Appendix: Opinion on Some Constitutional Problems—The Rule of Law

Kenzo Takayanagi
APPENDIX: OPINION ON SOME CONSTITUTIONAL PROBLEMS—THE RULE OF LAW

KENZO TAKAYANAGI

Translator’s Note: On July 19, 1963, at the 114th plenary session of the Commission on the Constitution, the late Professor Kenzō Takayanagi, its chairman, submitted a long opinion on constitutional problems. It was published as a 76-page appendix to the minutes of that session. The opinion was organized into nine sections: General Problems (an evaluation of the process of enactment, constitutional revision, constitutional interpretation, and the written style of the Constitution totalling 8 pages); The Emperor (7 pages); The Renunciation of War (9 pages); The Rule of Law (24 pages); The Parliamentary Cabinet System (19 pages); Finances (3 pages); Local Autonomy (4 pages); Amendment (2 pages); and The Supreme Law (1 page). It is not misleading to describe the opinion as a blend of an article-by-article commentary on the Constitution and a discussion of virtually every question raised about the Constitution in the proceedings of the Commission from the summer of 1957 to the spring of 1963.

I have here selected the section on the rule of law because it deals with a central issue of Japan’s constitutionalism, contains clear statements of the anti-revisionist position on a number of critical problems involved in the debate over revision, and sheds considerable light on Professor Takayanagi’s views as a constitutional and legal scholar.

In a brief note preceding a reprint of the opinion in an intellectual journal (46 JIVU 76, 1963) Professor Takayanagi states that he wrote it in the space of three weeks between his release from a six-month stay in the hospital and the Commission meeting at which it was presented. He added that his opinion was simply the private view of a Commission member, not a declaration issued in his capacity as Chairman.

Under the date of September 4, 1963, seventeen members of the Commission issued a paper entitled “Toward Constitutional Revision” which called for thorough revision. It was stated in a covering note that eight members had worked since the preceding February on the draft, joined later by the nine others. It was submitted to
the Commission as a working paper and was published as an appendix in the minutes of the 119th plenary session. This paper plus individual proposals by three extreme revisionists stood in opposition to the Takayanagi opinion.

John M. Maki

THE PRINCIPLE OF THE RULE OF LAW: FUNDAMENTAL HUMAN RIGHTS AND THE POWER OF CONSTITUTIONAL REVIEW

I. It has been said that the smooth functioning of democracy in a country depends, in the last analysis, on the consciousness of the rule of law within its people. Thus the Universal Declaration of Human Rights* maintains in its preamble that the establishment of the principle of the rule of law is the necessary condition for the prevention of rebellion.

It must be noted that the rule of law, founded on respect for human rights by those who govern, cannot be regarded as identical with "rule by law." The phrase "rule of law" originated in England, but it has come to be used throughout the world. Probably because it does not appear in the Constitution, our own constitutional scholars have not used the principle as a central concept in their own constitutional interpretations. If the body of the Constitution of Japan is examined as a whole, it is clear that the principle of the rule of law is one of its cornerstones. If this principle is accepted as a constitutional cornerstone, then it must be clearly kept in mind that democracy under our Constitution is, in essence, "constitutional democracy," not "absolute democracy." [Note: This paragraph is a translation of a revised version of the original. For the revised paragraph see p. 32 (item 4) of the appendix to the minutes of the 117th plenary session of the Commission on the Constitution.]

II. The paths toward realization of the principle of the rule of law vary in such liberal democracies as England, France, and the United States. All the liberal democratic constitutions enacted since the Second World War, such as those of India and Italy and the Fundamental Law of West Germany, are based on the principle of the rule of law within the framework of a parliamentary system. But in form they are

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"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."—Ed.
American. That is to say, they set forth the classical fundamental human rights (which have undergone some alteration) and have chosen judicial review of legislative and administrative acts, completely independent of both political branches, the executive and the legislative, as the method of guaranteeing those rights. The Constitution of Japan also utilizes the American method.

III. The rights and duties of the people in Chapter III of the Constitution are not, as is often said, simple copies of the provisions relating to fundamental human rights in American constitutions (state or federal). Many items are different. For example:

1. New fundamental human rights, not found in the classical Bill of Rights of the United States, are included. A striking example is Article 28 which relates to the rights of labor.

2. Chapter III also contains provisions which must be interpreted as guidelines for the legislative and administrative branches and which deal only indirectly with judicial guarantees. The provisions of Articles 13, 24, and 27 fall into this category.

As a matter of law-making technique it might have been preferable to place these provisions in a separate chapter. Bills of rights have a special character; courts require the legislative and administrative branches to abide strictly by their provisions. The Irish and Indian constitutions resort to this device. The drafters of the first version of our Constitution provided for these matters in Chapter III in accordance with the principle of simplification which meant following as closely as possible the organization of the Meiji Constitution. Scholars believe that there is no necessity to alter the body of the Constitution, because it is possible to make clear by interpretation the matters set forth in Chapter III which differ in character from the "rights" of the people.

3. Admonitory provisions directed at the people such as those in Article 12 are not found in the American Constitution. It may be that from the standpoint of earlier law-making technique such matters should have been inserted in the preamble. However, the writing of this Constitution was not governed by earlier law-making techniques.

4. Chapter III also contains a fair number of provisions relating to obligations; these were included at the request of the Japanese and are not found in the American Constitution.

5. In addition to the listing of freedoms and rights in Chapter III, there also appears what is termed "the public welfare" which can be regarded in a certain sense as a concept antithetical to the former.
This concept is not in the American Bill of Rights. Its character is much disputed but our Supreme Court deals with it as a legal concept and uses it as the basis for the limitation of fundamental human rights.

Thus, the provisions of Chapter III have a flavor of the twentieth century stronger even than that of the Bill of Rights in the Constitution of the United States; this gives them an originality which differs in style from their American counterpart.

