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The Constitution of Japan: An Unfinished Revolution

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The Constitution of Japan: An Unfinished Revolution

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¹ The Constitution of Japan, preamble, par. 1.

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Introduction

Toward a New Understanding of the Constitution of Japan

Japan's fanatical ultra-nationalistic movement of the pre-war years vandalized the Meiji constitutional regime that had once experienced the liberal democratic political process to a considerable degree. The movement finally ended when Japan surrendered to the Allied Powers in World War II. Then, a crucial question emerged as to how to respond to the reality of the defeat. There were two options available for the Japanese people: to restore the "good old regime" or to create a completely new political order. However, the actual outcome was something between the two options.¹ The Constitution of Japan, which was promulgated on November 3, 1946, and became effective on May 3, 1947, was established by following the amendment process the Constitution of the Empire of Japan (the Meiji Constitution) provided for but introducing new principles of government fundamentally different from its predecessor.²

In a comparison, we find a numbers of similarities and differences in these two constitutions. Organization of the two constitutions looks almost identical.³ The chapter dealing

¹ For the process of making the Constitution of Japan, see Sato Tatsuo, *Nihonkoku kenpo seiritsushi* 4 vols. (Tokyo: Yuhikaku, 1962, 1964, 1994) (hereinafter cited as Sato, *Seiritsushi*); Takayanagi Kenzo, Ohtomo Ichiro, and Tanaka Hideo, eds., *Nihonkoku kenpo seitei no katei* 2 vols. (Tokyo: Yuhikaku, 1972) (hereinafter cited as Takayanagi, *Seitei Katei*); Irie Toshio, *Kenpo seiritsu no keii to kenpojyo no shomondai* (Tokyo: Daiichi Hoki Shuppan, 1976) (hereinafter cited as Irie, *Keii*); Tanaka Hideo, *Kenpo seitei katei oboegaki* (Tokyo: Yuhikaku, 1979) (hereinafter cited as Tanaka, *Oboegaki*); Koseki Shoichi, *Shin kenpo no tanjyo* (Tokyo: Chuko Bunko, 1989, 1995) (hereinafter cited as Koseki, *Tanjyo*); Takahashi Hikohiro, *Nihonkoku kenpo taisei no keisei* (Tokyo: Aoki Shoten, 1997) (hereinafter cited as Takahashi, *Keisei*). Kyoko Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making* (Chicago: University of Chicago Press, 1991); Koseki, *The Birth of Japan's Postwar Constitution*, translated by Ray A. Moore (Boulder: Westview, 1998); Ray A. Moore & Donald L. Robinson, eds., *The Constitution of Japan: A Documentary History of Its Framing and Adoption, 1945-1947*, CD-ROM ed. (Princeton: Princeton University Press, 1998) (hereinafter cited as RM); John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton, 1999); Theodore McNelly, *The Origins of Japan's Democratic Constitution* (Lanham, MD: University Press of America, 2000); Dale M. Hellegers, *We, the Japanese People: World War II and Origins of the Japanese Constitution* 2 vols. (Stanford: Stanford University Press, 2001); Ray A. Moore & Donald L. Robinson, *Partners for Democracy: Crafting the New Japanese State under MacArthur* (New York: Oxford University Press, 2002).

² The Constitution of the Empire of Japan, art. 73.

³ The Constitution of the Empire of Japan, which was promulgated on February 11, 1889, and became effective on November 29, 1890, has seven chapters and seventy-six articles in total. Its organization was as follows: Chapter I The Emperor; Chapter II Rights and Duties of Subjects; Chapter III The Imperial Diet;

with the *tenno* (emperor) comes first in both constitutions. When we look more closely, we find that the status and powers of the *tenno* have changed completely. Although the *tenno* still remains as an institution in the postwar constitution,⁴ there no longer exists a *tenno* as the head of state with a divine right to govern. The *tenno* has become merely “the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.”⁵ Therefore we recognize a fundamental change in the holder of sovereign power.

The transition from the Meiji Constitution to the Constitution of Japan is procedurally dependent upon a pre-existing rule but substantially something fundamentally new. However different their constitutional theories might be, both conservative Hozumi Yatsuka⁶ and liberal Minobe Tatsukichi⁷ understood that a change of the *kokutai*, national polity or national character, led to a revolutionary transformation of the state.⁸ While the central idea of the Meiji constitutional system lay in the particularistic concept of the *kokutai* that the *tenno* in a line unbroken for ages eternal should govern Japan forever by following the will of the imperial founder and ancestors, the postwar constitution was based upon a universalistic principle of government as popular trust: “Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.”⁹ The basic structure of the postwar constitution is to adopt the principle of popular sovereignty and thorough pacifism in order to secure due respect for human dignity as

Chapter IV The Ministers of State and the Privy Council; Chapter V The Judicature; Chapter VI Finance; Chapter VII Supplementary Rules. Meanwhile, the Constitution of Japan has eleven chapters and one hundred three articles in total. Its structure is as follows: Chapter I The Emperor; Chapter II Renunciation of War; Chapter III Rights and Duties of the People; Chapter IV The Diet; Chapter V The Cabinet; Chapter VI Judiciary; Chapter VII Finance; Chapter VIII Local Self-Government; Chapter IX Amendments; Chapter X Supreme Law; Chapter XI Supplementary Provisions.

⁴ Even under the Constitution of Japan, the word “tenno” is usually translated into “emperor.” However, Japan ceased to be an empire after the Constitution became effective. Thus, I use “tenno” rather than “emperor” under the postwar regime except when the word “emperor” is used in an official English translation.

