the pre-war Peace Preservation Law and the National Mobilization Law were promulgated by nothing less than the Imperial Diet.¹² The recognition of the Constitution’s status as supreme law was a response to these pre-war laws, and a procedure was put in place so that the Supreme Court could intervene in the unlikely event similar laws were passed.

It can be said that after the war the *tatema* principle of constitutionalism took the world by storm. While a small number of military

¹¹ [Under Article 9 of the Japanese constitution, Japan is able to maintain only “defensive” forces. However, Japan’s military, one of the most modern and well equipped anywhere, could be transformed instantaneously into an instrument of aggression. It is an article of faith among the Japanese left that the Special Defense Forces (自衛隊, JIEI TAI) are unconstitutional. Conversely, the Japanese right would define “defense” broadly enough to include defense of national interests rather than merely the land, air, and water of Japan. Trans.]

¹² [The Peace Preservation Law of 1925, enacted by a vote of 246-18, is perhaps the most notorious single piece of legislation ever to make it out of the Diet. The Law banned many forms of political expression and was used to effectively crush dissent in the years leading up to the Second World War. The National Mobilization Act of 1938 officially put Japan on a war footing by giving the government absolute priority over material and human resources. Trans.]

and totalitarian regimes survive around the globe, even they no longer manifestly oppose constitutionalism. Even in those countries, the fact that they haven't reached the level of protection afforded by European and American style constitutionalism is typically excused by the actual conditions in each country.

Now, as constitutionalism enters the twenty-first century, will it continue to smoothly spread and be established around the globe? The problem is that constitutionalism was originally a distinctively western political culture. Accordingly, if one asks if constitutionalism, with its widespread diffusion and establishment, can be transplanted into the various countries outside the sphere of western culture, the only answer is that there are no grounds for open optimism. Now, assuming that all countries abandoned and discarded their current political systems, they might all adapt constitutionalism. While Toyotas are running on streets all over the world, it doesn't follow that all countries would independently produce Toyotas.

However, it would be incorrect to say that there were no ideas resembling constitutionalism existing outside western culture. Rather, the perspective that state power should be subject to limitations is an idea that was common, to some extent, to all civilized societies. It is thought that the naked assertion of unlimited political power, and its justification at the level of *tatema*, disappeared early. For example, in China, and even now, the naked political class could be seen, but at the level of *tatema* it was not so. For countless generations the exercise of state power was horribly arbitrary. However, because the Japanese believed that the Emperor's status was based on the "Mandate of Heaven," it followed that Heaven's commandments, as expressed through the Emperor, must be obeyed. For example, it was believed that famines and floods were messages sent forth by Heaven to warn the Emperor who was entrusted with power over the people. Naturally, there were few if any Emperors who, of their own accord, took responsibility for disasters and resigned.

While not on a level as abstract as the "Mandate of Heaven," there are other examples demonstrating that a consciousness of law's power to limit state power existed. For example, in the "cruel lives" of the *Nihonshoki*,¹³ there were officials who strictly enforced the law. If they were too strict, they fell out of favor with the Emperor and were dismissed. Even so, prior to such a dismissal, a proceeding was conducted where questions were asked and the official was allowed to answer and explain. Although this story is

¹³ [NIHON SHOKI, 日本書紀, was published in 720. One of Japan's oldest books, it contains both history and legends, though there is no bright line to distinguish the two. Trans.]

from the second century B.C., its suggestion that even the power of the Han Dynasty was limited by way of the law, while vague, allows us to inquire as to its [the law's] existence.

Even in Japan, it doesn't follow that there was no understanding of the concept that law could be used to limit state power. Most typically, this can be understood by examining the debate at the end of the Tokugawa Era¹⁴ over whether Japan should continue its policy of national isolation or, conversely, open up to the outside world. One faction within the military government maintained that the policy of national isolation was reflected in ancestral law. The law enacted by the founding fathers of the Tokugawa government was binding on the generations of leaders that followed.

However, while the concept that state power could be limited by law was common to both East and West, it is indisputable that constitutionalism originated in Western Europe. While it is tempting to believe that the difference is merely one of degree, in Western Europe there is an overwhelming accumulation, in both quantity and quality, of theories related to the relationship between the law and state power.

