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Minobe Tatsukichi: Interpreter of Constitutionalism in Japan, by Frank O. Miller

John M. Maki

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as they really are. . . .”⁷ It has also been referred to as “the definitive study about Philippine-American relations. . . .”⁸ And finally, “the writer of this review takes some pride in pointing out that the policy of this *Journal* . . . has during all the past years been in line with the very sound advice now so eloquently advanced by Professor Taylor.”⁹ This reviewer can only echo these sentiments about this highly worthwhile volume. It is a must for anyone who pretends to understand the complicated and dangerous situation today in Southeast Asia. It is hoped that it will be as closely and widely read in the United States as it has in the Philippines.

BEN CASHMAN*

MINOBE TATSUKICHI: INTERPRETER OF CONSTITUTIONALISM IN JAPAN. By Frank O. Miller.¹ Berkeley and Los Angeles: University of California Press. 1965. Pp. xi, 392. \$7.50.

Because Minobe Tatsukichi became a symbol of the small, courageous and ultimately impotent band of liberals in pre-1945 Japan, his name is familiar to even the more casual readers of modern Japanese history. This systematic study makes known to those outside Japan for the first time the precise nature of Minobe's constitutionalism and provides a far more accurate measure of his place in Japan's academic and political worlds than has hitherto been available. In this intellectually elegant biography Professor Miller has served not only his subject but the scholarly community very well indeed.

What Professor Miller has brilliantly produced can be summarized briefly: a clear intellectual portrait of an individual scholar whose thought and career were inextricably woven into the development of both an old-style and a new-style Japanese constitutionalism in the first half of the twentieth century. The Minobe we observe in this book is an individual both swimming with and fighting against the intellectual and political currents of his time. He emerges as a distinctive personality through the author's detailed description of his thoughts as ex-

⁷ Kennewick, *A Philippine Image*, Philippine Free Press (Manila), Sept. 26, 1964, p. 95.

⁸ *The Asian Student*, published by The Asia Foundation, San Francisco, Calif., Jan. 23, 1965, p. 8.

⁹ J. of the American Chamber of Commerce of the Philippines, Aug. 1964, p. 358.

* Member of the faculty, Shoreline Community College, Seattle; part-time member of the Political Science Faculty, Seattle University, Seattle.

¹ Professor of Political Science, College of Wooster, Wooster, Ohio.

pressed in his writings and his acts. Professor Miller has wisely refrained from attempting to plumb the psychological wellsprings of his subject.

Although the author has not explicitly stated it as one of his major themes, what is likely to prove to be a major contribution to the understanding of both the specialist in modern Japanese history—particularly legal and political—and the student of comparative law is Professor Miller's description of the interplay between what appear at first glance to be the abstractions of constitutional theory and the concrete worlds of political action and social change. One principal focus of the study is on the intersection of the abstract and the concrete in the thought and actions of Minobe.

Professor Miller has convinced this reviewer that Minobe's primary intellectual problem—as a constitutional theorist and an analyst of the Japanese politics around him—was how to square certain central elements of Japan's traditional and insular past with the new social and political requirements of Japan's transformation into a modern, national society. Indeed, this was not simply Minobe's problem; it was that of his intellectual adversaries, of his official and unofficial persecutors, and, above all, of the society itself. It was from this problem that two of the main themes of Minobe's constitutional theory emerged in the early years, very roughly from 1900 to 1920, of his long career. The first was his great reliance on German legal thought and the second his development of the organic theory of the emperor.

That Minobe and his fellow constitutional scholars became so dependent on German legal thought and methodology was inevitable. In the first place, the drafters of the Meiji Constitution (1889) relied heavily during the drafting period not only on German ideas, but on German advisers as well. Secondly, and this is perhaps a more fundamental reason, in the critical final three decades of the nineteenth century there was no autochthonous body of thought that could serve as the complete foundation of a modern system of government and politics in Japan. This is not to say that the Japanese had never concerned themselves with political abstractions. Over the centuries Japanese scholars had developed a conceptual apparatus that served admirably to justify the existence and the operation of a typically Japanese set of premodern political and governmental institutions. However, this apparatus could not deal with the issues raised by the governmental and political modernization through which Japan was then passing. Conse-

quently, as the bureaucrats and politicians adopted and adapted the governmental and political institutions and procedures of the contemporary West, so did the scholars turn to the concepts and theories of Western and particularly German writers. Minobe was no exception. Both through study in Japan and his residence in Germany briefly at the turn of the century he became thoroughly saturated with German legal thought and methodology.

