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INTRODUCTION

PERSPECTIVES ON THE JAPANESE CONSTITUTION AFTER TWENTY YEARS

DAN FENNO HENDERSON*

Twenty years (1947-1967) have passed since the enforcement of the new Japanese Constitution during the allied occupation and in the aftermath of World War II. The document called for an immediate transition from imperial to popular sovereignty, but of course the history of the world's written constitutions shows all too well that democratic aspirations on paper do not immediately (or necessarily ever) evoke effective responses in society. In addition, the postwar birth of the new Constitution was necessarily a Caesarean operation attended by an alien midwife which the newborn could probably not have done without nor easily live down. Many writers¹ were pessimistic, believing that such origins, in the headquarters of the Supreme Commander, Allied Powers, (SCAP), and the consequent alien quality of the text, would render the Constitution vulnerable to revision from conservative Japanese soon after the Peace Treaty (1952).

Thrusts for revision did come from the conservatives after the occupation ended, and indeed they clouded, for a time, the origins of the extremely important Commission on the Constitution (1957-1964), which, however, under the leadership of the late Kenzō Takayanagi, ultimately produced a balanced report (1964) which will remain an invaluable source of information for years to come.²

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¹ See Quigley, *Revising the Japanese Constitution*, 38 FOREIGN AFFAIRS (No. 1) 140 (Oct., 1959); Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 990-91 (1956). For references to the literature of this period, see Williams, *Making the Japanese Constitution: A Further Look*, AM. POL. SCI. REV. 665 (1967). See also T. McNelly, *Domestic and International Influences on Constitutional Revision in Japan 1945-1946* (microfilm thesis, Univ. of Mich., 1952). The SCAP version is found in SUPREME COMMANDER, ALLIED POWERS, *THE POLITICAL REORIENTATION OF JAPAN 1945-1948* (2 vols.) (1948); and the most detailed and reliable Japanese study is T. SATO, *NIHONKOKU KEMPŌ SEIRITSUSHI* (2 vols.) (1962).

² See Maki, *The Documents of Japan's Commission on the Constitution*, 24 J. ASIAN STUDIES 475 (1964). The Commission on the Constitution (*Kempō chōsakai*) was appointed by the Kishi Cabinet in 1957 pursuant to Law No. 140 (June 11, 1956). Headed by the late Kenzō Takayanagi, it labored for seven years (1957-1964) reviewing all aspects of the operations of the Constitution and popular as well as expert

Since the filing of the Commission report with the Ikeda Cabinet on July 3, 1964, observers³ have generally agreed that the chances of amendment in the foreseeable future are rather slim, despite some strong revisionist views in the Commission report and in some factions of the dominant Liberal Democratic Party. Against this background, it is gratifying to note, after two decades under the new Constitution, that the Japanese people are indeed operating a successful democratic government and also actively seeking to improve it.

The articles in this symposium are concerned with several major problems encountered en route from the promulgation to present social realization of the new style of Japanese constitutionalism. We have taken this opportunity to reflect after twenty years upon the problems of structure, political milieu, and continuity with the past. To some, continuity with the Meiji Constitution (1889-1947) might seem far-fetched until we remember that it had several characteristics in common with the new Constitution: both followed foreign models (German and Anglo-American); both were far in advance of the social realities which they sought to transform; both were thus a product of an elitist ideal and granted from the top down (by Meiji oligarchs and SCAP/Japanese drafters); neither was produced by a social upheaval, or granted in response to popular clamorings for power. Paradoxically, then, in the sweep of a century, the growth of the living constitution has been rather continuous, though there has been a rapid rate of achievement. Emphasis on continuity in this sense is important in focusing on the underlying contribution of the Japanese people to living constitutionalism. For it would be easy to see only elitist paternalism and popular passivity in the major historical events and overlook the almost unique social capacity of the Japanese for collective effort, even to insure individual rights to all in the routines of social and political life.⁴ This quality has been called "creative followership," but in the more recent political process, it has become a

opinion concerning its major features. The Commission, though initially suspected of revisionist motives, actually chose a purely investigative posture, and presented the entire spectrum of views on the Commission in its some 40,000 pages of published records and reports. The Commission as such made no recommendation, but rather presented all views to speak for themselves. For discussion of revisionist views concerning the public welfare standard in the Japanese constitutional debate, see L. Beer, *The Doctrine of the Public Welfare and the Freedom of Assembly Under the Constitution of Japan 191* (unpublished thesis, Univ. of Wash., 1966).

³ See Fukui, *Twenty Years of Revisionism*, *infra* this symposium, at 931, and Ward, *The Commission on the Constitution and Prospects for Constitutional Changes in Japan*, 24 J. ASIAN STUDIES 401-29 (1965).

⁴ See a detailed treatment of this idea in L. Beer, note 2 *supra* at 39.