II. IN WESTERN EUROPE, POLITICS AND RELIGION WERE BOTH "LEGALIZED"¹⁵

One characteristic aspect of Western European political culture is the fact that the language of politics and government has been "legalized" to a remarkable degree. In modern times the most straightforward example of that can be seen in the United States. From the bombing of North Vietnam to the adultery of a President, political conflicts are almost always through the language of law—especially "the relationship between legal rights and political rights" and the "range of the Presidents' special rights"—transformed into the language of the Constitution and often handled through lawsuits.

Of course, even within the sphere of Western European culture, the American example belongs in a special class. In the United States, beginning at the courthouse, through the ranks of elected officials and administrative staff, the rate at which posts are occupied by lawyers is,

¹⁴ [The Tokugawa Era (1600-1868) began with the unification of Japan through the military success of Tokugawa Ieyasu (徳川家康) and ended with the restoration of the Emperor. During that time, Japan had an official policy of *sakoku* (鎖国), or national isolation. Trans.]

¹⁵ [The author makes frequent use of the word *hōka* (法化) from this point forward. It combines the symbol for "law" or "legal" with the suffix for "-ization" and is best translated as "legalize." However, the meaning is not that an act that is illegal becomes legal through "legalization." Rather, the sense is that some principle or institution is infused with legal principles. Trans.]

compared to other countries, conspicuously high. Even the First Lady is a lawyer.¹⁶ However, while American society is exceptional, the phenomenon of political language being “legalized” has long been a feature of traditional Western European political thought. To begin with, Christianity itself, when sensed from our [Japanese] point of view, was a highly “legalized” religion. Of course, it is not the Christianity that was founded in Palestine with Jesus as its source but, rather, the Christianity that was organized and systematized by the Roman Catholic Church. During the Middle Ages, when papal authority was at its apex, the Popes were often scholars of law and religion. The earthly representatives of Christ performed their duties as legalists. Going back, it is said that the vocabulary of Roman jurists corresponded to the language and ideas found in the Bible that had been translated into Latin by Saint Hieronymus (*circa* A.D. 340-420) at the end of the fourth century and the beginning of the fifth. Even Thomas Aquinas, who was a theologian rather than a jurist, used descriptions drawn from law in significant portions of “The Complete Theology.” “The Complete Theology” is, as the name suggests, a book about theology; that is to say that although it is a book about religion, it is not entirely stories of the “I had an epiphany as if struck by a waterfall during my spiritual training” type. Instead, problems are raised, and proofs are attempted repeatedly. The type of proposition that should be proved, for example, is presented as an inquiry framed as, “Does God exist?”¹⁷ Therefore, if one believes “God does not exist” and puts forth the basics of an argument (for example, along the lines of “in spite of the fact that God should make things infinitely good, evil exists, therefore, God does not exist”), a refutation is presented and thereby the proposition that God exists is proved. While the proof of God’s existence does not directly relate to the discussion of law, this method of advancing a proof strongly resembles a courtroom debate.

During Europe’s Middle Ages, which were decidedly different from Japan’s, no one outside the priesthood could read; in other words it was a world without intellectuals. Accordingly, while theology was naturally part of the curriculum, the study of politics, medicine, and astronomy were all part of a priest’s duty. Because political theory and theology were the basics, from the “legalization” of that theology it followed naturally that political theory would also be “legalized.” After all, the Western European tradition is to describe political phenomena in terms of their relation to the law. While it belongs to a more recent era, this is exemplified by

¹⁶ [The author is referring to Hillary Clinton, wife of former U.S. President Bill Clinton. Trans.]

¹⁷ THOMAS AQUINAS, *SUMMA THEOLOGIAE. LATIN TEXT AND ENGLISH TRANSLATION, INTRODUCTIONS, NOTES, APPENDICES, AND GLOSSARIES* (1981) (Part 1, Problem 2, Paragraph 3).

Montesquieu's (A.D. 1698-1755) "The Spirit of Laws."¹⁸ If Asians were to classify political power with a complete lack of knowledge of Montesquieu, it would not be broken down into legislative, administrative, and judicial, but rather, education, military, civil, engineering, and the like, classified according to substantial distinctions. In contrast to this, Montesquieu's classifications are abstractions based on the relationship between political power and the law.

By the way, in contrast to the "legalization" of European politics, the "sexualization" of Japanese politics may have been a mistake. Certainly, "sex" is politically important in countries everywhere. That is because the flow of politics is determined by the inheritances and marriages of royal families. However, in Japan the relative importance in politics of "sex" is extremely great. For example, some people believe that the *hogen no ran* and the *heiji no ran*¹⁹ were caused by the entanglement of homosexual affairs in the Royal Court. In the Japanese Royal Court, sexual relations were themselves politics. For example, although successive generations of the Fujiwaras²⁰ place their daughters in the Emperor's harem for the purpose of establishing a common ancestry with the Imperial line, it was not necessarily a step taken to advance their own policies. Establishing the ancestral relationship was itself politics.

