COMMUNITARIAN ETHOS AND THE CONSTITUTION OF JAPAN: A PRELIMINARY EXPLORATION

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The constitution of Japan was promulgated on 3 November 1946 and put into effect on 3 May 1947. Though it was enacted as an amendment to the former Constitution, the Constitution of the Empire of Japan, 1889, their contents are drastically different. This paper describes some characteristics of the Constitution of Japan, and then explores why the courts under the Constitution are still not active in protecting individual rights.

THE MAKING OF THE CONSTITUTION OF JAPAN[1]

On 14 August 1945, the Japanese government decided to agree to the Potsdam Declaration, a joint declaration of the terms of Japan's surrender, which was made public in the names of China, the United Kingdom and the United States. The World War II ended in Japan's defect. Japan was occupied by the Allied Forces, mainly American, all over the country. The government was placed under the authority of General Douglas MacArthur, the Supreme Commander of the Allied Powers (SCAP).

At the outset of the occupation, the Japanese government maintained that despite the surrender, the basic form of the state, *Kokutai* was still intact, and that there was no need at all to revise the current constitution of the Empire of Japan, 1889, commonly known as the *Meiji* Constitution. This was also the received opinion among leading Constitutional scholars then.

However, after MacArthur's repeated suggestion that it was crucial to revise the Constitution in order to implement the Potsdam Declaration, the government established a committee examining the questions of whether there was any need to amend the Constitution, and if there was, what amendments were appropriate. After several months of deliberation, this committee drew up a draft proposal, the contents of which turned out to be quite conservative.

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1 As to the making of the Constitution of Japan described here, see materials reprinted in Tanaka, H. (ed), The Japanese Legal System: Introductory Cases and Materials, Tokyo, 1976, at pp. 642-84.

Becoming aware of its conservativeness and insensitivity to the international climate hostile to the imperial regime, the General Headquarters of the Supreme Commander (GHQ) decided to make its own version of draft constitution and to urge the Japanese government to revise the *Meiji* Constitution on the basis of it. The draft was drawn up within two weeks mainly by the GHQ's Government Section and delivered to representatives of the Japanese government on 13 February 1946.

Stunned by the unexpected presentation of the GHQ draft, after some resistance, the Japanese government reluctantly agreed to carry out the amendment on its basis.[2] The amendment proceeded squarely the procedure stipulated by the old constitution, and promulgate by the Emperor on 3 November 1946 as an amendment to the constitution of 1889. But its contents are drastically different. While the old Constitution was based on the imperial sovereignty, the Constitution of Japan, which drew heavily on the American draft, is based on the popular sovereignty principle, has made political institutions accountable to the electorate, and introduced constitutional review by the judiciary in order to protect the fundamental rights.

PROHIBITION OF WAR POTENTIAL[3]

On its face, the present Constitution adopts a extremely pacifist standpoint. The first paragraph of Article 9 of the Constitution provides that the Japanese people "forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes." This clause itself seems to leave the possibility of the threat or use of force as a means of self-defence. However, since the second paragraph of the same article prohibits the government from maintaining any military forces "as well as other war potential," this article as a whole seems to make any treat or use of force impossible. It is widely believed that this pacifist article was inserted in the draft of the Constitution on the strong initiative of General Douglas MacArthur.

In 1950, shortly after the Koran War broke out, upon the request of MacArthur, the government established the National Police Reserve, which has grown into the Self-Defence forces.[4] Although the dominant view of

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2 It is reported that in handing their draft MacArthur's team warned that to accept this draft was the only way to avoid accusation of the Emperor as a war criminal and to preserve the imperial system. See Tanaka, H., "A History of the Constitution of Japan of 1946" in Tanaka, H., supra note 1, at pp.660-61.

3 See Fukase, T. and Higuchi, Y., *Le Constitutionalism et ses problemes au Japon: une approche comparative*, Paris, 1984, particlualry chapter II.