Professor Miller deals (chapter I) with the impact of German political thought, particularly state theory and the science of state law, which was a major development of modern Japanese legal history. It was Georg Jellinek who particularly influenced the Japanese and, especially, Minobe. Miller states the point succinctly: ". . . Jellinek shares with Johann Bluntschli the distinction of having exercised more influence than perhaps any other foreign political thinker on the development of political theory in Japan, particularly in respect to methodology. Minobe, who acknowledged his reliance on Jellinek, has been described by one of his students as 'the Jellinek of Japan'" (p. 12). It is in his third chapter that the author describes how Minobe in the development of his general theory of state and law brought together the key ideas from his German inspiration and the particularities of the Japanese system which was his primary concern.

It was through his own awareness and knowledge of his country's political and social history and his concentration on the development of a new theoretical basis for its then modern political and governmental system that Minobe made his unique contribution to Japanese constitutional thought: the emperor-organ theory.

A bald, but not misleading, statement of the organic theory is to be found in Professor Miller's quotation from one of Minobe's articles: "In present-day juristic thinking, the state alone is the subject of governmental power, and the monarch is an organ of the state" (p. 27). This view of the role of the emperor as an organ, as the author demonstrates in conclusive detail, was simply one aspect of Minobe's general theory of law and the state (chapter III). As Miller's two chapters on the interpretation of the constitution itself and of constitutionalism under the 1889 fundamental law demonstrate beyond doubt, Minobe did not deal with his organic theory in isolation, but carefully traced out its implications for the total structure of Japanese government and politics. In so doing he not only reconciled an ancient Japanese political institution, the emperor, with a modern structure of government

and politics, but developed within the Japanese context a potentially democratic system. It was his organic theory which was to demonstrate dramatically, and almost tragically, the inseparable bond between Minobe's apparently abstract theory and the real world of government and politics.

The root of the difficulty was the collision between the organic theory and the orthodox view (represented by his great antagonist and colleague, Professor Uesugi Shinkichi) which held that under Japan's unique national polity (*kokutai*) the emperor was the supreme and absolute monarch, not a mere organ. This view was orthodox not simply because it was developed and maintained by powerful academic figures, but because it conformed with the dominant interpretation of traditional Japanese history and because it had been one of the principal ideas utilized by the drafters of the Meiji Constitution. That the orthodox view became unchallenged and unchallengeable and also one of the principal elements in Japan's ultranationalistic authoritarianism was not only the source of Minobe's difficulties, but one of the principal causes of the tragic course to which his nation became committed.

On the surface it appears as if there was an irreconcilable contradiction between Minobe's devotion to the emperor idea, and his advocacy of certain democratic principles and practices. However, Professor Miller's descriptive analysis makes clear that on the basis of Minobe's fundamental premise, the emperor as an organ of state, there could be both a logical and a practical accommodation of the two.

That Minobe was appointed to a second chair of constitutional law at Tokyo Imperial University in 1920, the other being held by Uesugi, that the debate over the issue endured for almost twenty years, and that Minobe emerged as one of the dominant figures in the history of modern Japanese constitutional studies are not to be accounted for simply on the basis of man's powers as a thinker and a writer. The times, roughly from 1910 to 1930, were such that Minobe's unorthodox and liberal views could not only be voiced, but be supported by others on their own merits.

Miller enumerates what he terms Minobe's "three basic propositions of modern constitutional theory": representative government, responsible government, and the rule of law (p. 115). In turn, these constituted a measure of the state of Japanese government and politics during the period of party ascendancy or, to use the other cliché, of normal government. It is now clear that these three propositions were

manifested only relatively at that time, as measured against what had previously transpired under the Meiji Constitution between 1890 and 1920, and what was to follow during the authoritarian 1930's.

Minobe's role as an interpreter of constitutionalism became less and less important after the 1931 Manchurian crisis which marked the clear advent to power of the militarists and their civilian supporters. The difficulty was not a defect in Minobe's theories or his inability to put forth his views clearly and cogently. It was simply that the orthodox constitutionalism with which he had been contending for more than two decades came to coincide more and more with both the concepts and the policies of the ultranationalists, in and out of uniform, who called the tune to which all performers had to dance.

