

The Characteristic of Japanese Constitution and it's Practical Use

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I. Introduction

More than a half century has passed since the end of Pacific War and Japan's adoption new constitution in 1946. Throughout that fifty eight year period, the constitution has been the centre of controversy in Japan's post-war society.

In 1868, under pressure of Europe and America, Japan undertook a programme of modernization.¹ It did so through the adoption of constitutional government where it hoped to gain respect from Western nation. However, in drawing up the constitution, the rules then did not intend to secure human right and freedom by constitution law.² Rather, their intention was to create the appearance of the modern state to the outside world and quell domestic unrest.

The rules decided to institute a constitution based upon the Prussian model as it was then the greatest power in the world. As a result, Japan met with the same destiny as Prussia, which had suffered bitterly in the aftermath of World War I.

Under the Meiji constitution, a prime minister was nominated by the Emperor; this was done with no regard to political parties. Such a system had led to prosperity in Prussia through the leadership of Bismarck, who has given whole hearted support to the Kaiser.³ The following Kaiser, Wilhelm II, however, relieved Bismarck his post.

While the Meiji constitution basically adopted the same political system as Prussia, it more conservative. The separation of powers was nominal. Legislative power was exercised through the Diet with the cooperation the Emperor, judicial

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power was exercised by judges by the name of Emperor, and executive power was exercised directly by the Emperor.

As the government had to be exposed to political parties under this new system, the bureaucracy and armed forces were placed directly under the Emperor's jurisdiction. Though the Minister of the Navy and the Minister of War were members of the cabinet, they had to be a military officer in active service. The prime Minister could not organize a Cabinet if the armed forces refused to nominate the ministers.

The Diet was composed of the House of Representatives and the House of Peers. The latter had broader powers than the former and comprised of hereditary members and Imperial nominees. It was also expected to keep the House of Representatives in check.

While human rights were granted formally, they could be freely restricted by laws. Freedom of expression was severely restricted by several laws.

The Meiji constitution system was an inadequate method of controlling political power.⁴ There was no effective system of controlling forces. Public opinion did not develop because freedom of expression was notably restricted. The notion of "Wa" (Solidarity of Cooperation, which was first explained by the Seventeen-Article Constitution of 604AD) justified the people's support of the Meiji state.

II. Enactment of the Constitution of Japan of 1947

The second World War ended with Emperor Hirohito's announcement of surrender on August 15, 1945 and Japan's acceptance of the Potsdam Declaration in 1945.⁵ The General Headquarters (GHQ) ordered the government to draw up a new constitution. Three-time Prime Minister before the war, Prince Konoe Fumimaro, asked MacArthur, "I would like to know whether you have any ideas or suggestions regarding the organization of Japanese Government and the composition of the Diet." On hearing this MacArthur suddenly sat up perfectly erect and replied in a loud almost reprimanding tone, "First of all

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Japanese Constitution must be revised.⁶” However, the Japanese Government’s draft was found to be too conservative.⁷ The GHQ decided to draft constitution and directed the Japanese Government to finalize the Constitution according to the draft.

After some alternation as to the wording, the draft was approved by the Diet as an amendment to the Meiji Constitution as the Constitution of Japan on November 3, 1946. It came into force on May 3, 1947. Accordingly, the Japanese constitution (here after referred to only as the Constitution) was greatly affected by the US Constitution and was a reaction against the evil of the Meiji Constitution.

III. Characteristic of the Constitution

A constitution is the product of a particular political tradition and historical circumstances. Within this context, each constitution has traits matching its audience in particular ways. Therefore, it is unsurprising to find that Americans adopted ideas from the US Constitution in drafting the Japanese constitution. To evince this, let us examine some article of Japanese Constitution.

Article I states that the Emperor shall be the symbol of the State. He is representative of the unity of the people. He derives his position from the will of the people with who resided sovereign power.

Before the War, the Emperor was an absolute monarch.⁸ He did not come under parliamentary jurisdiction and a handful of people exercised power over the people under his authority. Accordingly, the Emperor was made symbol of the state by the Constitution with some ceremonial formalities not substantially important affairs of state. He performs these roles through the advice and approval of the Cabinet.⁹

In many constitutions, a national flag and anthem are stipulated as symbol of the state. In Japan, the Emperor was stipulated as a symbol, while the flag and national anthem were not. Recently, the Government forced high school

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principals to have the national anthem (Kimigayo) sung during graduation and entrance ceremonies. Many teachers have opposed this because the lyrics of Kimigayo include praises of the absolute monarchy. One high school principal caught in this dilemma consequently suicide.