IV. The respect for and the guarantee of fundamental human rights in national administration are the central ideas of the principle of the rule of law. In order to drive this idea home to the people the Constitution of Japan utilizes rhetorical expressions and at times repetition (Articles 11 and 97). Because of the repetition, it is argued that Article 97 should be deleted. There is something to this argument from the viewpoint of earlier law-making technique which holds that repetition should be avoided to the greatest extent possible. However, a certain foreign constitutional scholar has pointed out that if this already existing provision is stricken, it could result in the weakening of the guarantee of fundamental human rights, an unforeseen consequence of constitutional revision; this warning should not be disregarded. Under present conditions in our country it is essential for the people to become thoroughly conversant with the spirit of the rule of law through which it will be possible to achieve democratic government. Therefore, even though the style of writing differs from that of the usual law-making technique it would still be better not to revise this section.

V. As noted above, a principal and special characteristic of the Japanese Constitution is the incorporation of the great concept of the public welfare. From the standpoint of the general welfare it is natural that the nation possess the functions of legislation and administration; essentially this is a matter which need not be set forth in a constitution as is the case in the United States. However, the Constitution does not provide standards for determining whether concrete legislative or administrative acts are unconstitutional because they place excessive limitations on fundamental human rights. Nor are standards provided for determining when such limitations are necessary in order to maintain the public welfare. In concrete cases drawing the boundary line between the two must be left ultimately to the free discretion of the Supreme Court or more precisely to the high intelligence of the Supreme Court justices. Some foreign constitutions
prescribe in detail the restrictions on each fundamental human right. For example, the Constitution of India contains detailed provisions relating to limitations on human rights. But, for the content of those rights, the English legal principle of case law has been written directly into the constitution; British legal experts resorted to the same technique when they drafted constitutions including fundamental human rights for other former colonies. In addition, the West German Fundamental Law sets forth similar limitations in some detail. The customary practices of “German-style legalism,” which worships clarity, were thus carried over into the drafting of their constitution.

In the United States, constitutional decisions have developed detailed criteria relating to each human right; these criteria concern limitations on those rights or, preferably, the drawing of the line between fundamental human rights and the police power of the states. As was done in the Constitution of India, these provisions could have been summarized and set forth in the Constitution of Japan. However, it was preferred that Japanese judges gradually bring them forth by means of judicial decisions within the framework of Japanese conditions. Thus, there are no detailed provisions relating to the limitation on human rights in the Japanese Constitution.

To establish detailed restrictive provisions in the Constitution itself might result, on the one hand, in narrowing the area of independent discretion as expressed by the exercise of the high intelligence of the Supreme Court and, on the other, in imposing contemporary views on later generations by means of the Constitution itself. It is the intent of the Constitution of Japan to provide elasticity, not by resorting to frequent constitutional revision, but by determining through the exercise of the good sense of the Supreme Court the limitations on fundamental human rights in accordance with changes from period to period.

Opposed to such an approach to the Constitution of Japan is the view that deems it necessary to revise the Constitution in order to establish concretely certain restrictive provisions on fundamental human rights; but I believe that it is more appropriate to follow a legislative policy as in the current Constitution and thus to establish the permanence of the Constitution itself. I am also opposed to this type of revision because the decisions of the Supreme Court are generally in accord with its conscience.

VI. Some also think that, because the present Constitution hails only the rights of the people and sets forth relatively little concerning
their duties, there is no balance between rights and duties. But this is due to the fact that the present constitution strongly advocates the spirit of the rule of law and I consequently believe that this one of its strong points. A constitution, especially its provisions on fundamental human rights, has as its principal objective the prevention of abuse of political power by those who rule. The general line of thought of liberal democratic constitutions is that it is not an objective of a constitution to provide norms by which the people must abide. Our Constitution is in accord with this belief.

It is a duty of the people to respect properly enacted law. This respect is to be expected even though there might not be special constitutional stipulations calling for it. In a way, this is an issue antedating constitutions. Provisions relating to the responsibilities of the people can be set forth in detail in the Criminal Code or the Civil Code, and it is proper to expect that the people will do their duty even though there may not be a written basis in the Constitution for placing this responsibility on them. No one believes that a criminal code or a civil code is unconstitutional and invalid in the absence of a clearly stated basis in a constitution for the placing of such responsibilities. Accordingly there is no real necessity for multiplying constitutional provisions concerning duties. Moreover, the listing of a large number of obligations in a constitution will dilute those provisions relating to fundamental human rights; even more harmful, such listing will dilute the principle of the rule of law, the indispensable condition for the success of liberal democracy.

Proposals to increase such obligations reflect a contemporary evil, the widespread failure to obey the law. But it is erroneous to attempt to deal with such an evil through the Constitution. Naturally, it is a cause for anxiety that the people assert only their rights while making light of their duties and responsibilities. But this is an issue that must await the improvement of constitutional education or the power of sound public opinion.