The complete eclipse of Minobe and his organic theory came with the Minobe affair of 1935. Its core, as the author's long and fascinating account reveals, was Minobe's forced resignation from the House of Peers because of his organic theory, but the accompanying circumstances were Japan's politics of the time. This was not simply a continuation of the academic controversy between Minobe and Uesugi and his followers. Miller quotes Professor Miyazawa Toshiyoshi, a Minobe disciple and the dean of contemporary constitutional studies, as writing in 1948, "the Organ-Theory Affair was not so much an incident in the history of Japanese public law as in Japanese political history" (p. 199). The state of Japanese politics in the mid-1930's can perhaps best be summarized by simply listing the sources of the attacks on Minobe as enumerated in Miller's chapter VII: fellow academicians, ultranationalistic societies, some members of the Privy Council, fellow peers in the upper house, cabinet ministers, army officers, and, of course, politicians. Miller, in all fairness, points out how the cabinet itself attempted to temper the rising gale of hysterical ultranationalism. However, its efforts were weak and unavailing. For Minobe the affair meant: lengthy interrogation by public prosecutors on suspicion of violation of the Publication Law, the proscription of the organic theory, forced resignation from the House of Peers, an attempt on his life early in 1936, and almost exactly a decade of complete suspension of public activity. So much for the impact of a real and ugly political world on the public thoughts and private life of a constitutional theorist.

Professor Miller wastes no time on the ugly history between 1935 and 1945 of authoritarianism, aggression, total war and absolute defeat, which constituted the necessary prelude to the final chapter of the

life of his protagonist. He plunges directly into the problem of the new constitutionalism, a completely unexpected fruit of the war. It was this new constitutionalism developing in a completely changed social context that provides the final view of the interplay between an individual academic and his society.

In the final three years of his life—from the initiation of the revision of the Meiji Constitution in the fall of 1945 to his death on May 23, 1948—Minobe played a significant role in the birth of the new constitutionalism. Professor Miller's account of these short but full years reveals what might be regarded as the supreme irony of his career. Because of his long and distinguished career as an interpreter of the liberal potential—never realized, of course—of the Meiji Constitution and because of the affair of 1935 Minobe was naturally expected to play a major role in the drafting of a new constitution. That he did, but not in the manner that was anticipated. The irony is that what the new constitution embodied were Minobe's three basic propositions—representative government, responsible government and the rule of law—yet both his devotion to and interpretation of Meiji constitutionalism led him to oppose the sweeping revision of the constitution that was initiated late in 1945. Miller paraphrases Minobe's account of his position as follows: "Revision of the constitution is not necessary, he declared, for democratization can be achieved by amending the laws and ordinances governing the diet, the house of peers, elections, the administrative departments, local government, and so on. . . . Emphasis is not on legal formalities [as stated in a formal written constitution] but on the actual ordering of government. Democracy in this sense requires no change in the formal constitution" (p. 261).

Professor Miller emphasizes that Minobe's initial opposition to constitutional change grew out of "his lifelong contention that a constitutional parliamentary democracy was entirely possible on the basis of the existing constitution" (p. 267). Minobe was engaged in defending his own constitutionalism, not in preventing the democratization of his society. Yet he could not stand in the way of the occupation-ordained constitution which, among other things, ignored the organic theory.

Once the new constitution came into effect he accepted it and turned with a will to the important task of interpreting this new fundamental law. He published no less than four books on the new constitution in the thirteen months preceding his death. Professor Miller sees (pp. 258-59) in these publications a considerable value because they pro-

vided an "initial orientation" cast in terms of "the familiar juristic premises of the passing order" for scholars and officials in their dealing with a new constitution based on unfamiliar concepts. But his evaluation of their long-term value is both harsh and accurate: "By 1950, except for a few polite or sentimental references or citation on some particular point of law, Minobe had faded from constitutional literature, leaving behind an impression of untimely conservatism" (p. 282).

Yet Miller is careful to point out that his subject has continued even after death to influence the new constitutionalism. He stresses particularly Minobe's role "in the historical development of modern Japanese constitutional theory." This has been particularly relevant to the struggle over the issue of whether or not to revise the 1947 Constitution, one of the storm centers of Japanese politics for many years. Miller states: "Minobe's constitutional theory was acknowledged by progressive critics to have provided . . . the point of departure for a positively democratic interpretation of the new constitution to make it the instrument of transition to popular democracy" (p. 286). But even this not inconsiderable contribution has not been sufficient to shield Minobe from attack by the same critics who praise him. Miller describes their unhappiness with Minobe's doctrine of constitutional change by interpretation (pp. 288-89) which he used to justify his view of the democratic potential of the Meiji Constitution. The irony is that postwar Japanese governments have used "change by interpretation" to move away from democratic principles, according to progressive critics.