Taking advantage of this opportunity, the government decided to give Kimigayo and Hinomaru legal status on 13 August 1999, it passed a law stating that Kimigayo is the national anthem and Hinomaru is the national flag.

The origin of Hinomaru (the rising sun flag) can be traced back to 600AD when Prince Shotoku sent a greeting to the Chinese King (Yudai in the Zui Dynasty) in which he stated that the Emperor in the country of the sinking sun (namely China, which lies to the West of Japan). Since then, the rising sun flag has often been used as the symbol of Japan. While the flag was adopted formally as the flag of the merchant fleet in 1870, it did not attain legal status as the national flag until August 1999.

The origin of Kimigayo is relatively new. Although the lyrics are derived from an old 31-syllable Japanese poem, its melody was composed in 1880 and has been used as the national anthem since then. It, too, had no legal status until August 1999. Many Japanese are still opposed to its adoption as the national anthem, primarily due to the following lyrics; the reign of the emperor would continue hundreds and thousands of years until a pebble grows to a rock and becomes covered with moss.

Article 9 states "Aspiring sincerely to an international peace based on justice and order, 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." It continues thus, "In order to accomplish the aim of the preceding paragraph, land, sea, and air force, as well as other war potential, will never be maintained. The right of belligerency of state will not be recognized".

This is the most famous provision of the constitution stipulating that the state does not maintain war potential in order to renounce war. It is a mystery why this point, which does not exist in the German Constitution, was introduced in Japan. MacArthur said that it was proposed by Shidehara, the Prime Minister at the time.¹⁰ However, it is unbelievable, because the government led by Shidehara was drawing up another conservative constitution.

In the constitution there are four similar articles that also appear awkward.

Article 11 states, "The people shall not be prevented from enjoying any of the fundamental human rights. The fundamental rights guaranteed to the people by

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this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”

Article 12 states, “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavours of the people, who shall refrain from any abuse of these freedoms and rights as they shall always be responsible for utilising them for the public welfare.

Moreover article 13 states, “All of the people shall be respected as individuals. Their rights to life, liberty and the pursuit of happiness are enshrined to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other government affairs.

Article 97 adds to this by declaring that the fundamental human rights enshrined by the Constitution are fruits of the age old struggle of man to be free. They have survived the many exacting test for durability and conferred upon this and future generations in trust, to be held for all time inviolate.

Although this declaration of human rights can be attribute violation under the Meiji Constitution, it is doubtful whether these repetitions of general clauses are effective in preventing infringements of rights and freedoms. The Japanese Government suggested deleting one of the four articles, and the GHQ agreed. During the deliberation on the Diet, the GHQ proposed to include a once deleted article in the Constitution. Though initially, opposed to this plan, the Government acquiesced and decided to add it in the last chapter. Article 97 was thus inserted into the Constitution.

Article 18 states, “No person shall be held in bondage of any kind. Involuntarily, servitude, except as punishment for crime, is prohibited.” This clause originated from an amendment to the US Constitution emancipating slaves. Despite the fact that the slavery had never exist in Japan, the GHQ suggested including this in the Japanese Constitution.

Article 19 states that “Freedom of thought and conscience shall not be violated.” Freedom of conscience would ordinarily be guaranteed together with freedom of religion, for freedom of thought is seldom independently guaranteed in a constitution. Its existence could be a reaction to the thought control and censorship under the Meiji constitution. Since laws generally regulate external relationship of behaviour it is difficult to legally protect freedom of thought or intention. Therefore, article 19 is interpreted mainly as a spiritual instruction.

In Europe, the constitution are predicated on established values based on Christianity. On no account are these values to be changed; they are also not to be amended through the constitution. Individualism in Europe is established on the basis of the values. Freedom of conscience could be regarded as a means to protect a citizen's value judgment.

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In Japan, however, there are no such established common values. Japanese tend to build their opinion individually, and the accumulation of such opinion might be decisions of an organisation or public opinion. There is no common substantial criterion when such decision should be made; therefore, Japanese are not able to predict the sort of decision that would be made. Even if one is convinced that this opinion is consistent with justice or the best interest of the organization, there is no guarantee that a form of justice based on the best interest can become a majority opinion. Someone named such a system as “absolutism by common consent” and inferred that the idea sprang from “The seventeen-article Constitution of 604AD.” Accordingly, Japanese are accustomed to building their opinion by considering the opinion of others.