III. "NATURAL LAW": CONSTANT, ETERNAL, FIXED BY GOD

It is important to note that during the period when the language of religion and politics was being "legalized," the venerable concept of "Natural Law" existed. The concept of Natural Law can be traced back to the ancient classics that existed before the spread of Christianity. Even in the Middle Ages, Cicero (106-43 B.C.), who clearly explained that there should be a Natural Law that transcended both political power and time should exist, was widely read. It was theorized that, with the spread of Christianity, even human beings with their imperfect powers of reason could recognize the Natural Law, a constant, immutable, perfectly reasoned law fixed by God.

Simply stated, if one listens as if perhaps to a fairy tale, although there are few true believers of the theory of Natural Law in Japan, the emergence

¹⁸ CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., 1900).

¹⁹ [The author is referring to civil disturbances in Japan from approximately April 12, 1156 to January 10, 1160. Trans.]

²⁰ [The Fujiwara (藤原) clan wielded great power from around 858 to 1160 by skillfully manipulating the Imperial system. Trans.]

in Western Europe of undaunted theorists who deny the existence of Natural Law is truly a recent event. Up until the eighteenth century, the existence of Natural Law was taken as a self-evident premise for the narrative regarding politics, theology, and the law.

Naturally, the concept of Natural Law was abstract from the beginning, and further, as public property that no one would be opposed to, if one inquired about its contents, various people would answer in various ways. At times it has the meaning of Natural Law rules; at times it is based on the morals people should follow such as Moses' Ten Commandments; and at other times, with sudden concreteness, it is spoken of as if it were today's "General Principles of Civil Law." However, it would be useful to state in certain terms that it (Natural Law) is law that transcends and limits political power.

It should not be forgotten that the concept of "Natural Rights" descended from the principle of "Natural Law." Thus the rights called "human rights" and "basic rights" are just the modern terms for "Natural Rights."

Opinions are divided regarding the point in time when the concept of Natural Rights was introduced into the Western European vocabulary of theology, politics, and law. Japanese are most familiar with this concept from the writings of two geniuses from sixteenth century England's period of confusion: Locke and Hobbes. Or perhaps, as some people insist, the concept of Natural Rights came from "liberal" contemporaries of these two who positioned themselves much closer to the "left." With this kind of historical inquiry, it is typical that the origin gradually moves back in time, and the origin of Natural Rights is no exception. Among others, Dominicans and Jesuits of the Iberian Peninsula, William of Ockham (*circa* 1285-1349 A.D.), a representative of the fourteenth century Nominalists, and civics theorist Jean Gerson all espoused the existence of some concept of Natural Rights. However, according the recent research of Brian Tierney, a scholar of Middle Ages religious and legal history at Cornell University, the germination of the concept of Natural Rights was already recognized by twelfth century scholars of law and religion.²¹

Of course, even though the concepts of Natural Law and Natural Rights have existed since the Middle Ages, it does not necessarily follow that they bore fruit in the form of a constitution with a codified system, i.e., a constitutionalized political culture. These concepts have been contemplated

²¹ BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625* (1997).

by monks in abbeys, but have also been used to justify contemporary political authority as representing "nature" or "God's will."

However, during the religious wars that raged during the sixteenth and seventeenth centuries, Natural Rights came to have the character of weapons to be used against the dominant political power of the time, as Protestants in Catholic countries, and Catholics in Protestant countries, invoked them as the basis for their own freedom of belief. The concept of Natural Rights forged during this intense political struggle were explicitly provided for in the Constitutions that emerged from the eighteenth century era of "Citizen Revolutions," with freedom of belief being the foremost freedom. It is not an easy endeavor, for those born outside the western world, with its extensive accumulation of knowledge, to learn through the experience of others.