⁵ The Constitution of Japan, art. 1.

⁶ See Hozumi Yatsuka, “Kenpo no seishin,” in Nagao Ryuichi, ed., *Hozumi Yatsuka shu* (Tokyo: Shinzansha, 2001), 23.

⁷ See Minobe Tatsukichi, *Nihon kenpo no kihon shugi* (Tokyo: Nihon Hyoronsha, 1934), 7-8; Minobe Tatsukichi, *Shin kenpo no kihon genri (Fundamental principles of the New Constitution)* (Tokyo: Kunitachi Shoin, 1947), 69-73.

⁸ For the details of constitutional interpretations in the Meiji system, see Chapter 1 section 7.

⁹ The Constitution of Japan, preamble, par. 1.

individuals. The values the two constitutions try to defend differ completely from each other.

In this dissertation, I will try to clarify the meaning of this continuity in procedure and discontinuity in substance. Through examining the reason why the Japanese people have had both a continuous and discontinuous constitutional experience, I will argue that making the Constitution of Japan should be best understood as an unfinished constitutional revolution. If revolution can be understood as simultaneous coexistence of both a notion of freedom and an experience of a new beginning,¹⁰ the process of making the Constitution of Japan can be regarded as a type of revolution. Since then, this constitution has constituted Japanese politics unprecedentedly in three aspects: process, style, and substance. My argument refuses to follow two conventional views of the postwar constitution: theories of external imposition and of internal continuity.

First, the external imposition theory attaches great importance to the fact that the postwar constitution was exogenous in essence and imposed upon the reluctant Japanese government as a consequence of harsh occupational policy. For instance, Robert Ward once severely criticized the fashion that GHQ intervened in the most fundamental domestic issue.¹¹ The Allied Powers, specifically General Douglas MacArthur and his GHQ staff, imposed the postwar constitution on the Japanese government, which had been extremely reluctant to revise the Meiji Constitution substantially because the ruling elites were preoccupied by management to maintain their cherished *kokutai*. Ward singled out the meeting on February 13, 1946, as evidence of threatening the Japanese government to adopt the new constitution.¹² That meeting was held between Brigadier General Courtney Whitney, Chief of the Government Section of GHQ, and Foreign Minister Yoshida Shigeru and Minister of State in charge of constitutional problems Matsumoto Joji, who had

¹⁰ See Hannah Arendt, *On Revolution* (New York: Penguin, 1963, 1965).

¹¹ See Robert E. Ward, "The Origins of the Present Japanese Constitution," 50 *American Political Science Review* 980-1010 (1956). However, Ward later has revised his imposition theory because more materials became available afterwards. Compare Robert E. Ward, "Presurrender Planning: Treatment of the Emperor and Constitutional Change," Robert E. Ward and Yoshikazu Sakamoto, eds., *Democratizing Japan: The Allied Occupation* (Honolulu: University of Hawaii Press, 1987), 1-41. Ward himself told Takayanagi Kenzo, the former chairman of the Commission on the Constitution, that because other evidence was available now, he would write the incident differently. See Takayanagi, *Seitei Katei*, 2: 59-60.

¹² See Ward, "The Origins of the Present Japanese Constitution," 995-999.

assumed that the GS would respond to the governmental proposed draft of revision of the Meiji Constitution.¹³ Instead, Whitney handed an American draft to them like a bolt from the blue. During the meeting, Whitney explained the background to repudiating the Japanese plan and preparing their own draft of a constitution and necessity for the Japanese government to accept a basic idea of the American draft and revise the Meiji Constitution in that direction. The words of Whitney might be understood as intimidation. Among other things, Whitney mentioned the possibility that the *tenno* might be prosecuted as a war criminal. Ward relied upon Sato Tatsuo's account of 1955, which basically derived from notes of Matsumoto because Sato did not attend the meeting, when Ward pointed out as evidence of the threat the following: "General MacArthur had for some time been considering most seriously the maintenance of the Emperor, but that it was essential to the accomplishment of this aim that the Japanese Government proclaim a revised constitution similar to the draft here being presented. If this was not done, the person of the emperor could not be guaranteed."¹⁴ And Ward wrote that "The most decisive pressure said to have been brought against [the Japanese] is [...] the threat to 'the person of the Emperor.' If such a threat was made, one can understand far better the docility of the Japanese in the remaining negotiations on constitutional revision."¹⁵ This criticism was resonant with the attempts of conservatives to revise the Constitution of Japan in the 1950s.¹⁶ However, "Most serious of all", Ward continued to write, "is the damage this constitution may have done to the very cause it was intended to serve--the democratization of Japan." Because "an idealized version of Anglo-American political institutions" did not fit well with "the social, economic and political realities of Japanese society", in Ward's view, "the older and more traditional political views and practices" that "not only survived but grew stronger and bolder"

¹³ For a description of the meeting from the Japanese side, see Sato Tatsuo, *Seiritsushi*, 3: 47-57. From the American side, see Takayanagi, *Seitei Katei*, 1: 320-336.

¹⁴ Sato Tatsuo, *Jurisuto* No. 82 (1955), 13, reprinted in his *Seiritsushi*, 3: 47

¹⁵ Ward, "The Origins of the Present Japanese Constitution," 999 (footnote omitted).