VII. There is a striking difference in the character of the judicial power under the Meiji Constitution and under the present constitution. The judicial power under the Meiji Constitution was modeled on the French concept. In the disposition of civil and criminal cases the judicial power was completely independent of the executive power; also the executive power was completely independent of the judicial power. This can be regarded as the true form of the separation of
powers. However, under our present constitution the judicial power not only can rule executive actions unconstitutional and invalid but in like manner the acts of the National Diet. The position of the judicial power in national affairs has increased strikingly in significance. The location in the courts of the power to determine the constitutionality of legislative or administrative actions lies at the heart of the Constitution of Japan. Possessing only intellect and neither the authority nor the power of the purse of the Diet or the government, the courts stand in a position of unfettered independence. The constitutional interpretations of the Supreme Court are the nation's most authoritative interpretations; what might be termed the official interpretations are those of the Supreme Court, not those of the government. That the National Diet and the Cabinet and also the people in general must respect the constitutional interpretations of the Supreme Court is in accord with the spirit of the new Constitution. The concept of the rule of law is thereby strengthened in both the governing and the governed. Naturally, scholars and others are free to criticize such constitutional interpretations; this is also necessary. However, what is most necessary in national affairs is not academic theory but the constitutional interpretations of the Supreme Court. If what is ordinarily referred to as a "theoretical precedent" is not taken to mean a "theory based on precedent," the spirit of the new Constitution will be disregarded. Theory in this area of constitutionalism and value conversion of case law seem to have created a complicated stir in West Germany which now also has a system of constitutional review. Of course, in the event that a great majority of the people reject the Supreme Court's interpretation of a constitutional provision, then an amendment to the Constitution can be made through the National Diet in accordance with the amendment procedure stipulated in the Constitution; but until such an amendment has been made it is necessary to respect the meaning of the Constitution as interpreted by the Supreme Court. It appears that some members of the ruling group and the people at large have not yet developed sufficient respect toward the Supreme Court and of the supremacy of cases over theory. Among those who rule, the concept of judicial power under old Constitution has not yet been rooted out, and some among the people in general regard the courts and the executive as having the same character. These people have attempted to sway decisions of the Supreme Court, which should be handed down with unfettered independence.
and calm judiciousness, by applying pressure through demonstrations and so forth. Until such thoughts and feelings have been rooted out a strong popular consciousness of the rule of law, which is the condition for the success of democracy, cannot be developed.

VIII. Because the Supreme Court must play an important role in national affairs, the Court Law requires that Supreme Court justices possess a high degree of intelligence and be more than ordinary jurists.† They must also be well versed in civil and criminal matters. It is said in the United States that the requirement is to be a lawyer-statesman. “Statesman” in this case refers to a high level of insight into political matters transcending the opinions of a specific political party.

Consequently, the selection of such men must be doubly circumspect. Whether a selection committee should be used to curb a tendency to appoint men committed to a specific political party is debatable, but the pros and cons of such a plan are worth careful consideration. Assuming for the moment that the proposal be approved, I am opposed to the position that such a committee be established as a constitutionally established organization. I believe that it would be preferable to create the committee by legislation.

IX. The constitutional interpretations of the Supreme Court up to now may be considered, for the most part, to be intellectually sound. Some hold the view that it would be preferable not to bestow the right of judicial review on the lower courts but I believe it better to maintain the present system. Because laws and administrative acts must be regarded as valid until the Supreme Court holds them unconstitutional, as a matter of principle it is in reality unnecessary for problems of constitutionality to be determined with great rapidity. Popular awareness of the Constitution can be fostered by a process under which the Supreme Court hands down its decision after a lower court

† Court Organization Law Art. 41 (1947) provides in part:
Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than 40 years of age. At least 10 of them shall be persons who have held one or two of the positions mentioned in item (1) or (2) for not less than 10 years, or one or more of the positions mentioned in the following items for the total period of 20 years or more:
(1) President of the High Court;
(2) Judges;
(3) Judges of the Summary Court;
(4) Public prosecutors;
(5) Lawyers;
(6) Professors or assistant professors in legal science in universities which shall be determined elsewhere by law.—Ed.
APPENDIX

has made public a judgment on a constitutional issue based on an exhaustive examination of the facts and after there has been ample public discussion of it. Moreover, there is the additional consideration that a system under which only a Supreme Court carries out constitutional review involves considerable danger that constitutional decisions will lapse into abstract judgments without reference to specific facts.

X. I do not recognize the necessity for improvement in any area relating to the judicial power, but I would like to describe several impressions I have of its operations at present.

1. Consideration should be given to the possibility that the Supreme Court may be weighed down with too many responsibilities. I believe that the constitutional decisions of the Supreme Court must necessarily be written in an excellent style to insure against technical legal shortcomings, to provide the people with vivid impressions of the spirit of the Constitution, and to lead later generations to refer to them. Many such decisions can be found among those of the United States Supreme Court. The opinions of Marshall and Holmes are models of their kind. If like opinions are to be written by the Japanese Supreme Court, a considerable amount of time must be devoted to the cultivation of broad and elevated judgment in Supreme Court justices. An overabundance of cases in the Supreme Court will not only delay justice but will also prevent the Court from playing the above described role. For this reason it may be necessary to establish separate courts for the handling of cases which are being disposed of by the petty benches [of the Supreme Court]. It may also be necessary to consider the adoption of the system of certiorari, that is, to have the Supreme Court render decisions only in important cases without having it dispose of every constitutional issue, large or small. At the same time it might be advisable to consider a reduction in the number of Supreme Court justices to a total of seven or nine.

2. Quite recently a new phenomenon has appeared: some lawyers cannot become Supreme Court justices because of their private economic circumstances. It is feared that this might exert a great influence on the character of future Supreme Court justices. Lawyers are legal experts who have devoted many years to the protection of the rights of the people. It is absolutely necessary to have men with rich experience in this field among the Supreme Court justices who bear the responsibility of protecting human rights. It is a widely known fact that in Great Britain and the United States popular confidence in the
courts has increased because judges are men, who, as lawyers, have devoted their efforts for many years to the protection of human rights. They are under a system known as the integrated bar. In our country, even though it might be impossible to change immediately to this system in all respects, it is absolutely necessary that, at a minimum, men from the ranks of lawyers be on the Supreme Court. If not, there is the danger that Supreme Court justices will be regarded by the people as nothing more than judicial bureaucrats lacking in a consciousness of human rights. The question of salary must be considered if fine lawyers are to accept appointments. At the same time there must be some consideration of the possibility that excellent Supreme Court justices can be found not only among the ranks of the older lawyers but also among outstanding lawyers in their forties.