IV. CONSTITUTIONALISM AS A FOREIGN CULTURE

For the Japanese, Constitutionalism is a foreign culture imported during the Meiji Era. While it can be said that, compared to the Constitution drafted by the military personnel of the Supreme Command for the Allied Powers, the Meiji Constitution is an "Independence" constitution, the difference between the two is only a matter of degree. Because the history of the Meiji constitution itself exemplifies the role of outside pressure, the legal tools used to build the Constitution were of western origin. The "National Goal" of Meiji Japan was to be seen with its shoulder placed against the advanced countries; Japan wished to become more than a second-rate country, but less than a first-rate one, that was all. In concrete terms, the goal for the time being was treaty revision.²² It cannot be thought that even the great men of Meiji Japan, whose lectures the public heard repeatedly, could, if transported to the present time, improve the mistaken results of the "Vacuum Prime Minister."

In short, the goals of Meiji Japan were very simple. In order to gain treaty revision, Japan had to fashion what appeared to Western Europe to be an honest legal order. For that reason, Japan had to manage the work of constructing a constitution, a civil code, a commercial code, and a civil procedure law. In fact, it was during the roughly ten years between the establishment of the Meiji Constitution in 1889 and 1900, that a modern

²² [In 1858, Japan signed treaties with the United States, Britain, France, Holland, and Russia. These treaties, collectively the "unequal treaties," significantly eroded Japan's national sovereignty. After the Meiji Restoration in 1868, the elimination of the treaties became the overriding goal of the political process. Trans.]

code system, based on the aforementioned codes, was developed. Outside Western Europe, this was a monumental achievement of code compilation. In other words, the Constitution and constitutionalism were not themselves recognized as having value, rather they were a step in the direction of treaty revision.

Simply put, it can be said that the Constitution was constructed in response to external demands rather than the spontaneous volition of the Japanese. That said, the Japanese have protected and defended it quite well. Both Russia and China established constitutions at roughly the same time as Japan, and neither worked very well. In contrast, the Japanese Constitution, during those ten years and up until twenty years ago, like a deft cutting move applied to a sumo wrestler's topknot,²³ somehow or other managed to function as the basic rules for managing politics. Even during the depths of World War II, the Constitution was not suspended, the Diet continued to meet, elections were held, and the courts continued their operations. While constitutionalism is not a political culture that the Japanese built up at their own expense, at the very least it must be thought that the received and digested "received body" is within the spiritual structure of the Japanese people. In fact, at the end of the Tokugawa Era the idea of a "public consultation form of government"—the precursor to constitutionalism—was widely discussed among intellectuals and political experts.

The story is sometimes told of a Japanese person living in Vienna in the 1960's. Around that time it was said that a visiting Japanese orchestra had launched into a performance of the "Vienna Waltz." The spectators responded with giggles. It wasn't necessarily that the skill of the musicians was inferior. Instead, the spectators seemed to feel that "something was strange." Although, as is well known, the waltz has a three beat tempo, when performed by the Vienna Orchestra, the three beats are not of equal duration with some being longer than the others. Apparently when played this way, it is easier to follow the steps when actually dancing. For Japanese, the Vienna Waltz is a song for music festivals, but for the citizens of Vienna, it has always been practical music. This difference in perception of reality may cause the difference in musical performance.

This discussion goes back a long way. During the Warring States Period,²⁴ many missionaries came from Portugal and it is said they were surprised to learn that the religion in Japan, Buddhism, was the same as the

²³ [This idiomatic expression suggests that the success of the Japanese constitution was accomplished with smoke and mirrors. Trans.]

²⁴ [The Warring States Period (戦国時代, SENGOKU JIDAI) 1467-1568, was a period of intense warfare in Japan preceding the unification of power under the Tokugawa shogunate (1600-1868). Trans.]

religion they had seen throughout Southeast Asia. Even the beliefs of the Jesuits, which were quickly accepted by the Japanese, were transformed into something that only faintly resembled Catholicism. Both Buddhism and Catholicism are imported cultures. It seems that Japanese possess a special ability to absorb foreign culture and, at the same time, transform that culture.

This kind of relation probably exists between the Constitutionalism of Japan and that of Western Europe. This does not mean that the difference is as immediately obvious as that between the "Vienna Waltz" and a street song. When both types of constitutions are wrapped in their political cultures, the result is in both cases constitutionalism. However, it cannot be denied that the Tokyo "Vienna Waltz" is different than the one in Vienna. It is not that one is superior to the other, but different is different.