4 The Self-Defence Forces consist of three forces; Ground Self-defence Force, Maritime Self-Defence Force and Air Self-Defence Force. At the end of 1993, the

academics has consistently regarded it as unconstitutional, the Liberal Democratic governments have argued that maintaining the Self-Defence Forces is not in conflict of the Constitution, for the Constitution must not deny Japan the right of self-defence and hence permits the government to keep minimum forces to implement it. The Socialist Party had stubbornly opposed to and maintained unconstitutionality of the Self-Defence Forces, while being out of office for almost 40 years. However, after their party leader Tomi'ichi Murayama assumed office of the Prime minister in June 1994, they declared that they now regarded the Self-Defence Forces as constitutional at their yearly conference in September 1994. Thus, in the national political arena, there is now nearly unanimous recognition for the legitimacy of the Self-Defence Forces. The Supreme Court has so far declined to make its view clear on this question.

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Main international human rights instruments ratified by Japan include the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, and Convention on the Elimination of All Forms of Discrimination against Women. Japan has not ratified the International Convention on the Elimination of All Forms of Racial Discrimination, on the reason that its article 4 might conflict with the Constitution of Japan, which protects the right to free expression in its article 21.[5]

In Japan, a finally concluded treaty is regarded as part of the domestic law and publicised as such. It is generally accepted that when they are in conflict, a treaty prevails against a statute enacted by the Diet. Scholars' views are divided on the relation between the Constitution and treaties. The dominant view among academics is that the validity of the Constitution is superior to that of treaties. The case-law seems to affirm this conclusion and holds that treaties may be declared unconstitutional and void.[6]

Ground Self-Defence Force commanded about 146,000 personnel, Maritime Force possessed 160 warships (totalling 326,000 ton), and the Air Force owned 510 planes. In 1994, the budget for the defence forces was 4,683,500 million yen (about 46,835 million US dollars), 6.4% of the total budget. See Defence Agency, *Bôei-Hakusho: Heisei 6 Nendo-Ban* (Defence of Japan 1994), Okura-sho Insatsu-Kyoku, 1994, at p.175 and p.332.

5 Answer by the Prime Minister, Yasuhiro Nakasone, at the House of Representatives, 2 February 1987.

6 Supreme Court Judgement, 16 December 1959, 13 Keishû (Criminal Case Reporter), p.3225.

On the other hand, some scholars assert that the "established laws of nations" (Art.98, Para. 2) will supersede even inconsistent clauses of the Constitution, for while treaties involve the danger that a stronger state imposes unfair obligations upon a weaker country, there is no such risk with regard to established customs.[7] Arguing thus, they seem to bear in mind the principles of universal human rights as typical examples. The government has also adopted this view.[8]

With regard to the human rights instruments ratified by Japan, most of the area provided by them are already covered by the Constitution of Japan. Therefore, it should be rare that they will raise any independent question before the national courts. In case their provisions are in conflict with the Constitution, the validity of the provision in question will be still upheld as far as the provisions are regarded by the courts as belonging to the "established laws of nations".

ENUMERATION OF FUNDAMENTAL HUMAN RIGHTS

The provisions regarding fundamental rights are found in Chapter 3 of the Constitution. American influence is said to be decisive in this field as well. One prominent constitutional scholar says that the very term "human rights" used by the Constitution "calls to mind the American idea of civil liberties with a natural law flavour."[9]

The bill of rights in the Constitution of Japan is in some respects more extensive than that of the American Constitution. First, the Constitution guarantees not only classical individual liberties, such as freedom of expression (Art.21) or that to property (Art.29.), but also various rights to state services, the "social rights", under the influence of the idea of welfare state; for example, the rights to maintain the minimum standards of wholesome and cultural living (Art.25), or the rights to receive equal education (Art.26).

Second, detailed safeguards regarding criminal process are provided also under the American influence (Arts.33-40).

Third, although the rights guaranteed by the Constitution are declared to be eternal and inviolable (Art.11 & 97), the people are at the same time obliged to use them for the sake of public welfare (Art.12).

Fourth, the Constitution sets up constitutional judicial review in order to protect basic rights effectively (Art.81). The received view is that the

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7 See e.g., Higuchi, Y., *Kenpô (Constitutional Law)*, Sôbunsha, 1992, p.101.

8 Answer by the Director-General of the Cabinet Legislation Bureau, Shûzô Hayashi, at the House of Councillors, 17 November 1959.

9 Okudaira, Y., "The Constitution and Its Various Influences" in Luney, P. and Takahashi, K. (eds), Japanese Constitutional Law, Tokyo, 1993, at p.8.