¹⁶ For arguments for revising the postwar constitution, see Watanabe Osamu, *Nihonkoku kenpo "kaisei" shi (A History of Attempts to Revise the Constitution of Japan)* (Tokyo: Nihon Hyoronsha, 1987), 233-331.

would undermine the liberal democratic promise of the constitution.¹⁷

In 1980, Eto Jun, a literary critic, expressed his criticism of a made-in-America constitution. Eto argued that the current constitution had constrained the psychology of the Japanese as a taboo that had rejected all criticisms.¹⁸ His central target was Article 9 of the postwar constitution that provides for denunciation of war and of armed forces and the right of belligerency.¹⁹ His argument had a dual structure: Article 9 excluded all criticisms as a taboo and the fact that GHQ was its real producer was forbidden ground as well. There is nothing new in criticisms that the constitution was imposed by GHQ and that Article 9 deprived Japan of sovereignty as an independent state. Immediately after the end of the occupation, conservatives began to campaign against the imposed constitution to create a more traditional *tenno* system and the military. Eto's argument held only a part of the traditional attacks on the postwar constitution. What was new in Eto's criticism was that he connected to the imposition theory the fact that the Civilian Censorship Department of GHQ rigorously censored the Japanese press not to criticize their authority and not to inform the people of the bizarre origins of the postwar constitution.²⁰ In his view, GHQ not only limited the sovereign right of an independent state to fight war but also constrained a way of thinking of the Japanese people. Eto contended that the effects still remained.

However, the external imposition theory is not entirely persuasive. The alleged threat in the

¹⁷ Ward, "The Origins of the Present Japanese Constitution," 1010.

¹⁸ See Eto Jun, *1946 nen kenpo: Sono kosoku (The Constitution of 1946: Its Constraint)* (Tokyo: Bungei Shunjuu, 1980). See also, Eto Jun, *Tozasareta gengo kukan: Senryogun no kennetsu to sengo nihon (The Sealed Linguistic Space: The Censorship of the Occupation Forces and Postwar Japan)* (Tokyo: Bungei Shunjuu, 1989, 1994).

¹⁹ Article 9 of the Constitution of Japan reads "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. (2) 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. The right of belligerency of the state will not be recognized."

²⁰ For the censorship by CCD, see Dower, *Embracing Defeat*, 405-440; Yamamoto Taketoshi, *Senryoki media bunseki (An Analysis of Media during the Occupation)* (Tokyo: Hosei Daigaku Shuppankyoku, 1996); Ariyama Teruo, *Senryoki media shi kenkyu: Jiyu to kisei 1945 (A Study of History of Media during the Occupation: Freedom and Regulation 1945)* (Tokyo: Kashiwa Shobo, 1996). As Yamamoto has pointed out, Eto failed to understand GHQ's censorship in relation to the pre and mid-war Japanese censorship system. See Yamamoto, *Senryoki media bunseki*, 554-562. Further, Eto did not raise the critical issue that Article 9 was established to save the *tenno* himself and its institution. See Theodore H. McNelly, "'Induced Revolution': The Policy and Process of Constitutional Reform in Occupied Japan," Ward & Sakamoto, *Democratizing Japan*, 76-106, 102.

February 13 meeting is dubious.²¹ At the meeting, which was clearly a turning point of history, no American and Japanese participants other than Matsumoto Joji remembered that Whitney said that if the Japanese government did not proclaim a revised constitution similar to the GHQ draft, the person of the *tenno* could not be guaranteed.²² At that time, MacArthur had already decided to exclude the *tenno* from war criminal investigation and told the Joint Chiefs of Staff that he strongly opposed a plan to render the *tenno* subject to a war criminal trial.²³ However, the Japanese government did not know this fact but did feel the international opinions were extremely harsh on him.²⁴ In such a situation, the Japanese participants might misunderstand Whitney's utterance as a threat. It is reasonable, however, to interpret what Whitney said in that meeting as an objective warning of "what might happen if the Japanese Government failed to effect a constitutional reform in accordance with the terms of the Potsdam Declaration."²⁵ Charles Kades, one of the American participants, explains Whitney's intention on the analogy of lawyer's counsel of a danger if a client refuses to follow his or her advice in the lawyer-and-client relationship.²⁶

More fundamentally, the imposition theory is in a sense self-contradictory. In fact, the conservatives have gained maximum benefit from GHQ's intervention because they can maintain

²¹ For the details, see Chapter 3 section 3.

²² See Takayanagi, *Seitei Katei*, 2: 58; Sato Tatsuo, *Seiritsushi* 3: 53-56 (Sato Isao adds this portion in 1994). According to the note of American participants, Whitney said the following: "As you may or may not know, the Supreme Commander has been unyielding in his defence of your Emperor against increasing pressure from the outside to render him subject to war criminal investigation. He has thus defended the Emperor because he considered that that was the cause of right and justice, and will continue along that course to the extent of his ability. But, gentlemen, the Supreme Commander is not omnipotent. He feels, however, that acceptance of the provisions of this new Constitution would render the Emperor practically unassailable. He feels that it would bring much closer the day of your freedom from control by the Allied Powers, and that it would provide your people with the essential freedoms which the Allied Powers demand in their behalf." Takayanagi, *Seitei Katei*, 1: 326-328.

²³ On November 29, 1945, the Joint Chiefs of Staff sent General MacArthur the terms of SWNCC-55/6 and instructed him to collect evidence concerning the *tenno*'s possible war criminality. MacArthur replied negatively on January 25, 1946. General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower), *FRUS*, 8(1971): 395-397 in RM054. See also, Robert E. Ward, "Presurrender Planning," Ward & Sakamoto, *Democratizing Japan*, 1-41.