Professor Miller's final evaluation of his subject is as brief as it is affirmative: "By any standard he was an important figure in his era. By the standard of constitutional liberalism his role was almost entirely salutary" (p. 289). On the basis of the author's evidence and his own lay judgment of Minobe, the reviewer supports this judgment (with the minor reservation that he is not sure how much weight should be attached to the "almost"). This evaluation, however, brings to the fore what seems to me to be the single shortcoming of this admirable study: the absence of a more detailed and comprehensive judgment of Minobe's role as a political thinker.

Specifically, the last few pages of the book are devoted primarily to an examination of post-Minobe constitutional studies in Japan with particular reference to the continuing debate over revision. I found this section to be both interesting and important. However, I believe that the author would have served both his subject and his reader even

better by substituting—or preferably adding—a section devoted to a broad overall evaluation of Minobe as a political thinker, a task for which he is admirably fitted. Throughout the book there is a succession of considered and enlightening judgments of specific aspects of Minobe's thoughts and actions. From these and other comments the reader can construct Professor Miller's overall evaluation of Minobe's work and role; but the result might conceivably do justice to neither author nor subject.

It is possible, for example, to extract from Professor Miller's account both a diminished and a magnified portrait of Minobe as a political thinker. Because of his heavy reliance on German thought and German methodology, it is easy to argue that Minobe was both unoriginal and imitative. Because his writings reveal nothing which had not already been thought or said on representative and responsible government and on the rule of law, he obviously contributed nothing to theory in these important fields. Because his books and articles did not alter the course of constitutionalism (and consequently the governmental and political developments stemming from it), he can be regarded as nothing more than a bookish theoretician or, perhaps better, an ineffective liberal. But is it too harsh to evaluate him in such a manner?

On the other hand, Minobe clearly made a major contribution to modern Japanese legal, political and constitutional thought by creating a theory which accommodated a highly important traditional concept and institution, the emperor, to a thought system which necessarily had to be imported into Japan, simply because it could not evolve inside Minobe's society. He also thought thoughts which none of his contemporaries were capable of thinking in his strivings to accommodate what he clearly perceived as the main currents of Meiji constitutionalism to the realities of Japanese government and politics, and vice versa. Does this give him and his constitutionalism a relevance to modern supra-national political thought that transcends his undeniably great contributions to his own society?

If Professor Miller had chosen to round off his portrait with such a broad evaluation he undoubtedly would have provided us simultaneously with some badly-needed insights into the nature of the Japanese liberalism of the 1930's, always written about but never really studied.

I must call attention to one factual error (p. 107) relating to only a secondary issue, but of a type which almost invariably captures the attention of the uninitiated reader. Professor Miller refers to the

naming of a civilian in 1930 as acting minister of war. What actually happened was that Major General Abe Nobuyuki (later to become prime minister of one of Japan's shortest lived and least effective cabinets) was appointed acting minister of war during the incumbent's illness. The legal issue raised and the one about which Minobe undoubtedly wrote was whether or not a civilian cabinet minister could concurrently hold the post of acting minister of war.² The Abe appointment obviously was the practical answer to the question, even though it left unresolved the legal issue.

Having struggled with the difficulties of translating Japanese materials dealing with legal problems, I checked against the original a few of a number of Professor Miller's translations of key passages from Minobe's works. I must express my unalloyed admiration for the skill that Professor Miller exhibits in his translations. He not only renders exactly the meaning of some difficult passages, but his English has both the style and intellectual flavor appropriate to the subject matter.

Both the Center for Japanese and Korean Studies of the University of California (Berkeley) and the University of California Press are to be congratulated for adding this distinguished study to the list of outstanding works on Japan which they have sponsored and published during the past few years.

JOHN M. MAKI*

² For an account of this incident see *Asahi Shimbun*, June 16, 1930. Unfortunately, the Minobe article on this development to which Professor Miller refers is unavailable to me.

* Professor of Japanese Government and Politics, Far Eastern and Russian Institute, University of Washington.