Constitution only expects the American-type a *posteriori* review system exercised by ordinary courts in solving judicial controversies.

However, because of the terse and fragmentary character of the definitions of basic rights in the Constitution, real issues only begin in the stage of their interpretation. If there are any problems in guaranteeing basic rights in Japan, we should seek them not in the provisions of the Constitution but in the ways they are implemented.

JUDICIAL REVIEW

On the question of judicial review, the dominant academic view as well as the case-law have accepted the so-called "double standard" theory of judicial scrutiny; that is, constitutionality of laws restricting civil liberties, in particular right to free expression, should be examined more strictly than that of laws restricting other rights, such as economic or social rights, because civil liberties are essential elements of the democratic political process.[10]

The Japanese Supreme Court has been quite passive in controlling the constitutionality of governmental acts. It has held unconstitutional government acts only in six cases since its establishment in 1947. One of the reasons may be that the justices think that in Japan the most fundamental civil liberties, such as the right of expression, are protected well. Moreover, claims on the constitutionality produced by parties may be often without substance. But this may be a symptom of the deeper way of thinking embraced by most of the Japanese.

The Supreme Court often referred to "the prevailing ideas in society" in trying to strike a balance between the public interest and individual rights. And according to the "prevailing ideas", a municipal government does not violate the separation of the State and religion (Art.20), even if it holds a *Shintoist* — ceremony for the start of constructing a city gymnasium[11]; in spite of the equality under the law(Art. 14), a discrimination regarded as rational from the viewpoint of the "prevailing ideas in society" is not contrary to this principle[12]; the prohibition of sale or distribution of obscene publication is justified because it serves the general interest, and what constitutes obscenity can be judged with the "prevailing ideas in society."[13] Such a way of reasoning

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10 Supra note 7, at pp. 193-95. However, the Supreme Court has never held unconstitutional any legislation restricting freedom of thought or freedom of expression.

11 Supreme Court Judgement, 13 July 1977, 31 Minshû (Civil Case Reporter), p. 113.

12 Supreme Court Judgement, 18 November 1964, 18 Keishû, p. 579.

13 Supreme Court Judgement, 13 March 1957, 11 Keishû p. 997. This case is known as "*Chatterley Case*". See Tanaka, supra note 1, at pp. 744ff.

seems to lead to settle the limits of individual rights in accordance with the majority opinion, which runs counter to the idea that the basic rights should be protected even when doing so may reduce the overall general welfare.[14]

LACK OF ALTERNATION OF POWER

There are some ways to explain why the courts in Japan are not very active in exercising their power of constitutional review. As one explanation, many scholars point out the fact that there was never an alternation of the government from 1955 to 1993, that is, around 40 years.[15] This fact is said to have brought about the following results. First, since the electorate are not given a real choice on any public issue as there had hardly been any alternation of ruling party and government policy in recent decade, most Japanese people expect the government achievement as not in public interest but for their private interest. This leads to the result that government officials, including judges, act as co-ordinators of various particular interests, at best as promoters of the aggregate particular interests. On the other hand, the above situation has brought about a disposition on the part of judges to adapt themselves to the eternal social majority.

Although this theory has been widely accepted, it does not seem to be very persuasive. If Japan is a pluralistic society, as this theory presupposes, and the government has become a moderator of various private interests, then the courts can play more active roles in promoting public interests or protecting the basic rights which are neglected by the ordinary political process. Of course, it is not likely that judges would make decisions which run counter to the majority's view for a long time. But since each of individual citizens has various and different interests most of which can not be adequately represented to the national political arena, the courts can and should represent those neglected aspects and such decisions might get supports from the majority of citizens.[16] Therefore, at least it is not a logical truth that the courts would become passive when there is no alternation of the government as far as the political system is really a pluralistic democracy.

JAPANESE COMMUNITARIAN ETHOS?