V. IS THE JAPANESE CONSTITUTION A GUARDIAN OF "LIVELIHOOD"?

The biggest difference is probably the image of the Constitution. In Japan, the image of the Constitution has been diffused. As had been emphasized time and again, the ultimate aim of a constitution and constitutionalism is to limit state power and secure individual liberty. Also, it is not necessarily the common people in each country that have a strong desire that their constitution protect freedom of expression and freedom of religion; rather, it is the intellectual elite who play a central role in the discussion. As a result, the political concept of constitutionalism will always be colored by some form of elitism. However, in Japan the image of the Constitution is not tied up in this form of elitism.

The image strongly held among the Japanese people is that the Constitution is determined by what is important to the people. However, what is important? It is settled that it must be important "to the people." It goes without saying the first is "life," although there are many types of "life." After "life," what is next? This is probably "being able to eat." To recast it in clearer language, peace is most important. After that is welfare. There is no third, fourth, or fifth thing. This also seems to be reflected in the popular image of the Constitution.

NHK's [Japan Broadcasting Company's] Broadcast Cultural Research center recently conducted a very interesting survey.²⁵ The survey repeats the

²⁵ [Professor Annen cites a survey repeated every five years by NHK (the Japan Broadcasting Corporation). The survey has been conducted since 1973. It covers a broad range of topics, most of which are not relevant to Professor Annen's discussion. In the survey, respondents are asked to name the rights guaranteed by the Constitution. In 1973, 49% of the respondents said that "freedom of expression" was guaranteed by the Constitution. That percentage has declined in every poll since, reaching 37% in 1998.

same questions every five years. While the questions covered topics as divergent as the way in which leisure time is spent, to "Do you rent a room in your house to a foreigner?" Among them are also questions of a different type; for example, "Regarding the Constitution, without regard to duty, how should the rights of citizens be set? Please select as many [answers] as you want."

- (A) Announce to the world what one is saying.
- (B) Paying taxes.
- (C) Obeying one's superiors.
- (D) Walk on the "right" side of the road.
- (E) Live like a human being.
- (F) Form labor unions.
- (G) Do not know.

The respondents were not specialists, and as this question does not test knowledge of the Constitution, but rather, asks about the image of the Constitution, the answers are extremely interesting. While the number of respondents who answered "paying taxes" is not at all small in highly-educated Japan, what deserves the most attention is probably the fact that in contrast to the people who answered, "[L]ive like a human being"—and who also tended to believe theirs was the "right answer," "freedom of expression" [answer A] and "freedom to organize" [answer F] were chosen by a smaller percentage of the respondents each time the survey was administered.

To the Japanese people, the Constitution is, more than anything else, for the protection of "livelihood." It is thought that perhaps expressions such as "[G]et the Constitution in the center of life" and "[G]ive life to the Constitution at the workplace," which somehow cannot be translated into English, are accepted without any suggestion of incompatibility, and lead to the "livelihood"-based constitutional image.

Precisely because the Constitution is effective at meeting the demands of "living humans," if the concept is extended a little further, the thought naturally occurs that the Constitution should respond to the changing demands of society. Accordingly, in response to social change, demands are made that "the right of privacy should be written into the Constitution" or

The percentage of Japanese who believe that "freedom of association" is constitutionally protected has also fallen with each subsequent poll; from 39% in 1973 to 23% in 1998. Trans.]

“environmental rights should be written into the Constitution.” In other words, “incorporationism” becomes rampant.

Japanese often say that although the U.S. Constitution has been amended many times, this is not the case in Japan where the fact that the Constitution is immune from amendment has caused “system fatigue,” which is an obstacle to reform. Certainly, constitutional amendments have not been infrequent in the United States and Europe. However, the essential parts of the Constitution are not being changed at all in those countries with stable political systems based on constitutionalism. The most important part of the U.S. Constitution, the First Amendment, which guarantees freedom of expression and freedom of religion, has not been amended in the 200 plus years since it passed in 1791. The most recent amendment to the U.S. Constitution was a technical amendment prohibiting Congress from granting its members retroactive pay raises.

VI. THE CONSTITUTIONALISM OF THE JAPANESE PEOPLE IS “WANTING TO RELINQUISH FREEDOM”

From now on, will Japan be able to maintain a political system that respects freedom; i.e., one that is, though imperfectly, constitutionalistic? Although no one can see into the far future, I don't believe that I can be optimistic. More than anything else, the fear is that the Japanese people have a strong antipathy towards freedom. Even among the young people whose degree of affection for freedom exceeds that of past generations, this type of antipathy seems firmly imprinted. I have strong feelings about this based on the answers I have received to test questions.