“creative participation,” maximizing popular support of the Constitution, as befits a country whose major resource has always been its remarkable people. Both Japanese constitutions were, in this perspective, exciting experiments in a gamble for popular self-fulfillment based on the hope that there would develop enough right consciousness as leverage so that the people could pull themselves up by their own constitutional boot straps. To an encouraging degree they have.⁵

Another point of continuity with prewar constitutional law is the persistence of systematic theories developed in Japan, initially under the influence of the civil law world, which still, in their developed Japanese form, permeate legal scholarship today. The clarity of analysis and spectrum of opinion⁶ inherent in such a legacy have contributed greatly, along with the new case law, in the search for on-going meaning in developing constitutionalism. Indeed, the postwar blend of concrete case law and synoptic civil analysis may produce a juristic method drawn from the best of both worlds. For often, common law lawyers seem to have their oversized feet irrevocably stuck in a quagmire of discreet cases, while their academic civil law brethren often conversely lose their heads in a cloud of abstractions. The Japanese jurist seems to be evolving a useful middle way in recent years.

Whatever continuity there has been, it would be a distortion not to emphasize the novelty of the 1947 Constitution, derived from its alien sources. Most basic perhaps of its new features is its justiciable quality. By decisions of the courts of its own creation, the Constitution is now susceptible of legally authoritative meaning unknown to the Meiji Constitution. This feature makes it not only a lawyer's constitution for the first time but a people's constitution as well because of the reciprocal support between justiciable rights in the courts and right consciousness in the populace. There is not the space nor the need to discuss here the relationship between popular sovereignty and constitutionalism (limited government), but experience has shown that popular sovereignty requires a meaningful choice at the ballot box and that a meaningful choice requires freedom of expression, association and assembly for individuals, best insured and enforced by courts

⁵ T. KAWASHIMA, *NIHONJIN NO HŌSHIKI* (1967).

⁶ *See*, for example, the variety of suggestions made by scholars at the Commission on the Constitution for revision of the judicial provisions. The support for most of these amendments was light, but the diversity was useful. KEMPŌ CHŌSAKAI, *KOKUMIN NO KENRI OYOBI GIMU; SHIHŌ NI KANSURU HOKOKUSHO* 81 (1964).

empowered to determine the constitutionality of legislation and other official acts.⁷

Under the Meiji Constitution, legal challenges of unconstitutionality could not be filed with the regular courts, and therefore such arguments were only useful to politicians for political effect in trying to re-align power factions within the Emperor's ruling oligarchy. Thus, prewar constitutional law was largely a discussion of political theories by scholars using constitutional language to fortify their conceptions of the imperial state.⁸ In the literature, academicians were the expounders of the Constitution rather than judges and lawyers.

The transition in 1947 from a political to a legal (or justiciable) constitution of American design meant, therefore, a reverse shift from professors to the courts as the authoritative interpreters of the Constitution. Soon followed a body of Supreme Court decisions from which for the first time lawyers could get detailed and authoritative guides to answer constitutional questions. This required, in turn, the adoption throughout the legal profession of a new juristic method in public law rooted in case analysis. All of these changes—in professional roles, sources and methods—have caused a new interest among Japanese lawyers in American constitutional law, and some dilution of prior preferences for Continental European theories.

The transitions outlined above have not taken place without much travail and improvisation,⁹ and this symposium discusses some of these problems. Of the three major topics, the first is re-appraisal and revisionism. As noted above, one of the chief reasons given for revision of the Constitution has been its alien origins in the allied occupation, and the debate has been intensified by the sharply bipolar political alignment since the war. Ironically, the pro-American, conservative and dominant Liberal Democratic Party has constantly sought revision of the American-style Constitution, whereas the anti-American socialist and communist left has staunchly defended the Constitution and has been able to maintain slightly more than 1/3 of the seats in the Diet,

⁷ The English constitutional process, insured by purely parliamentary and electoral safeguards, is an exception to this position; the parliamentary has been effective enough at home, but it has not survived exportation so well. See D. Henderson, *Law and Political Modernization in Japan*, in *POLITICAL DEVELOPMENT IN MODERN JAPAN*, 387 (R. Ward ed. 1968).

⁸ See F. MILLER, *MINOBE TATSUKICHI* 43 (1964).

⁹ See H. Itoh, *The Japanese Supreme Court: Judicial Decision-Making Analysis* (unpublished thesis, Univ. of Wash., 1968).

thus blocking a conservative revision.¹⁰ (See articles herein by Maki, Takayanagi and Fukui.)

The second topic, the expanded judicial power mentioned above, has a new importance under the 1947 Constitution. The growth of judicial power to review legislation is outlined (Henderson) and three specific problems are treated: political questions (Yokota), judicial review of administrative actions (Ogawa), and the relation between the Constitution and treaties (Satō).

The third major topic of the symposium is the eternal balancing, required in all democratic constitutionalism, between individual liberties and the public welfare. Again, the bipolar extremes in Japanese politics have complicated this problem, especially relating to street meetings and demonstrations (see articles by Beer, Ukai and Nathanson, and George). The transition from imperial to popular sovereignty, and the concomitant shift of Japanese constitutionalism from the realms of political theory to the concreteness of justiciable law have been achievements of the first order in the past two decades. It should not escape notice that our Japanese guests in this symposium, led by former Chief Justice Yokota and especially the late Kenzō Takayanagi, Chairman of the Commission on the Constitution, have themselves played important roles in the postwar Japanese achievements.

¹⁰The range of suggested revisions is succinctly set out by the Commission on the Constitution in *KEMPŌ CHŌSAKAI JIMUKYOKU, KEMPŌ CHŌSAKAI HŌKOKUSHO NO GAIYŌ* 203-214 (1964).