3. It will probably be some time before the parliamentary cabinet system under the Constitution of Japan advances to the point where it can be compared favorably with that of Great Britain. Similarly, it will probably take some years of effort to bring the Supreme Court to the same level as the United States Supreme Court. In the former case it will take a great deal of thought and effort to achieve the goal, with the many years of experience in England as the model; equally, in the latter case, in order to achieve perfection we shall have to observe the example of the United States which has achieved its present state after many years of experience. These developments, I think, are absolutely necessary if we are to avoid dictatorship of either the right or the left by making the principle of the rule of law the immovable cornerstone of Japanese democracy.

XI. Many arguments for revision are put forth with the idea of remedying contemporary abuses in governmental affairs. These arguments involve a number of points concerning both the administration of justice and the rights and duties of the people. However, it is my conclusion that these points can await the enactment of suitable legislation, new interpretations by the Supreme Court or simply an improvement in the operations themselves, and thus do not require constitutional revision. Here I would like to express in simple terms my opinions on these questions of suggested revision.

A. Fundamental Human Rights

1. Should the Constitution contain provisions relating to a state of emergency? No.
One view holds that one of the great deficiencies in the present Constitution is the failure to provide for means by which either the National Diet or the Cabinet could take measures to deal with a state of emergency. This view asserts that there should be detailed provisions in the Constitution relating to such matters as the limitation on human rights on the occasion of a state of emergency. Another view holds that such detailed provisions should be left to law but that it is necessary to set forth the basis for the enactment of such legislation in the Constitution. I oppose both views.

a. The first view is based on the idea of a "complete constitution." However, the Constitution of Japan was written with the intention of establishing parliamentary democracy and the principle of the rule of law which is its indispensable condition. It is undesirable that there be detailed provisions relating to a state of emergency in the Constitution because they would dilute fundamental human rights and consequently the principle of the rule of law. Presumably, under a state of emergency those in the government who must deal with it should be made aware that the emergency itself is not a part of the constitutional order and that they should be strongly conscious that the constitutional order should be restored with the greatest possible speed. In many countries and especially in those in which democracy has not yet completely taken root, it is necessary to act so as not to relive the experience by which rulers have become dictators in the name of a state of emergency. I believe that it is wise then to deal with this situation as if it were exceptional, lying outside the constitutional order.

b. In regard to the second view I believe that such a revision is absolutely unnecessary.

Essentially, it is an unwritten law that whenever a state of emergency arises it is possible to take any appropriate emergency measures notwithstanding constitutional provisions. The function of guaranteeing the maintenance of national order, equally with the right of self defense, is intrinsic in the state and exists even without a clear statement in the Constitution.

In the Constitution of Japan the basis for taking emergency measures in such situations is to be found, technically speaking, in the provisions relating to "the public welfare." Thus, in such cases, the decision whether or not concrete steps taken by those running the government to limit human rights are proper under existing conditions
should be left to the Supreme Court. The Supreme Court may find certain concrete actions by government to be constitutional under conditions in which it is recognized that they are necessary and thus in accord with the public welfare. However, when in the light of existing conditions limitations on human rights are unnecessary then the court may find all or part of such actions to be unconstitutional, thus guaranteeing human rights.

Such judicial restraints operate to prevent the rulers of the country from abusing their powers in the name of a state of emergency. I believe that it is necessary to carry out renewed and detailed academic studies of the problem of actions taken to deal with emergency situations, such as the scope of limitations on human rights, and the balance between the National Diet and the Cabinet. I am not necessarily opposed to the passage of ordinary laws based on such studies, but I believe that to deal with this matter in the Constitution would be both harmful and unprofitable.

2. Is it necessary to set forth stipulations regarding the principle of communal life in the family and the protection of home life itself? No.

Some European constitutions have provisions relating to the protection of the family. This has been a result of strong demands from the Catholic Church which has acted by this means to prevent the destruction of the old family system. In the constitutions of countries in which the Catholic Church is strong, such as Ireland, Italy, and West Germany, there are provisions relating to the family but many Protestants strongly oppose them. In our country the inclusion of constitutional provisions relating to the family is advocated principally by males who would like to preserve the old family system based on Confucianism. However, to provide for the old family system in the Constitution and to bind succeeding generations to it can be considered both unprofitable and harmful.

As many sociologists assert, the structure of the family alters in accordance with sociological and economic change. Already, not only in the cities but in the farm villages as well, such ideas as respect for the individual and equality between the sexes have spread widely. In addition, industrialization and the concentration of the population in the cities have advanced with great speed. Along with these developments another symptom of change has appeared in ethical thought revolving around parents and children, husband and wife, and the
structure of the family. Notwithstanding these developments, I believe that the family will endure for a long time as the principal social unit. However, what will bind it together in the future is not the Confucian ethics of the past but natural affection among its members. It may be, as Toynbee has pointed out, that the center of the family will be not the father, but the mother. At any rate, it will be impossible to prevent such change by law.

As for the economic preservation of the family, it may be left either to the provisions relating to the responsibility for support in the Civil Code or to the broadening of social security. The present Constitution points the way toward future family organization with equality between the sexes and respect for the individual as the fundamental bases of family life. This, I believe, is correct as the fundamental principle for family ethics. To provide especially for other matters in regard to the family would weaken this principle. It might also be considered a step along the reverse course to the old system.


The disregard of human rights in so-called "private governments," that is, in the internal regulations of private organizations in modern society, has become a highly debated constitutional question in the United States as well. What is more, it is desirable not only that fundamental constitutional principles be protected both on the national level and within private organizations but also that the general practices of influential private organizations contribute to the strengthening of practices on the part of the nation relating to the respect of fundamental human rights. However, as a current issue, the problem is extremely complicated and in the present stage of affairs to place such a provision in the Constitution might well result in a mischievous sociological confusion. Consequently, it may be that the most appropriate steps for the necessary protection of fundamental human rights will be determined concretely on an individual basis by means of such legal principles as public order under private law, sound moral practice or the prevention of the abuse of authority.

4. The Supreme Court has already established that the intent of Article 24 (equality under the law) is to prohibit unreasonable discrimination. Is it necessary to advance further and establish standards in the Constitution for determining reasonableness? No.