²⁴ For the international opinions on the *tenno* during the period of before and after 1945, see Takeda Kiyoko, *Tenno kan no sokoku (The Conflicting Views on the Emperor)* (Tokyo: Iwanami Shoten, 2001, 1978).

²⁵ Tanaka Hideo, "Introduction," in Takayanagi, *Seitei Katei*, 1: xxii. See also, Tanaka Hideo, *Oboegaki*, 189-204; McNelly, "Induced Revolution," Ward & Sakamoto, *Democratizing Japan*, 82.

²⁶ See Charles L. Kades, "The American Role in Revising Japan's Imperial Constitution," 104 *Political Science Quarterly* 215-247 (1989).

their cherished *tenno* institution anyway. In light of the extremely antagonistic atmosphere among the Allied countries other than the United States,²⁷ it is fair to say the American “imposition” saved the *tenno* himself and its institution from the danger of its abolition for the conservative cause.

Meanwhile, secondly, the internal continuity theory, which my thesis also challenges, tends to ignore the revolutionary novelty of the postwar constitution. While the external imposition theory more or less recognizes an intentional discrepancy between the prewar and postwar constitutions, the internal continuity theory places emphasis upon traditional continuity expressed in the postwar constitution.

The internal continuity theory argues that the symbolic *tenno* system is nothing fundamentally innovative but the most suitable to the traditional image of the *tenno*.²⁸ Its argument is basically founded upon a contention that the *tenno* did not directly govern the state during most periods of Japanese history.²⁹ Thus, the theorists argue that the *tenno* has been a symbol of unification of the nation for most of the time. During such a period, the *tenno* has had no real political power but only moral or spiritual authority. That is, the *tenno* has reigned but not governed. Ancient times and the Meiji constitutional era were exceptionally deviant. During these periods, the *tenno* was at once a ruler and a symbol. The internal continuity theory contends that the separation between power and authority has been a normal condition in Japanese history. According to the theory, the Constitution of Japan presents only a traditionally authentic model of the *tenno* system. Thus, the symbolic *tenno* system the postwar constitution realizes is essentially consistent with a traditional principle of indirect government and the postwar constitution has not been the most drastic reform since the

²⁷ See Takeda, *Tennokan no sokoku*.

²⁸ See e.g., Tsuda Sokichi, “Kenkoku no jijyo to bansei ikkei no shiso (Conditions of the Nation Building and the Idea of a Line Unbroken for Ages Eternal), *Sekai* April 1946 in Hidaka Rokuro ed., *Sengo shiso no shuppatsu (The Beginnings of Postwar Thoughts)* (Tokyo: Chikuma Shobo, 1968), 114-142; Odaka Tomoo, *Kokumin shuken to tennosei (Popular Sovereignty and the Emperor System)* (Tokyo: Kunitachi Shoin, 1947).

²⁹ See Ishii Ryosuke, *Tenno: Tenno tochi no shiteki kaimei (The Emperor: Historical Elucidation of the Government by the Emperor)* (Tokyo: Kobundo, 1950); Ishii Ryosuke, *Tenno: Tenno no seisei oyobi fushinsei no dento (The Emperor: Origins of the Emperor and the Tradition of Indirect Government by the Emperor)* (Tokyo: Yamakawa Shuppansha, 1982).

founding of the state.³⁰ This school of thought attempts to minimize the impact of the defeat in war on the traditional authority in Japan.

For instance, Tsuda Sokichi, who was an eminent professor of Japanese history at Waseda University and a victim of the fanatic right-wing assault against his positivistic approach to ancient Japan, argued in his famous and controversial 1946 essay how the idea of a line unbroken for ages eternal was born and had developed.³¹ Tsuda's reasoning reached a point similar to what the Constitution of Japan declared several months later.³² "The significance of the existence of the imperial house consists in the center of the unity of the people and the living symbol of the national spirit."³³

What Tsuda as a victim of ultra-nationalism said about the *tenno* and Japanese history received close public attention after the wartime defeat. In the new era, he presented an unchanged image of the *tenno* as "the living symbol of the national spirit." In his position, the postwar constitution is nothing revolutionary, but it expresses merely the core of the Japanese tradition of a line unbroken for ages eternal. The new constitution guarantees a return to normalcy.

Odaka Tomoo, professor of jurisprudence at the University of Tokyo, is regarded as one of the most prominent advocates of the internal continuity theory.³⁴ He argued that the *kokutai* had never changed, because both popular sovereignty and the *tenno* sovereignty were parts of the idea of "nomos sovereignty."³⁵ To him, the most urgent problem of the day was to reconsider the concept of sovereignty that had been understood as absolute and to recast it under the ideal of law. In his view, any political power had to be subject to law as justice. If so, it was nomos that should be sovereign

³⁰ See Ishii, *Tenno: Tenno no seisei oyobi fushinsei no dento*, 334-336.

³¹ Tsuda, "Kenkoku no jijyo to bansei ikkei no shiso." For the details of Tsuda's argument, see Chapter 5 section 6.

³² Tsuda wrote this essay in January 1946. It was at least one month before the government officially announced its constitutional draft including the symbolic emperor system.

³³ Tsuda, "Kenkoku no jijyo to bansei ikkei no shiso," 140.

³⁴ For the details of Odaka's argument, see Chapter 5 section 7.