Another possible answer to the question of why Japanese judges are not willing to exercise their power of constitutional review has been widely received inside and outside Japan. In this view, the Japanese embrace an

14 Dworkin, R., A Matter of Principle, Cambridge, 1985, at p. 375.

15 Higuchi, Y., "*L' alternance de 1993 et l'enjeu constitutionnel au Japon*", 71 (1994) Pouvoirs.

16 Dahl, R., "Decision-Making in a Democracy: The Supreme Court as a National Policy Maker", 6 (1957) Journal of Public Law, p. 294.

intense communitarian ethos, which dictates one right answer to every social or moral problem. Since they are so willing to follow this ethos that lawsuits are much fewer than in Western countries. Even if a conflict occurs they don't have to resort to fixed, rigid and universalistic concepts like rights, obligations etc., in order to resolve it. Everyone knows her own role and status through common sense though such role and status fluctuate in accordance with ever changing circumstances.[17] According to one author who points out the extraordinary homogeneity of thinking of the Japanese, we the Japanese "often justify our view or action by saying that 'others do the same' or 'others think the same way' — Apparently, such a pattern of thinking is not very conductive to the development of an attitude respecting the positions or views of other people."[18] If judges also embrace such peculiar ethos, they are not very keen on protecting the individual rights.

However the above argument is open to some difficulties. First, it seems highly improbable that more than one hundred million people embrace one definite positive morality which gives an answer to every moral question in spite of changing circumstances. The fact that a lot of human rights issues, though not so many as western countries, have been brought up in Japan seems to contradict this argument.

Second, the above explanation conflicts with the dominant view regarding the Japanese *Weltanschauung*, the view advanced by Professor Jun'ichi Kyogoku. According to this view, "every phenomenon in the cosmos is a manifestation of the eternal being." Accordingly, "although everything is separate and distinct, at the same time, they share a common, ontological quality."[19] It follows that the Japanese are not sensitive to the pros and cons of alternative solutions to moral problems, because all possible solutions are equally manifestations of the eternal being. Rather they are willing to follow whatever alternative on condition that it becomes a *fait accompli* and all other people follow it. If such an account is rights, the Japanese just want to act as if there were a consensus even when there is no actual consensus.

These considerations lead us to an alternative explanation of why the Japanese are not very keen on protecting individual rights. My suggestion is that most, if not all, of Japanese people regard most legal or moral problems, including human rights ones, as co-ordination problems.

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17 Kawashima, T., "Dispute Resolution in Contemporary Japan" in Tanaka, supra note 1, p. 269ff.

18 Noda, Y., "*Nihon-Jin no Seikadu to sono Hô-Kannen* (The Character of the Japanese People and their Conception of Law)" in Tanaka, supra note 1, p. 295.

19 Kyôgoku, J., The Political Dynamics of Japan, Tokyo, 1983, at p. 49.

CO-ORDINATION PROBLEM

In a co-ordination problem situation, each agent must choose between alternative courses of action and all agents find it to be in their common interest to achieve some uniformity, or co-ordination of action.[20] A typical example of co-ordination problem is the case of traffic rules. Most people are indifferent as to on which side of road we should drive. We are only anxious to know on which side most other people drive, and willing to follow the others choice. Given a convention that all (should) drive on the left side (as in Japan), it will be in the best interest for everyone to follow the same rule. Thus in a co-ordination problem situation, it is important to have some settled rule rather than to have any particular rule.

Although this kind of situations can be seen widely in other societies as well, it seems to me that the Japanese people are inclined to regard almost all legal or moral problems as co-ordination problems. Faced with some alternative courses of action, a typical Japanese would say: "I prefer to do A on condition that most of the others will do A; I prefer to do B on condition that most of the others will do B" and so on. As everyone knows both that others have such conditional preferences and that others know she also has the same preference, there emerges a genuine co-ordination problem, in which P shall choose the action which P expects Q to choose, and which P expects Q to expect P to choose, and which P expects Q to expect P to expect Q to choose, and so on.[21]

This inclination probably carries with it the ability to alter one's preference orderings to extent on accordance with circumstances including other people's preference orderings. A part of the reason of such an inclination would be the traditional *weltanschauung* that any solution to a social problem is no better or worse than other solutions. In case if no agent has her own definite preference orderings and each wants to act as to meet other's choices, then to have a settled solution and make everyone able to follow it will be the only relevant matter each has interest in. Such a settled solution will serve everyone's expectation and interest. The relative homogeneity of Japanese people in culture and language makes it easy to send a message of solution efficiently.