The establishment of such general standards is in practice extremely
difficult. A sounder method is to have the Supreme Court determine reasonableness on a case-by-case basis.

5. Should Article 25 be revised to establish the right to petition the state to grant the minimum standards of wholesome and cultured living? No.

The Supreme Court has long since held that Article 25 is a programmatic provision establishing basic national policy which does not bestow any legal right on the individual. If a provision recognizing the individual's right to petition the state [for "the minimum standards of wholesome and cultured living"] is enacted, it may be regarded as establishing an actual system; then by analogy it might be reasoned that the "obligation to work" in Article 27 is an actual enforceable duty, permitting the state to force people to work, and sanctioning a system of forced labor. If this analogy is permissible, the former proposal must also be regarded as unrealistic.

6. Is it necessary to add a provision which would make it clear that the rights of workers guaranteed by Article 28 are to be exercised only for the improvement of the economic conditions of workers and not to guarantee the right to strike to achieve political objectives? No.

Because the Supreme Court has already pointed out that purely political strikes fall outside the rights guaranteed in this article, it is unnecessary to add such an amendment.

Moreover, an amendment generally prohibiting political strikes would create a great stir in the world of labor. The unions would think that under such a provision management would interpret all strikes to be political and attempt to prohibit them. In addition, if the courts were to confirm the unions' fears, the right to strike, which is the only weapon for the workers against the powerful management camp, would in reality be taken away.

7. Is it necessary to set up a provision holding that the rights of labor should be exercised in accordance with the public welfare? No.

The Supreme Court has already held that the rights of labor must be exercised with due consideration for other fundamental rights, including that of property. I believe that this is sufficient.

8. Is it necessary to establish special provisions relating to public officials? No.

The Supreme Court has included public officials among workers in Article 28. It has also recognized that restrictions on public officials are greater than those imposed on others because the public welfare so
requires. Consequently, it is not necessary to establish special provi-
sions in the Constitution. Such special regulations might better be set
forth in the laws relating to public officials.

It is perfectly natural that public officials occupy a position differing
from that of the general population. On this point the famous aphor-
ism of Justice Holmes regarding the Boston police strike might be re-
called; he declared that everyone has the right to strike but everyone
does not have the right to become a policeman.

9. Should Article 29 relating to the right of property be amended to
clarify the social nature of this right? No. Should the order of the
first and second paragraphs of that article be changed? No.

At a time when restrictions on the right of property are conspicu-
ous in all countries, the wording of Article 29 might be open to the
ideological criticism that it is a little bit too old-fashioned. However,
I think that there is no necessity for such an amendment if one ob-
serves the actual operation of Article 29. In the area of private law
there is no one who proclaims the absolute nature of the rights of
property and all recognize the legal principle of the abuse of rights.
Also in respect to limitations on the right of property in the course of
city planning, the Supreme Court has recognized the constitutionality
of individual administrative acts on the basis of reasonableness and
the principle of equality.

There is a tenable ideological argument for changing the order of
paragraphs 1 and 2, but even if they were so changed, in actual fact
there would be no difference.

10. Is it necessary to revise Article 31, relating to due process, in
order to guarantee due process in procedural matters? I give condi-
tional approval to such a revision.

The American lawyers who drafted Article 31 clearly believed that
its provisions should be set forth as they are because of the American
experience in which the development of social and labor legislation
was blocked on many occasions by the Supreme Court’s interpreta-
tion of due process. However, the Constitution of Japan differs from
the American Constitution in that it contains provisions relating to
social rights. Thus, there is no concern over the possibility that Amer-
ican history might be repeated here.

The Constitution of India has a provision which parallels Article
31, and the Indian Supreme Court has held that the provision does
not preclude a law providing for the preventive detention of ringlead-
ers in times of social upheaval. The challengers argued that the law ran counter to commonly accepted practice in civilized countries.

The phrase "procedure established by law" thus raises an extremely important question relating to the guarantee of human rights. Even if it is interpreted to mean only law established by the National Diet, excluding orders and regulations of the executive branch, the result might be that the Supreme Court might have to declare such law constitutional no matter how arbitrary or unjust its content might be.

Thus, it has been suggested that "procedure established by law" be changed to "procedure in accordance with basic principles of justice and equity" and that the latter be set forth as a general principle of criminal law preceding the individual provisions of Articles 30 through 40. To the proponents of such a change the question is not simply a problem of phraseology but a problem greatly influencing the nature of criminal justice. However, because the Supreme Court has not yet made clear how it would interpret Article 31, there is no immediate need for revision. Assuming, however, that the Supreme Court followed the same interpretation as the Indian Supreme Court, a real necessity for revision might arise.

11. *Is it necessary to revise Article 33, which sets forth the conditions of arrest, in order to make clear as a matter of criminal procedure the constitutionality of regulations concerning on-the-spot arrest?* No.

Because the Supreme Court has already held such arrest to be constitutional, there is no need to revise the Constitution.

12. *Should the interval of time between arrest and appearance in court be clearly set forth in the Constitution?* No.

If this is necessary, it can be determined by ordinary law.

13. *Should it be made clear that the guarantees in Articles 33 and 35 extend to administrative arrest, search, and seizure?* No.

Cases of criminal procedure and cases of administrative procedure cannot be treated as absolutely identical. I think that as a matter of principle it is desirable to observe the principles of both Articles 33 and 35 in administrative procedures, but it may not be necessary to do so in all circumstances. I think that this should be determined by law on an individual basis and that it should not be generalized in the Constitution.

14. *Should a provision prohibiting capital punishment be added?* No.

Article 102 of the Bonn Constitution, for example, provides for the abolition of capital punishment, but in Japan there are still opposing
views on the question. If abolition is to be approved, then it can be done in the Criminal Code without providing for it in the Constitution.

15. Is it necessary to provide a detailed definition of “proof against him is his own confession” in paragraph 3 of Article 38? No.