While the origin of such an attitude in Japan are unclear, it is believed that it is a product of the influence of Buddhist doctrine. Instead of coercing people to subscribe to certain value of behaviour, Buddhism urges people to decide matters with an open and unprejudiced mind. As an upshot, Japan has accepted various civilizations of the developed nations in a relatively short period of time. This also one of the reason for the general Japanese lack of self-confidence and the established criterion of Justice.

Article 31 states that “due process of law” is modeled after the 14th amendment in the US Constitution. In article 31 to 40, personal liberties are carefully and thoroughly delineated. Such minute provisions, which ordinarily would have been stipulated in laws, are perceived as reaction to the serious violations by the police under the Meiji Constitution. Most of the personal liberties stipulated in these article are usually protected by legal precedents derived from the due process of law and are not included in the US Constitution. The following are article 31 to 40.

Article 31: No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according procedure established by law.

Article 32: No person shall be denied the right of access to the courts.

Article 33: No person shall be apprehended except upon a warrant issued by a competent judicial officer. The warrant must specify the offence with which the person in charged.

Article 34: No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause. Should any person demand counsel, the case must be decided immediately in open court in his presence and that of this counsel.

Article 35: The right of all persons to be secure in their homes, papers and affects against entries, search and seizures shall not be impaired except upon

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warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33. each search or seizure shall be made upon separate warrant issued by competent judicial officer.

Article 36: The infliction or torture by any public officer and cruel punishment are absolutely forbidden.

Article 37: In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal. He shall be permitted full opportunity to examine all witnesses, and he shall have obtaining witnesses on his behalf at public expense. At all times, the accused shall have the assistance of competence counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

Article 38: No person shall be compelled to testify against himself. Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession.

Article 39: No person shall be held criminally liable for an act which was lawful at the time it was committed, or which he has been acquitted, nor shall he be placed in double jeopardy.

Article 40: Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.

Article 15 adds to this as states, "the people have the inalienable right to choose their public officials and to dismiss them. All public officials are servants of the whole community and not of any group thereof."

Paragraph 2 of Article 15 has been interpreted as the legal basis for the political neutrality of public servants. Originally enacted by the GHQ to suppress labour movements after the war, this political neutrality was soon extended to the prohibition of all public servants' political activities. Consequently, public servants are now prohibited from even holding demonstration marches or posting bills. It goes without saying that public servants are prohibited from running as candidates for parliament.

Though the traditional system of political neutrality of public servants in the USA and Britain was readily introduced in the Constitution, such a system can be attributed to measures eliminating a spoils system in USA and is, therefore, not a universal principle. Such a system is unnecessary for France, Germany or Japan, where a spoils system has not been practiced.

In post-war Germany, such measures were also proposed for inclusion in their Constitution, but they refused to adopt them, leaving such concrete measures

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to provision of law.¹¹ Accordingly, German public servants are permitted to run as candidates for Parliament. They can decide whether to accept the position or not, if elected. Eligibility for election is considered to be a right enshrined by the German Constitution.¹²

An application of Article 15 has recently highlighted some political issues. By limiting the possibility of talented public servants running as a candidate in the Diet, inherited parliamentary positions have increased two thirds of all the members of Government party. As the result, there is a deterioration of Diet men in general.

As a reaction of the Meiji Constitution, the House of Representatives was given higher status than the House of Councillors. It is responsible for the enactment of laws, budget decisions, approval of treaties, and designating the Prime Minister. The House of Representatives has broader responsibilities than the House of Councillors. Their duties are explicitly presented in the following Articles.

Article 59: A bill becomes a law on passage by both House, except as otherwise provided by the Constitution. A bill is passed by the House of Representatives. Should the House of Councillors decide differently, the bill will only become law if a majority of two-thirds or more of the members present in the House of Representatives vote for it.

Article 60: The budget must first be submitted to the House of Representatives. When the House of Councillors makes a decision different from that of the House of Representatives, and when no agreement can be reached even through a joint committee of both House on the matter of the budget, or in the case of failure by the House of Councillors to take final action within thirty days, the period of recess excluded, after the receipt of the budget passed by House of Representatives, the decision of the House of Representatives shall be the decision of the Diet.