The broadcast industry is subject to the regulations of the Broadcast Law, which includes a ban on the broadcasting of politically biased programming. The question of whether this type of regulation violates the Constitutionally protected freedom of speech has been debated in both Japan and the United States. I have even asked the question on several examinations. Students who have studied well often note the scarcity of channels and the special characteristics of the broadcast media (i.e., that compared to print media, the audience easily becomes passive), and that “therefore, the legal regulation of program content is necessary.”

However, students who do not study very much—the majority of students—do not answer this way. As a matter of course, they answer that “because television is very influential, the broadcasting of biased opinions leads to disorder and, therefore, it is good to regulate it.” However, because these students have not studied, the answers do not reflect deep thinking.

Therefore, this kind of “freedom equals disorder equals bad” response must be a conditioned reflex that accurately reflects the feelings of the people.

It is not just the modern youth. We legal scholars are inhabitants of a world where hatred of freedom prevails. In Japan, being a constitutional scholar, for example, is a lifetime position; students who are only twenty-two or twenty-three years old decide to specialize in the Constitution and they continue as constitutional scholars thereafter. Whether civil law scholars or criminal law scholars, it is the same for everyone. Like hunters who certainly cannot go after sacred animals, for Japan’s constitutional scholars there is a taboo against “meddling” in other fields. I, myself, in addition to the Constitution, selfishly and restlessly meddled in administrative cases, finance, business law, came to “eat all I wanted and then some” but did not receive recognition as an honest scholar. And yet, it does not appear that I have been totally banished from the academic world, thanks to the fact that I have come to be ignored by the “conservative mainstream.” It is often said that “all things human follow the inscrutable ways of Heaven.”

Naturally, the purpose of this manuscript is not to get you to listen to my complaints. What is deeply interesting is this perfect division of the academic world. Although there is no compulsion and no one running the show, it can nevertheless be seen as completed by “nature.” There is nothing strange about the existence of a “constitution with all one’s heart, civil law with all one’s heart” people. However, one must admire the fact that most legal scholars, even though they are under no particular compulsion to specialize, choose “one thread-ism.” In regard to living a long life of self-regulation, the overwhelming majority experience no feelings of doubt.

I do not believe Japanese people trust freedom even though there is no desire to abandon it. It goes without saying that this mentality is not fertile soil for constitutionalism. Certainly, when compared with Western Europe, post-war Japan can be counted among the countries where constitutionalism has functioned well. However, this doesn’t mean that the Japanese feel a strong commitment to freedom. Japanese support the Constitution not because it protects freedom, but rather the consciousness that it would continue to bring peace and prosperity by responding to the demands of “living beings.” If peace and prosperity declines as a result of economic and international changes, people respond that “it is not necessary to adhere to useless things like the Constitution,” and, frankly, it could be abandoned.

In predicting the future of constitutionalism in Japan, Japan’s relationship with the United States is of particular importance. For Japan the

supreme importance of the United States, aside from the obvious fact that they are allies, comes from the fact that whether it likes it or not, Japan has no choice but to be strongly influenced by American political culture. Large numbers of Japanese believe that "the alliance between the two countries is based on common values of freedom and democracy." Paradoxically, many Japanese also believe that the United States/Japan security arrangement is itself the guardian of constitutionalism. If Japan secedes from the alliance and becomes "independent," it will probably expand its diplomatic and military inroads in Asia, as happened in the 1930s when Japan seceded from the "Washington System" and attempted to establish a "New Order," and constitutionalism will be exposed to a major trial.

In spite of this, there is a strong belief in Asia that Japan's constitutionalism is an example of exceptional success. Regarding the degree to which constitutionalism is established, South Korea and Taiwan are approaching passing grades, though in both cases the fact that something resembling military government has been in place until recently is a fresh memory. Because constitutionalism is a political system that limits state power through the operation of law, the people will have their hands tied; this is difficult to accomplish. Although there are few people in places like Malaysia and Singapore who admire their political leaders, very few when compared to the countries where constitutionalism works directly to limit state power, the rules of the game have been different from the beginning.

At any rate, Japan, although it has intellectual tradition of constitutionalism, came to maintain and develop a mediocre constitutionalist political system. I have personally shown that even Asians have a "If one does it, it can be done" mindset. While it probably cannot be said that Japan is at the same level as the United States and Europe, it has reached the same degree as the Japanese orchestra's "Vienna Waltz." I do not think it can be said that the Japanese people have made a contribution to mankind sufficient to make them proud.