This is a problem which can best be left to interpretation by the Supreme Court.

16. Should it be made clear that the provision in paragraph 3 of Article 38 is not to be applied to confessions made by the accused in open court? This is not necessary.

The Supreme Court has already held that paragraph 3 of Article 38 does not stand in the way of a verdict of guilty when the only proof is a confession made in open court. However, there was a dissenting opinion which included almost half the court. I agree with the majority opinion because at the stage of open trial the accused has already had the benefit of counsel, because his confession can be considered to have been given with the advice of counsel, and because, therefore, no corroborative testimony is required. On this point the provision of paragraph 2 of article 319 of the Code of Criminal Procedure [“the accused shall not be convicted in cases where his own confession, whether made in open court or not, is the only proof against him.”] is constitutional but must be criticized. If, in order to speed up the disposition of criminal cases, the Anglo-American system of arraignment be approved for adoption, then accordingly the Code of Criminal Procedure would have to be revised. The constitutionality of this procedure could best be determined in the Supreme Court.

In Anglo-American law, procedural rules requiring corroborative evidence for the confessions of the accused are limited to confessions made outside court; it is believed unnecessary to have corroborative evidence for confessions made in open court by the accused when he has had the advice of counsel. Even though the highest court of Japan has upheld the constitutionality of provisions requiring corroborative evidence in all cases, the necessity of such provisions may be questioned. There is sufficient protection for the accused when he is in open court, and I believe the approach of the Anglo-American cases is reasonable.

17. Should there be new constitutional provisions relating to the basic principles of social organization and education? No.

A constitution is a law which guides not only the present but future generations as well, and which is binding on the people. Some things
regarded as proper by the present generation may be regarded as improper by later generations. I believe that it would be unwise to impose basic educational and economic policies (which might be regarded as absolutely essential at the present time, and which should be determined by law, such as the basic law for education) on future generations by setting them forth in the Constitution.

B. The Judicial Power.

18. Should a policy in favor of the widening and strengthening of the judicial power in the present Constitution be supported? Yes.

Such a policy is necessary because, as described earlier, it will make effective the principle of the rule of law which is indispensable for the success of the parliamentary democracy under the present Constitution.

19. Should the Supreme Court be given the right of abstract constitutional review? No. Should it be possible to ask advisory opinions of the Supreme Court? No. Should the right of constitutional review be limited only to the Supreme Court? No.

The special character and the great worth of constitutional interpretation by the Supreme Court lie in the fact that interpretations are made only after a full hearing of contrasting constitutional constructions relating to concrete cases growing out of the social and political life of our country, not mere abstractions. Under the above proposals there is the danger that the interpretations of the Supreme Court would become abstractions not based on specific fact.

20. Should the Constitution be amended to enable the establishment of a committee for the study of constitutional problems in the National Diet? No.

Before the enactment of a law, the abstract determination of the constitutionality of a bill is the responsibility of the National Diet. At present the Cabinet Bureau of Legislation has the function of preventing unconstitutional legislation. If the National Diet is dissatisfied with this state of affairs and believes it preferable to create its own committee to carry out its own review of the possible unconstitutionality of a bill, then such a committee can be established. However, I believe that it is not necessary to so provide in the Constitution; it can be determined by the Diet itself.

21. Should it be made clear that treaties are not subject to constitutional review? No.

At the present stage of development of the international community,
I think that in matters of domestic law the theory that a constitution is superior to a treaty is proper. In the United States this theory has been firmly upheld from early times to the present. Quite recently, the United States Supreme Court established a precedent guaranteeing human rights set forth in its constitution by holding unconstitutional sections of administrative agreements based on American security treaties with both Great Britain and Japan.

To declare an international treaty unconstitutional is an extremely important step which involves international good faith which is not to be taken lightly. It seems wise to act to the greatest extent possible so as to uphold the constitutionality of treaties. This might be done either by interpreting domestic law so that treaties will not be held unconstitutional or in unavoidable circumstances by invoking the political question principle whereby the question must be decided by the Diet or the Cabinet. However, I think that it is going too far to say that treaties should never become the object of constitutional review.

22. Should the system of popular review of Supreme Court justices be abolished? No.

The system of popular review of Supreme Court justices was set forth in the Constitution [Article 79] so that there would be democratic control over their nomination and appointment by the Cabinet. Of course, this is not the only democratic method of control; for example, the same objective could be achieved by a system under which the approval of the National Diet would be required.

This system basically relates to the question whether there should be popular election of Supreme Court justices. Our Constitution adopted the so-called "Missouri plan," a device which adds a measure of democratic control over the system of appointment. In the United States the question whether the system of popular election is better for the naming of judges than the system of appointment has been debated for many years. The appointive system is preferred in legal circles but the problem is one that cannot be solved abstractly. For example, it is widely accepted that judges popularly elected in the State of New York are among the best in the country. Thus, approval of the Missouri plan is a question that cannot be decided abstractly. Among those states which have adopted the Missouri plan, popular control over appointments made by the governors seems for the most part to be executed without ill effects. It also appears that there is no movement to change the system.
Popular review is not only a democratic means of control over nominations and appointments by the cabinet; it is also a device to prevent judicial independence from collapsing into judicial complacency. This is the strong point of the system. Viewed abstractly, there are two possible weaknesses in the system: first, the danger that judges of high intelligence who hand down decisions contrary to public opinion might be dismissed as a result of popular review; and, second, the danger that Supreme Court justices concerned about popular review might lose their attitude of unfettered freedom of conscience. However, neither of these evils has appeared in our country.

Accordingly, I believe that at the present time there is no necessity to abolish the system of popular review.

23. Should administrative courts independent of judicial courts be established? No. Should there be established a constitutional court on the West German model separate from the Supreme Court? No.