³⁵ Odaka, *Kokuminshuken to tennnosei*.

because it meant the fundamental principle of law.³⁶

In Japanese history, in Odaka's view, rule of *nomos* had been consistent. In fact, he argued, the *tenno* reigned but did not govern under the Meiji Constitution. The Japanese tradition showed that the *tenno* had constantly embodied the invariably right ideal of politics. "Purification of the *tenno*'s status as such from its superfluous mixture in real politics leads to the symbolic *tenno* system." The *tenno* as symbol represented the invisible people as a whole in a visible way when he carried out matters of state such as appointment of the prime minister and the chief justice of the Supreme Court. "The acts by the *tenno* as symbol are the most important state affairs that are representative of the ideal and meaning of popular sovereignty. This is a true reconciliation of popular sovereignty and the *tenno* institution in the new constitution. This is what a new *tenno* institution should be like in a new era, without extinguishing the tradition of history and with purifying long-standing abuses associated with the tradition of history."³⁷

In this way, Odaka claimed that *nomos* as the expression of the legal ideal of justice had remained unchanged. In the Japanese tradition, government by the *tenno* did not mean a form of executing actual state affairs on the part of the *tenno* but presented the righteous ideal of government. The *tenno* as the symbol of the unity of the people showed this Japanese tradition in the most purified way. Thus, to Odaka, the *kokutai* had never ceased to exist.

However, the internal continuity theory trivializes the postwar constitutional experience of the Japanese people. It is true that the postwar constitution retains the *tenno* institution as the symbol of the unity of the people. But it is only a part of the entire constitutional scheme. If there were no serious change in the constitutional system, the principle of popular sovereignty the postwar constitution has declared would not be something fundamentally new. Before the defeat, however, if someone had publicly said that the Japan was a democratic state, he or she would have been accused

³⁶ Odaka, *Kokuminshuken to tennosei*, 63.

³⁷ Odaka, *Komuminshuken to tennosei*, 205-206.

and imprisoned due to a violation of the *Chian Iji Ho* (the Peace Preservation Law).³⁸ Open discussion about the current political system, which inevitably led to questioning the legitimacy of the *kokutai*, always faced grave obstacles of criminalization. That situation was contrary to the principle of popular sovereignty, which requires all kinds of information about governmental officials and their policies to flow freely so that the sovereign people themselves can evaluate them from their own perspective. Thus the idea of popular sovereignty is without doubt unprecedented in Japan.³⁹ Due respect for human dignity as individuals, a core substantial value of the postwar constitution, is also a novel concept for the Japanese governmental process. The postwar constitution has indeed brought Japan to a fundamentally innovative stage of its history.

Therefore, both the external imposition theory and the internal continuity theory do not fit well with what really happened in the process of creating the postwar constitution. They also fail to present the eminent features of the postwar constitution. Thus, we have to move beyond thinking in terms of external imposition or internal continuity. Before embarking upon a search for a third way, however, we have to confirm our starting point. How different is the Constitution of Japan from the Meiji Constitution? Here we briefly examine the novelty of the postwar constitution in three respects: process, style, and substance.

1) Process:⁴⁰ As a matter of process, the postwar constitution is a product of public deliberation on creating political order that the Japanese people as a whole never have had before. The former Constitution of the Empire of Japan, which is the first modern written constitution in Japan, was established as a gift of the benevolent *tenno* to his subjects. A few governmental leaders secretly prepared a draft. When the Meiji Constitution was in the making, there were no public discussions on what was the goal of the government, which type of governmental systems would properly work to attain the goal, or what the public welfare meant. Japanese people failed to

³⁸ For the contents and administration of the *Chian Iji Ho*, see Okudaira Yasuhiro, *Chian Iji Ho shoshi* (Tokyo: Chikuma Shobo, 1977).

³⁹ See Maruyama Masao, "Sengo minshu shugi no 'genten' ('The Starting Point' of Postwar Democracy)," in *Maruyama Masao shu* (Tokyo: Iwanami Shoten, 1996), 15: 57-70, 67.

⁴⁰ For the details of the process of making the postwar constitution, see Chapters 2 & 3.

constitute a state structure because they were not entitled to participate in state affairs as active citizens. They as subjects could play only a subordinate role in a field the *tenno* had delineated. The very framework was a *fait accompli* and far beyond their control. If a person discussed a derisive governmental system openly, he or she would be accused of a violation of the *Chian Iji Ho*. Although the Meiji Constitution had an article on its amendment, the Imperial Diet was excluded from the amending process.⁴¹ Open discussions about its amendability had never occurred because the constitution was believed to be the great immortal code.⁴² The Meiji Constitution was, from the beginning to the end, a benefit granted by the charitable *tenno*. There was no room whatsoever for self-determination by the people and thus no public deliberation was necessary.

In sharp contrast, the Constitution of Japan is an outcome of unprecedented public deliberation, whatever limits it might have involved. On the official front, the postwar Imperial Diet can be regarded as a virtual constitutional convention for the Constitution of Japan. Socialists and communists were allowed to participate, along with a majority of conservative parties, in debates in the Imperial Diet. Furthermore, a few women had their first ever seats in the Diet as a result of a general election based upon a newly established rule of universal suffrage.⁴³ In the Diet, women as well as an overwhelming majority of men one way or another argued for and against a structure of government that is appropriate in a new era.⁴⁴ Private groups and political parties also made a significant contribution to deliberating on a new constitution by proposing their drafts,⁴⁵ although the Japanese government failed to appreciate the importance of public deliberation when the

⁴¹ The Constitution of the Empire of Japan, art. 73.

⁴² Imperial Rescript on the Promulgation of the Constitution described the Meiji Constitution as “the present immutable fundamental law”.