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20 Lewis, D., Conventin, London, 1969; Ullman-Margalit, E., The Emergence cf Norms, Oxford, 1977; Green, L., The Authority of the State, ch.4, Oxford, 1988. I further developed this argument in my "Rights of Corporations, Rights of Individuals" in Higuchi, Y. (ed), Five Decades of Constitutionalism in Japanese Society, Tokyo, forthcoming.

21 In this respect I mainly rely on the exposition on conformism in Ullmann-Margalit, supra note 20, at pp. 93-96.

The recent "self-restraint" syndrome during the last emperor's illness can be explained similarly. There was no settled convention as to how people should behave while an emperor is seriously ill. Since the Japanese are eager not to be blamed for bad manners and rules of manners are nothing but conventions, they sought to know how others behave in this situation. Thus, when the government ministers cancelled parties and trips abroad, the other people willingly followed the patterns. Some of them even cancelled their wedding ceremonies. This phenomenon of self-restraint can not be interpreted as a sign of respect the Japanese embrace towards the emperor. There was no difference on this matter as well, and most of the Japanese had little interest in him.[22]

INDIVIDUAL RIGHTS AND CO-ORDINATION

A case of the conflict between human rights and the general welfare is no exception to such a line of thinking. In every social conflict, a suitable solution can only be to follow a settled convention. Thus, the Supreme Court should decide human rights cases according to "the prevailing ideas in society", because it should not disappoint people's expectations as to how they ought to behave. This way of solution would not be given up when there is no real consensus in the community as to the issue in dispute. In such a case, the decision by the Supreme Court itself can create a settled precedent which can focus people's expectations and solve the co-ordination problem successfully. According to the Supreme Court Judgement, 13 March 1957, the

> judgement of what the prevailing ideas in society are in, under our present system, entrusted to judges. The fact that, as with separate individuals in society, there is no necessary unanimity of ideas among judges, ... is the same as in the other situation: the interpretation of law. This exists not only when there is a judgement as to obscenity in writing; hence, it cannot be denied that courts have the authority to determine what constitute the prevailing ideas in society.[23]

In general, co-ordination problems can be solved by norms either emerging as autogenous conventions or those decreed by some authority. Here, the Supreme Court merely seems to confirm a natural conclusion that when there is no established convention, the Court itself can authoritatively settle the situation.

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22 According to a public opinion poll held in Japan in 1988, 47% of those questioned had no particular feeling towards the emperor. Those who are respectful or favourable to him were just 50% (NHK Opinion Poll Section, *Gendai Nihon-Ji n no Ishiki-Kôzô* (The Structure of Consciousness of the Contemporary Japanese), 3rd edition, Nihon-Hôsô-Shuppan-Kyôkai, 1990, at p. 104.

23 11 Keishû, p. 997 (the *Chatterley Case*).

CONCLUSION

From the viewpoint of rights-theorists, who contend that rights should not be subordinated to conceptions of aggregate collective good or the general interest, the Japanese way to dispose of human rights issues can not be completely justified. We ought to presuppose some kind of utilitarianism, appealing to the notion of mutual expected advantage, so as to regard a situation as a co-ordination problem and solve it as such.[24] This way of thinking would require each of us to make a choice which will meet everyone's expectation and interest. And we may presume that we have reason to behave so as to meet everyone's expectation and interest, other things being equal. But it is not always the case that other things are equal; there would be a lot of cases where the prime objective is not to co-ordinate social interaction in society. And rights-theorists would assert that human rights cases should not be solved in accordance with utilitarian calculation.

Yet, the Japanese will not cease not to take rights seriously while they remain unconscious about their way of thinking and its underlying utilitarianism. However, when they realize this, their ability to change their own preferences may bring about not conformism nor western "rigid" individualism but a new kind of soft individualism[25] which can admit plurality of values and allows at least some individuals not to regard a given situation as a co-ordination problem but as a matter of serious individual rights.

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24 Postema, G., "Co-ordination and Convention at the Foundation of Law", 11 (1982) Journal of Legal Studies, pp. 165-203; Postema, G., Bentham and the Common Law Tradition, Oxford, 1986, at p. 108.

25 As an attempt to seek such a possibility, see Yamasaki, M., *Yawarakai Koninshugi no Tanjo* (The Birth of Soft Individualism), Chûô-Kôronsha: 1984.