Article 61: The second paragraph of the preceding paragraph applies also to the Diet approval required for the conclusion of treaties.

Article 67: The Prime Minister shall be designated from among members of the Diet by the resolution of the Diet. This designation shall precede all other business. If the House of Representatives and the House of Councillors disagree and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fail to make designation within ten days, exclusive of the period of recess, after the House of Representatives has made designation, the decision of the House of representatives shall be the decision of Diet.

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The cabinet system, which was only a practice and had no constitutional basis under the Meiji Constitution, was provided for the Constitution.

Article 65: Executive power shall be vested in the Cabinet.

Article 66: The Cabinet shall consist of the Prime Minister, Who shall be its head, and other Minister of state, as provided for by the law. The Prime Minister and the other Minister of State must be civilians. The Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet.

As requested by the GHQ, paragraph 2 of Article 66, states, "Minister of state must be civilians". Thus, it was and was inserted during deliberations on the Constitution in the Diet. Before the war, military officers unacquainted with politics became Minister of State. However, the renouncement of war and Japan's war potential in Article 9 ensured that would be no military officers of Japan. The reason behind the GHQ's request for such clause is a mystery as it is inconsistent with Article 9 because Japan would be unable to maintain its war potential with a Self-Defense Force.

Under the Meiji Constitution, the Prime Minister had no control over other Minister of State. Disagreements between Cabinet members often caused the resignation of the Cabinet. The way Constitution gives the Prime Minister the power of maintain the integrity of the Cabinet.

Article 68: The Prime Minister shall appoint the Minister of State. However, a majority of them must be chosen from among the members of the Diet.

Article 72: The Prime Minister, represents the Cabinet, submits bills, reports on general national affairs and foreign relations to the Diet and exercise control and supervision over various administrative branches.

Article 75: During their tenure of office, Minister of State shall no be subject to legal action without the consent of the Prime Minister. However, the right to take that action is not impaired hereby.

Article 81: The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

This article, which originated from the USA, endowed the courts with the power of judicial review. The power of judicial review can be exercised as far as it is necessary to judge cases. There have been only 5 cases in fifty-five years that the Supreme Court has declared laws to be unconstitutional.¹³ This could be attributed to the legal technology inherited from the USA. When a law could be interpreted as both constitutional and unconstitutional, the law should be interpreted in conformity to the Constitution so as to avoid being declared unconstitutional.

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The concept of justice and the judicial system meting our justice in Japanese daily life was admittedly established a long ago in Japan. It had no filtered down to common people until quiet recently. As such, a deliberative council discussing judicial reform in Japan recently recommended that the members of the legal profession should increase drastically, thus, it proposed that the numbers of new lawyers by examination should increase from 500 to 3000 annually.¹⁴ This is also one of the attempts to perpetrate the idea of justice into the people.

Article 90: Final accounts of the expenditures and revenues of the state shall be audited annually by a Board of Audit and submitted by the Cabinet of the Diet, together with the statement of audit. It should be presented the fiscal year immediately following the period covered.

The organization and competency of the Board of Audit shall be determined by law. The Board of Audit is attached to the Diet. The original draft of the GHQ had also stipulated that the Diet determined the organization of the Board. However, the Japanese Government proposed the alteration of the sentence in paragraph 2; thus “determined by the Diet” became “determined by law”. In so doing, the government followed the Meiji Constitution by creating the Board Audit as an independent administrative. Although the Board of Audit is independent from the Cabinet, it has deviated from the intention of the GHQ in becoming an administrative agency. Furthermore, the audit report is not submitted directly to the Diet, but to the cabinet and thence, to the Diet.

Article 96: Amendment to this Constitution shall be initiated by the Diet, through a concurring vote two-thirds a more of all members of each House and shall thereupon be submitted to the people of ratification. This requires the affirmative vote of majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify. When the amendment is ratified, it shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this constitution.

There are number of groups in favour of amending the Constitution, the most prominent among them is the Yomiuri Newspaper.¹⁵ There are also many groups who opposed to any such amendments. The majority of people seem to be against it, and it is very difficult to predict when such movements in favour of amending the Constitution will come into the open.¹⁶ Perhaps, it is improbable in near future.