⁴³ The Law of Election of the Members of the House of Representatives was revised in December 1945. See Soma Masao, *Nihon senkyo seido shi* (Fukuoka: Kyushu Daigaku Shuppankai, 1986), 202-222.

⁴⁴ The first postwar general election of the House of Representatives was held on April 10th 1946. There were 79 female candidates of a total of 2770 and 39 female representatives of a total of 464. The percentages were 2.85 and 8.41, respectively. Incidentally, 39 female seats has been the largest number in the postwar history of Japan. The second largest is 35, in the last general election of 2000. See Uchida Mitsuru, ed., *Gendai nihon seiji shojiten* (*Dictionary of Contemporary Japanese Government and Politics*), saishinhan, (Tokyo: Buren Shuppan, 2001), 190; Ishikawa Masumi, *Data sengo seiji shi* (*Data History of Postwar Politics*) (Tokyo: Iwanami Shoten, 1984), 115.

⁴⁵ For various drafts of a new constitution, see Sato, *Seiritsushi*, Chap. 11 “Seito sonohoka no minkan kenpo kaiseian (Proposals of Constitutional Revision by Political Parties and Other Private Groups),” 2: 733-883.

fundamental law of a state is at stake.

In the process of such public deliberation, the Japanese people for the first time heard alternative conceptions of the state and a fundamentally different idea of politics. They heard even a plan of a new governmental system without the *tenno*. A tiny group of communists denied the *tenno* system in favor of a republican form of government. However, a republican form of government was not a monopoly of the communists. Takano Iwasaburo, a former professor of statistics at the Tokyo Imperial University, published a constitutional plan for the republic of Japan. He was a leading liberal who was very interested in social problems in general and enthusiastically supported the labor movement in particular. After defeat in the war, he organized the *Kenpo Kenkyukai* (the Constitutional Research Group) with no relationship with orthodox constitutional scholarship to publish a private plan and aim to influence the ongoing public discussion on constitutional reform.⁴⁶ It proposed a new government system of popular sovereignty and a ritualistic *tenno* system.⁴⁷ In short, the proposal of the research group was a kind of symbolic *tenno* system, which the Japanese people currently have. This was a well democratized view by the standard of the time.⁴⁸ However, Takano himself felt dissatisfied with a compromising attitude of the members of the research group. He thus published his own draft of a new constitution in which he proposed a presidential system instead of the *tenno* system.⁴⁹ He emphasized that it was high time for common citizens to disenchant themselves of the obsolete *kokutai* ideology in an era of liberation and democracy.⁵⁰

⁴⁶ Suzuki Yasuzo, another important figure in the group, might be regarded as a constitutional scholar. However, he had no orthodox background of constitutional scholarship of the day. He had no legal education at a university and studied constitutional history without a professorship in any university. After the war, Suzuki argued in the media about the necessity of establishing a new constitution. See Koseki, *Tanjo*, 46-50; *Birth*, 27-29.

⁴⁷ For the text of the draft of the Constitutional Research Group, see Sato, *Seiritsushi*, 2:784.

⁴⁸ In fact, the Government Section of the General Headquarters of the Supreme Commander for the Allied Powers paid close attention to and highly evaluated this draft from a liberal democratic point of view. On January 11, 1946, Milo Rowell pointed out the popular sovereignty provision of the draft by the research group as outstandingly liberal and that the proposed constitution as a whole was democratic and acceptable despite omission of several essential provisions. See Takayanagi, *Seitei Katei*, 1: 26-40.

⁴⁹ Takano placed a republican government system as the fundamental principle in his *Kaisei kenpo shian youko* (*Outline of a Personal Proposal for a Revised Constitution*).

⁵⁰ Takano Iwasaburo, "Torawaretaru minshu (The Captured Masses)," *Shinsei*, February 1946 in his *Kappa no he* (Tokyo: Hosei Daigaku Shuppanyoku, 1961), 38-53.

Takano argued for a new political science needed in a new era.

However small and weak such new voices might have been, the people on the periphery of the established power structure certainly raised them and the Japanese people as a whole had chances to hear them. This phenomenon had not emerged until the postwar period of Japan. The new manner of making a constitution has opened a possibility that publicly deliberated opinions can prevail over the elitist secretiveness.

2) Style:⁵¹ The second aspect of novelty of the postwar constitution is related to its style of wording. This constitution is written in a much more colloquial way than the Meiji Constitution. At the beginning of the modernization of Japan, new words were coined to express introduced Western legal concepts in Japanese. Newly coined terms were difficult for common citizens to understand their meanings. It was partly because there are two steps to understand what a new word means: original Western legal concepts are translated into traditionally used Chinese characters that carry not only sounds but also meanings. It was also partly because the elite attempted to keep common citizens away from the governmental and legal processes and thus purposefully adopted difficult words. In the result, the prewar legal documents were written in a strictly literary manner with Chinese characters and *katakana* and without punctuation marks.

In vivid contrast, the Constitution of Japan is written in a colloquial style with Chinese characters and *hiragana* and with punctuation marks. Writing statutes and legal documents in colloquial Japanese has since been a common practice. Thus, legal materials have become more easily accessible to ordinary people than ever before. This is decisively important in terms of a democratic foundation of the governmental process. Reading and trying to understand the fundamental law of the state are, obviously, the most rudimentary way of participating in politics.