First, my thoughts concerning the establishment of independent administrative courts. As a reflection of the fact that the French conseil d'État efficiently carried out the function of protecting human rights, the lawyers in the army of occupation in West Germany did not abolish the continental-type administrative courts, but rather promoted a policy of strengthening them. Accordingly even some American and British scholars recognized the possibility that in Japan independent administrative courts might possibly perform the protective function of the conseil d'État more effectively than the present system.

The administrative courts under the Meiji Constitution were neither efficient nor especially sensitive to the protection of human rights. Moreover, they were not truly independent because they were a part of the executive branch. Because the administrative courts were inclined to do what the government wished, it cannot be said that there was no [Japanese] endorsement of Professor Dicey's famous opposition to administrative courts. Nor can it be said that because the referees were well versed in the realities of administration, they disposed of administrative cases more efficiently than ordinary judges. The procedural slowness of the administrative courts was too well-known. Naturally there was opposition to revival of administrative courts of such a character.

If specialized courts for administrative cases are deemed necessary, it is possible to establish them by law as lower courts under the present Constitution. It is also possible to create special sections inside the
judicial courts to handle administrative cases. Such a tendency can now be observed. Within this framework I do not oppose later developments in this direction.

With the industrial revolution and the tendency toward the welfare state there has been a great increase in the number of administrative cases. Many of these cases are of such a character that only men possessed of highly specialized technical knowledge can handle them. It is even difficult for judges with administrative experience to dispose of cases of this kind. Under these circumstances it would seem better to bestow quasi-judicial power on an administrative body or committee. However, the decisions of such bodies should not be regarded as final; the way must be left open for appeal to judicial courts. Naturally, the appeal should be limited to the review of questions of law. This method, after many years of debate in Britain and America, has been established as one means of disposing of this difficult problem. I have said just a few words relating to a situation which may arise in the future.

The idea of establishing a constitutional court outside the Supreme Court can mean two things. First, it can mean the establishment of a constitutional court to deal with abstract constitutional questions. This seems to be the essence of the proposal which has been considered in our country. In this sense, it is unnecessary. Laws enacted by the National Diet are assumed to be constitutional and applicable until they are held unconstitutional by the Supreme Court, even though their constitutionality might be contested by both scholars and the opposition party. Thus, it is unnecessary to establish a constitutional court to decide abstract constitutionality in a decision before or after the enactment of that law and apart from the National Diet's own abstract judgment of constitutionality of the law [during debate]. To do so, I think, might also contain the danger of politicizing the courts.

The second aspect of the idea relates to the machinery of constitutional review. The question is whether or not it is preferable, as in West Germany and Italy, to establish a separate supreme court which would concentrate on handling ordinary civil and criminal cases and a constitutional court which would specialize in constitutional cases. In view of actual experience with the constitutional court of West Germany one cannot conclude that this continental system is necessarily bad. Against the background of the industrial revolution and the movement toward the welfare state there is a general tendency to
broaden and strengthen the executive power. In accord with this tendency legislative power is diminishing and legislation in actual fact is being carried out by the executive branch. Accordingly, the necessity for supervision over this situation from the constitutional standpoint is greatly increasing. Even in the United States the Supreme Court has in reality become a constitutional court and the federal courts the final court of appeal for ordinary civil and criminal cases.

Our own Supreme Court, following the American system, is equipped with both the function of final appeal in civil and criminal cases and that of constitutional review. It carries out the former function mainly through the petty bench system. However, Supreme Court justices lose much time in "ditch-digging" as Mr. Mano of the Commission [a former Supreme Court justice] has so aptly described the first function. This provides no time for adequate thought or the enhancement of insight.

The argument that the Supreme Court should be detached from ordinary civil and criminal cases and a constitutional court thereby established is not without a certain appeal. However, I believe that, as in the case of the Supreme Court of the United States, it is better to strive for improvement by giving the Supreme Court more of the character of a constitutional court in actual fact either by improving the appeals system, or by bestowing on a separate court the right of final review of ordinary criminal and civil cases. In the event that such a development is necessary, it might serve the purpose even if the personnel of the Supreme Court were reduced to less than that of the Supreme Court of the United States.

24. Is it necessary to set forth clear provisions in the Constitution relating to the location of the power of judicial administration? No

What is referred to as the separation of powers is carried out by the general distribution of the functions of national administration. From time to time in our country various conclusions have been drawn by using deductive reasoning based on this theory, but they must be treated with some circumspection. It is universally recognized that if the separation of the three powers of government is literally applied, administration of the affairs of state would come to a standstill. The legislative branch performs functions which seem in fact to be parts of the executive and judicial processes; the executive branch also has functions resembling those of the legislative and judicial branches. Accordingly, even if the courts do things which seem to be part of the
executive process, it does not naturally follow that their acts are unconstitutional. The following proposals are not intended to negate the above statement; rather they are comments on both the Constitution and the Court Law.

First, concerning the appointment of the judges of the lower courts. It is argued that since the Supreme Court has the power of nomination, the Cabinet's power of appointment may lapse into a mere formal and mechanical function. Some think that the provisions of Article 80 [relating to lower court judges] of the Constitution rigidify the judicial branch, thicken its conservative air, and stifle any sensitivity to change in new directions, and that therefore it would be preferable if the Cabinet were given more freedom in the power of appointment. There is an element of truth in this. But at the same time it is doubtful that judicial rigidity could be checked through the device of enabling the Cabinet to appoint judges independently, as did the old Ministry of Justice under the Meiji Constitution. Moreover, there is a strong possibility of a striking abuse of the power of appointment by the Cabinet. For such reasons I oppose the revision of Article 80 of the Constitution.

Second, the current system is criticized concerning such matters as personnel administration and compensation inside the courts, the duties of the inspection committee for public prosecutors, affairs relating to the training of judicial apprentices and the judicial assembly. I believe that maintenance of the status quo would result in no great abuses. If there be abuses, I think that they should be disposed of by amendment to the Court Law and that there is no necessity for constitutional revision.