It is true that the defects of the present Constitution have becoe perceptively clear, but such defects have not yet created any concrete inconveniences. One of the problems of the present Constitution lies in its emphasis on the importance of human rights. While this is a reaction to practices during the Meiji Constitution, it does not include a concept of solidarity with the people or community. One of the important features of enacting the Constitution lies in dissuading people from

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seeking immediate gains. Instead, it wishes to consider the needs of public welfare or solidarity with the people. Religion, therefore, play an integral part in persuading people to help each other.

IV. Practical use of the Constitution

The 1947 Japanese Constitution has never been amended or revised. The formal amendment under Article 96 requires concurrence of “two-thirds of all the members of each Houses” and ratification by a majority in a special referendum. As the Constituion was tailored from the Anglo-American tradition, there have been many difficulties adapting it to Japanese society. Consenquently, some of the articles were frozen (unused), some were interpreted differently from the original intentions, and some underwent drastic changes in interpretation. Confronted with such difficulties, there have been attempts to amend the Constitution. However, maany people have been against it, because they believe the amendments would not improve the present situation.

The emperor has since become the symbol of the state. Article 4, paragraph 1 prescribes, “The Emperor shall perform only such acts in matters as are provided for in this Constitution and shall have powers related to goverment.” Article 6 and 7 enumerated some of the matters as a symbol.

The private and public actions of the Emperor vis-a-vis matters of state are enumerated in the Constitution. For example, he regularly attends the Diet, the National Athletic Meet, or the National Arbour Day Ceremony and makes speeches, or holds garden parties and invites many prominent figures. While it is against the wording of the Constitution for him to do so, it is illogical to declare these acts unconstitutional. It has been proposed that such acts should be considered as the Emperor’s public acts and ought to be separate from matters of state. However, it is feared that such public acts would expand unlimitedly, and ultimately result in the constitution losing its credence. As a compromise, the idea of the public figure emerged. This notion maintains that public figures are obliged the attend various ceremonies, to have social relationships, or to meet peopleof high social positions. Beyond matters of state, these are the only such social acts premitted to the Emperor. This has now become the broadly accepted interpretation of the Emperor’s role within the Constitution.

Article 9, paragraph 1 renounced war and paragraph 2 provides, “In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained.” Accordingly, if the existing

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Self-Defense Force (SDF) should fall under “war potential,” it would be unconstitutional to maintain it. The Government has asserted that the forbidden “war potential” is the power to conduct a modern war effectively; as the Self-Defence Force has no missiles or other effective weapons, it can not conduct a modern war. Thus, it lacks does not have any war potential. However, as military preparedness becomes further enriched, it is increasingly difficult to refute the SDF’s ability to conduct a modern war.

In light of the fact that as State has the right to defend itself, the interpretation of the Government changed again so as to enable the State to maintain its right to self-defense. Therefore, it is not constitutionally forbidden to have the minimum military forces to defend the state. The SDF is constitutional because it is a minimum security force or self-defense without any war potential.

Article 13 provides for “the right to life, liberty, and the pursuit of happiness, to the extent that it does not interfere with public welfare, be the supreme consideration in legislation and in other governmental affairs.”

The article was first employed as grounds for interpreting the rights and freedoms guaranteed by the constitution. There are no clauses in the Constitution to restrict the rights and freedoms within in the limits of public welfare except Article 22 (Freedom to choose and change residence and occupation) and 29 (property rights). Thus, it is often cited as a proof that the rights and freedoms are not unlimited.

However, the necessity to define new rights, such a privacy, which are not provided in the Constitution, came to be developed in time. In the United States Constitution, the Ninth Amendment provides, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or discharge others retained by the people.” Accordingly, the US Courts had established by judgment some new constitutional rights which are not enumerated in the Constitution. In Germany, Article 2 paragraph 1 states, “Everyone shall have the right to the free development of his personality in far as he does not violate the rights of others or offend against morality.”¹⁷ This article is deemed to comprehensively guarantee the rights and freedoms of people which were not enumerated in the Constitution.

In Japan, Article 13 guarantees the comprehensive rights of personal integrity, which can include not only enumerated rights and freedoms but also other rights which are not enumerated in the Constitution. The court declared some un-enumerated rights equivalent to other enumerated rights, and the right to privacy was declared by the court as a constitutional right in Japan.