Furthermore, this reform in a wording style came totally from the leadership of a group of Japanese private citizens.⁵² Among them, Yamamoto Yuzo, a famous novelist, most enthusiastically

⁵¹ For the details of the writing style of the postwar constitution, see Chapter 4 section 2.

⁵² See Irie, *Keij*, 269-273, 289-291; Sato, *Seiritsushi*, 3:274-285; Koseki, *Tanjo*, 210-217; *Birth*, 133-137; Dower,

devoted himself to lobbying to make legal documents easier to understand. To Yamamoto, usage of plain words and simple characters did not necessarily lead to worthless writings, but to prosperity and expansion of a culture.⁵³ The lobbying movement eventually persuaded governmental officials into making a constitutional draft in colloquial Japanese. Here we can recognize a more democratic feature of the Constitution of Japan in its form than ever before.

3) Substance:⁵⁴ The final aspect of revolutionary features of the postwar constitution is concerning its substance. I will point out three substantial issues: popular sovereignty, individual freedoms, and citizenship without arms.

First, the principle of popular sovereignty has marked a new and discontinued stage of political life of the Japanese people. The people have become the sole source of political power. This is crucially different from the *tenno*-centered system in prewar Japan. As a matter of constitutional logic, the people were merely objects of rule by the governing elites. The Meiji Constitution was established as *kintei kenpo*, a constitution bestowed upon the subjects as a gracious *tenno*'s gift. The idea of the *tenno* as the ultimate value creator was well presented in the imperial speech on the promulgation of the Constitution of the Empire of Japan. "Whereas We make it the joy and glory of Our heart to behold the prosperity of Our country, and the welfare of Our subjects, We do hereby, in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate the present immutable fundamental law, for the sake of Our present subjects and their descendants."⁵⁵ After all, the people were his subjects.

The Constitution of Japan, on the other hand, appeals to a universal value. The postwar governmental system is based upon an idea that "Government is a sacred trust of the people, the

Embracing Defeat, 392-393.

⁵³ Yamamoto Yuzo, "Moji to kokumin (Letters and the Nation)," *Sekai* April 1946, in *Yamamoto Yuzo zenshu* vol. 11 (Tokyo: Shinchosha, 1977).

⁵⁴ For the details of the new principles of the postwar constitution, see Chapter 4.

⁵⁵ "Imperial Speech on the Promulgation of the Constitution," in Ito Hirobumi, *Commentaries on the Constitution of the Empire of Japan*, trans. by Ito Miyoji (Tokyo: Chuo Daigaku, 1906), 2nd ed., 169. "We" here refers to the emperor, not the people. The Japanese original text reads "chin," which means I used by the *tenno*. Ito Miyoji did not translate the text literally.

authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.”⁵⁶ And the constitution solemnly declares that this idea is “a universal principle of mankind”.⁵⁷ Indeed, the very constitution was established as a result of the exertion of sovereign power on the part of the people. Popular sovereignty is understood as one of the most conspicuous characteristics of the postwar constitution.

Secondly, a conception of individual rights that cannot be restricted by statutes has been introduced in the postwar constitution. Due respect for human dignity as individuals is its most fundamental principle.⁵⁸ To secure human dignity, the constitution has a detailed list of rights.⁵⁹ Positive rights as well as negative rights are enumerated in the list along with judicial review.⁶⁰ It is true that the Meiji Constitution also declared some rights of the subjects such as personal freedom, property right, freedom of religious belief, freedom of speech, and right to petition.⁶¹ However, these rights were protected only against invasion by the administrative branch. That is, they accompanied reservation of law. On the other hand, the Constitution of Japan protects rights against the legislative branch as well as the administrative branch.

Above all, the guarantee of both freedom of religion⁶² and freedom of expression⁶³ is decisively important to the postwar governmental system. As Carl Schmitt has pointed out,⁶⁴ freedom of religion reflects the belief that whereas individuals are bearers of absolute values, the state is only a means and thus relative, derivative, and restrictive in all its powers. Freedom of religion gives individuals a private space to which they can confine themselves. If religious freedom constitutes a foundation of liberal democracy, the postwar constitution shows considerable promise.

⁵⁶ The Constitution of Japan, Preamble, par. 1.

⁵⁷ The Constitution of Japan, Preamble, par. 1.

⁵⁸ See the Constitution of Japan, art. 13.

⁵⁹ See the Constitution of Japan, chap. 3, arts. 11-40.

⁶⁰ See the Constitution of Japan, art. 81.

⁶¹ See the Constitution of the Empire of Japan, chap. 2, arts. 19, 22-30.

⁶² See the Constitution of Japan, art. 20.

⁶³ See the Constitution of Japan, art. 21.

⁶⁴ See Carl Schmitt, *Verfassungslehre* (1928), chap. 14.