Third, there is the demand that the right of trial in cases relating to juvenile protection be transferred from the family courts to the executive branch. However, it is doubtful that such a transfer would result in real improvement. In any event, this is a problem of the Court Law and does not require constitutional revision.

25. *Is there any necessity to provide regulations which would make clear the relationship between the rule-making power of the Supreme Court and the legislative power of the National Diet?* No.

Because what we refer to as "the rule-making power" has been taken directly from Anglo-American law, it has resulted in widespread misunderstanding. In reality, it means "legislative power" but Article 77 intends that the Supreme Court be constitutionally guaranteed the
exercise of legislative power only in determining "rules of procedure and practice" and of other matters pertaining to attorneys and courts. This is one aspect of the policy of broadening and widening the judicial power which is set forth in our Constitution.

This system originated in Great Britain. However, American judicial circles have recognized its practical value and some states constitutionally guarantee the exercise of this kind of legislative power by the courts. However, even in the United States old and new ideas collide over this point.

The old idea is that of the 19th century, namely, that only the legislature should exercise the legislative power. Accordingly, it is thought that the legislature must enact laws relating to matters of judicial procedure. Legislative practice in the past was governed by this theory. The English who emphasize practice more than theory were the first to recognize its shortcomings. They perceived that it is more appropriate for the courts than for the national legislature to pass laws dealing with court procedure, and provided the courts with what in reality was legislative power regarding court rules. However, they required the court rules, which in reality constituted legislation by the courts, to be presented to the legislature for approval. The courts in using a most ordinary word such as "rules" expressed their respect for the traditional concept of legislative supremacy. This tactic is quite in the British style. However, examples in which the national legislature actually objected to legislation by the courts are virtually nil. This fact indicates the sanction of perfect legislative power in the courts. In addition, it has increased the efficiency of the legislative arm by reducing the scope of its duties.

What is termed the new idea deems it preferable, from the practical point of view, to have matters of judicial procedure legislated by the courts not the legislature, thus placing responsibility for all judicial matters in the courts. At present this new idea is the trend in American federal and state government. However, because the old idea is still latent, various debates have sprung up concerning the relationship between legislation by the legislature and legislation by the courts. Very recently the constitution of the State of New Jersey was amended to recognize the supremacy of the legislative power of the courts in matters relating to court procedure over that of the state assembly. The prime requirement for understanding the meaning of Article 77 of our Constitution is a firm grasp of the historical development of this system.
In our country the old idea of the legislative power is strong. It has influenced the meaning of the word "rules" and in matters relating to "rules" the Diet is naturally understood to be supreme. Generally speaking, the rule-making power is applied as if it meant "the power to make by-laws." Thus, there still has not been any real consideration of the question which would really improve the administration of justice: whether to leave this legislative power in the National Diet, or to bestow it on the courts. Also the Supreme Court has not clearly revealed its opinion as to whether a law enacted by the Diet could be changed by a rule.

Under these circumstances it would be unwise to undertake a revision with the intent, based on the old Constitution, to place the rule-making power within the scope of law. It is probably necessary to carry out a thorough debate, based on the actual state of affairs in our country, on the practical value of both the old and new ideas relating to the legislative power in this area.

26. **Should the organization of the Supreme Court be set forth in the Constitution?** No. **Should the number of Supreme Court justices be determined in the Constitution?** No.

I believe that these matters should change in accordance with the requirements of the times and that it is unwise to freeze them permanently in the Constitution.

27. **Should the Constitution provide for advisors to the Cabinet on appointments to the Supreme Court?** No.

An advisory committee to the Cabinet is certainly one method by which political appointments to the Supreme Court might be prevented. However, I believe that if such a committee is regarded as a good idea then it should be created by law and not by the Constitution. It would be wise to set the committee up in such a way that changes could be made in the future in the light of actual experience.

28. **Should the provisions in Article 82 relating to exceptions to public trial be deleted?** No.

Crimes involving the press and cases in which fundamental human rights are in issue have been handled publicly up to the present and in such a manner that there have been no particular irregularities. I believe that this provision is reasonable because secret trials involving political crimes produce results unfair to the accused as attested by past historical experience.

29. **Should the phrase “exercise of their conscience” in paragraph 3
of Article 76 be deleted? No.

Freedom of conscience is provided for in Article 19 and the same word—"conscience"—appears. But the sense in which the term "conscience" is used is determined by the context; the same word should not be understood to have exactly the same meaning at all times. Also I believe that it is unnecessary to delete the phrase since I have not heard of a situation in which an irregularity resulted because of it.

30. Should the Supreme Court have the power of dismissal when the private conduct of a judge is questioned? No.

Dismissal of judges is a matter of great importance, in light of the guarantee of the status of judges. Thus, it is necessary that the current method be followed, namely, the impeachment procedure in the National Diet. If the Supreme Court had the power of dismissal, it would be possible for situations to arise in which striking injustices were done to the person concerned. Because I believe that it is proper to proceed as at present, I am opposed to revision.

31. Should the Constitution have a provision that the Chief Justice of the Supreme Court should report to the National Diet each year on the state of the progress of all justices? No.

Under the Constitution at the present time the National Diet whenever it deems it necessary can request such a report on the basis of its power to conduct investigations in relation to government [Article 62].

32. Should the position of the Attorney General be clearly set forth in the Constitution and should he be given authority the same as that of a judge? No.

I do not understand clearly the meaning of the phrase "authority the same as that of a judge." Because it is recognized that the Attorney General in our country at the present time possesses authority appropriate to his position, I believe that it is unnecessary to set forth in the Constitution provisions enlarging his authority.

33. Should the power to introduce bills be given to the courts? No.

To give the courts the power to present bills is improper because of the nature of the judicial power. However, as a means of strengthening the views of the courts and of exerting more influence on legislation relating to the administration of justice, it may be that the devices resorted to by the federal courts in the United States are worth considerable study.