Article 33 provides that no person shall be apprehended except upon a warrant issued by a competent judicial officer. The warrant must specify the offense with which the person is charged, unless he is apprehended while the offence is being committed. According to the wording of this article, a suspect

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shall not be apprehended without a warrant. The only exception to this is when a criminal is arrested while committing a crime. Both principles and exceptions are stated and as a result, a law can not provide an exception to the constitutional exception. However, the Criminal Procedure Act stipulates that the police can arrest a suspect of a relatively serious offense, without a warrant, on the condition that the arrest warrant is issued immediately after the arrest. This should be unconstitutional. The substantial reason for this provision lies in the fact that the policeman should arrest a suspect in his presence. Such an arrest is constitutional because the warrant is issued "in advance" of the arrest.

Article 39 provides, "that no person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy."

The prohibition of double jeopardy means that no person shall be held criminally liable twice for the same offence. This is based on the principle that a person cannot be tried for the same crime twice. Under this provision, a public prosecutor should not appeal a decision of "not guilty". Ever since the Meiji Constitution, however, Japan has adopted three judicial systems. Under this system, public prosecutors can appeal a decision of not guilty or guilty to a higher court. The maintenance of this system is inconsistent with the wording of the Constitution. But the Supreme Court has decided that the lower courts, appellate courts and the Supreme Court are only a part of one continued state of jeopardy and an appeal by a public prosecutor would not go against the Constitution. Through this decision, the principle was deprived of its original meaning.

The Article 69 provides, "If the House of Representatives passes a non-confidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives are dissolved within ten days."

This constitution has no provision to judge whether a Cabinet can dissolve the House of Representatives at its discretion. Accordingly, the interpretation of this article has been split.

The competence to dissolve the House of Representatives is enumerated as one of the matters of state; and when the Emperor performs it, he must do it with the advice and approval of the Cabinet. Article 4 states that the emperor shall perform only such acts in matters of state as are provided for in the Constitution and shall not have powers related to government. The dissolution by the Emperor must be construed as a formal and ceremonial act. Likewise, the advice and approval of the Cabinet must also be construed as advice for a ceremonial act of the Emperor and includes no governmental power to determine a dissolution.

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In 1948, when Yoshida Cabinet was in office, Prime Minister Yoshida wished to dissolve it so as to get a majority in the House of Representatives. The opposition would not submit a resolution of no confidence. The GHQ had maintained the interpretation that the Cabinet can dissolve the House of Representatives only as prescribed in Article 69. Yoshida asked the GHQ gave the order and the House of Representatives was dissolved on December 23, 1948. This is known as dissolution by agreement.

Under the Meiji Constitution, the Cabinet could dissolve the House of Representatives freely, and the Yoshida Cabinet wished to recover such powers under the new Constitution. The Government negotiated with the GHQ to alter the interpretation of the GHQ on the grounds that Japanese scholars held that the power to decide dissolution also lay in the device and approval of the Cabinet. In 1952, the Supreme Commander for the Allied Powers was replaced and the new GHQ approved the interpretation by the Government of Japan.

Consequently, the dissolution of the House by the Yoshida Cabinet in August 22, 1952 was ordered on the basis of this new interpretation. This was called surprised dissolution. This interpretation has since taken precedence.

Article 89 prescribes, "No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority."

"Under the control," was translated into Japanese as "belonging to." Thus, it is a matter of contention whether the government can give financial assistance to private educational institutions unaffiliated to the public authority. It is clear from the wording that it is unconstitutional for the government to support private educational institutions. But the government decided that it was not appropriate to refuse subsidies to private educational institutions working for the public good. It was decided that educational enterprises not belonging to public authority was a misinterpretation and that this sentence should be construed with the meaning "under the control of." Since private educational institutions are also under the control of the public authority, they interpreted the article to mean that assistance to private educational institutions was constitutional.

Article 87 states, "In order to provide for unforeseen deficiencies in the budget, a reserve fund may be authorised by the Diet to be expended upon the responsibility of the Cabinet. The Cabinet must get subsequent approval of the Diet for all payments from reserve fund."

There are two possible interpretations of "reserve fund": One perceives the reserve fund as a means to fill unforeseen deficiencies of the budget or defraying costs not provided for in the budget. The second interprets it as a permanent fund established by resolution of the Diet, which exist over the term of budget, and is

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used not only for defraying cost not provided for in the budget, but also for expenditures under the responsibility of the Cabinet in cases of failure of the budget or for plans extending past the term of budget.

The Japanese Government adopted the former interpretation, which was similar to the interpretation of the Meiji Constitution. However, in lieu of another article that states, "The Cabinet shall prepare and submit to the Diet for its consideration and decision a budget for each fiscal year", this interpretation is doubtful. The government should have accepted the second interpretation because the fund to fulfil unforeseen deficiencies of the budget can included in the budget; moreover, it does not require separate provision under the Constitution. Perhaps the government of that time did not have enough knowledge of financial system of other states and thus interpreted the article in light of the Meiji Constitution.

Article 96 provides, "A special law applicable only to one local public entity can not be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law."

This provision was originally adopted in some of the states in the United States in response to the enactment of laws which made exemptions for laws providing inequalities or disadvantages affecting the essence of the local public bodies. It could be regarded as a provision necessary in a federation of states, but unnecessary in a homogenous nation.

After the passing of the Constitution, Article 95 was applied to fifteen laws enacted between 1949 and 1951, affecting 18 cities by providing them with financial assistance. Afterwards, the government adopted new interpretation of the article. This provision should not have been applied to laws concerning local public bodies which do not interfere with the organisation, management, competence or rights or duties of the inhabitants. Consequently, its inapplicability of this provision has become void and Article 95 has become virtually meaningless.

V. Conclusion

Although the Constitution of Japan has never been formally amended in the past 58 years, the interpretation of the Constitution has been dramatically changed to adapt it to changes in actual situations. It might seem strange that instead of making amendments such interpretations, the wording of the Constitution is sometimes ignored. Here, we do not see a firm belief to apply the

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Constitution as a supreme norm for instituting the idea of justice, but the mental attitude to apply it as the concrete appropriateness of the norm. The reasons behind the flexible application of the Constitution are a subject of careful consideration, but it might be summarised as follows:

First, the Japanese did not believe that amending the Constitution would improve the state of things. Amendment to one Article would inevitably lead up to the amendment of Article 9. It was feared that if the Constitution was amended, Japan would not be able to resist pressure to reinforce the Self-Defense Forces so as to cooperate in the collective security system of a superpower.

Secondly, unlike laws or ordinances, the constitution does not effect the rights and freedoms of the people directly; rather, it has the nature of idea or ideology. Accordingly, the government and the courts have had broad discretion to interpret the Constitution, taking into account normal political influences.

Third, is the Japanese tradition to attach more importance to concrete appropriateness rather than to making rules and observing them. Such traditions may have something to do with the doctrine of Buddhism, which teaches one to find truth without prejudice.

Fourth, Japan has no history of naturally developed laws. The idea of law was imported from Europe and America as a tool to govern the people. Until recently, people did not regard laws as tools to protect their freedoms and rights. Only pressure and business groups acquainted with the virtue of laws were able to actively utilise them.

Endnotes

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- 3 Nihon-no Rekishi (1959). Tokyo: Yomiuri Shibunsha. Japan, p. 61.
- 4 Ibid., p. 70.
- 5 The text of *Postdam Declaration: Proclamation by Heads of Government of the United States, United Kingdom, and China*, July 26 1945, is "Appendix A-3" Government Section, SCAP, in *Political Reorientation of Japan*: September, 1945, p. 413.
- 6 Yasuzo Suzuki. (1945). Kempo kaisei no konpon ronten. *Shinsei* 1. No 2 (December), p. 23.
- 7 Hugh Borton (1955). *Japan's Modern Century*. New York: The Ronald Press Co. USA, p. 424.
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- 10 Koseki Shoichi (1997). *The Birth of Japan's Postwar Constitution*. Westview Press: Harper Collin Publisher, USA, p. 166.
- 11 David P. Currie (1994). *The Constitution of the Federal Republic of Germany*. The University of Chicago Press, Chicago and London, p. 222.
- 12 Ibid., p. 223.
- 13 Lawrence W. Beer and Hiroshi Itoh (1996). *The Constitutional Case Law of Japan*. University of Washington Press: Seattle and London, p. 3-54.
- 14 Data Provided by Justice Itsuo Sonobe, Supreme Court of Japan.
- 15 *Asahi Shinbun*, August 13, 1948.

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- 16 Koho Kenkyukai (1949), Kenpo kaisei iken. *Horitsu Jiho* 31, No.4, April, pp.55-61.
- 17 Currie, *The Constitution of The Federal Republic of Germany*, p.12.

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