Unlike the Meiji Constitution, its text provides for no reservation of law.⁶⁵ Furthermore, separation of state and religion has been formulated for the first time in the postwar constitution. This is pivotal because the Meiji constitutional system was essentially built upon the premise that the sovereign *tenno* occupied the both secularly and religiously highest rank in the state (martially as well). In the immediate aftermath of the defeat, Maruyama Masao, a distinguished political philosopher, pointed out in his famous essay that ultra-nationalism in prewar Japan derived from the lack of protection of individual internal freedom.⁶⁶ “Whereas in the West national power after Reformation was based on formal, external sovereignty,” Maruyama argues, “the Japanese State never came to the point of drawing a distinction between the external and internal spheres and of recognizing that its authority was valid only for the former.”⁶⁷ The Meiji Constitution and the *Kyoiku Chokugo* (the Imperial Rescript on Education)⁶⁸ were understood as the official documents to declare that the state, more precisely the *kokutai*, monopolized internal values such as truth, morality, and beauty. Because it was founded upon the unification of spiritual authority and political power, the prewar Japanese state held in herself the standard of judgment on governmental activities. Thus the state never confronted serious challenges to its legitimacy. In such a situation, the standard of values came down to relative distance from the *tenno*, the embodiment of ultimate values in both the state and society. Furthermore, even the *tenno* himself could not enjoy subjective freedom. At the establishment of the Meiji Constitution, the *Tenno Meiji* swore to the imperial founder and other imperial ancestors that

⁶⁵ Compare the Constitution of Japan, art. 20 with the Constitution of the Empire of Japan, art. 28. The former reads that “Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority. (2) No person shall be compelled to take part in any religious acts, celebration, rite or practice. (3) The State and its organs shall refrain from religious education or any other religious activity.” The latter reads “Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.”

⁶⁶ Maruyama Masao, “Chokokkashugi no ronri to shinri,” *Sekai*, May 1946 in *Maruyama Masao shu* (Tokyo: Iwanami Shoten, 1995), vol. 3, 1946-1948, 17-36. “Theory and Psychology of Ultra-Nationalism,” trans. by Ivan Morris, in Masao Maruyama, Ivan Morris ed., *Thought and Behaviour in Modern Japanese Politics* (Oxford and New York: Oxford University Press, 1963, 1969), 1-24.

⁶⁷ Maruyama, “Theory and Psychology of Ultra-Nationalism,” 5.

⁶⁸ For the text of the Imperial Rescript on Education, see Gluck, *Japan’s Modern Myth*, 121.

he would “maintain and secure from decline the ancient form of government”,⁶⁹ because he inherited his right to sovereignty of the state from his ancestors in “a lineal succession unbroken for ages eternal”.⁷⁰ As a matter of constitutional logic, the *tenno* himself was restricted by the intents and practices of the founder and his ancestors. In fact, this logic was declared in the *Tsugebumi* (Imperial Oath Sworn at the Sanctuary of the Imperial Palace). The Meiji Constitution was considered a mere expression in the form of fundamental law of “the instructions bequeathed by” the imperial founder and by other ancestors.⁷¹

In a different vein altogether, the postwar constitution on the one hand guarantees individual internal freedoms and on the other declares separation of state and religion. The latter is especially important because thanks to this institution, the Japanese state has separated herself from Shintoism for the first time. Shintoism has lost its established status and become a private religion of *koshitsu* (the *tenno* house).⁷² The postwar constitution has finished the state’s monopoly of values and transformed Japanese society into one in the nature of secular diversification and pluralism.⁷³ It has sowed the seeds of liberal democracy.

Another important right that the postwar constitution guarantees is freedom of expression.⁷⁴ Under the Meiji constitutional scheme, surely, free expression was somewhat protected. But such protection was not as solid as that in the postwar constitution. Freedom of expression was with reservation of law as other freedoms guaranteed in the Meiji Constitution. The most serious threat

⁶⁹ Tsugebumi (Imperial Oath Sworn at the Sanctuary of the Imperial Palace) in Ito, *Commentaries on the Constitution of the Empire of Japan*, 167.

⁷⁰ Joyu (Preamble).

⁷¹ Tsugebumi.

⁷² Minobe Tatsukichi, one of the most liberal interpreters of the Meiji Constitution, admitted that the establishment of Shinto was based upon Japanese tradition from ancient times. Minobe Tatsukichi, *Kenpo satsuyo* (Tokyo: Yuhikaku, 1932), kaiteidaigohan (5th ed.), 174-175.

⁷³ Maruyama concludes his famous essay as follows. “August 15, 1945, the day that out a period to Japanese imperialism, was also the day when the ‘national polity’, which had been the foundation of the entire ultra-nationalist structure, lost its absolute quality. Now for the first time the Japanese people, who until then had been mere objects, became free subjects and the destiny of this ‘national polity’ was committed to their own hands.” Maruyama, “Theory and Psychology of Ultra-Nationalism,” 21.

⁷⁴ The Constitution of Japan, art. 21 reads “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. (2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.”

to free expression was once again the idea of the *kokutai*. For instance, the *Chian Iji Ho* (the Peace Preservation Law) was enacted in exchange for universal male suffrage in 1925. The conspicuous feature of the law was that it prohibited and severely penalized associations and organizations the purpose of which was to subvert the *kokutai* and to deny the system of private property.⁷⁵ The concept of the *kokutai* was highly ambiguous because it might be interpreted as either a legal term or a moral and ethical concept. As a legal term, the *kokutai* means the location of sovereignty and is generally distinguished between monarchical sovereignty and popular sovereignty.⁷⁶ In this sense, the meaning of the *kokutai* was clearly defined in the provision of the Meiji Constitution which stated that “the Emperor is the head of the Empire, combining in Himself the rights of sovereignty”.⁷⁷ If the term was interpreted as moral, however, its extension became inevitably vague. In the Meiji constitutional system, as argued above, the state monopolized all values and thus there was no challenge to the definition on the part of the government. That was, in fact, exactly what the *Kyoiku Cokugo* (the Imperial Rescript on Education) presented to the people.⁷⁸ As Okudaira Yasuhiro has clarified, the judicial bureaucrats held the moral conception of the *kokutai* when they prepared the bill and later that conception became more and more powerful.⁷⁹ Moralization of the concept was vividly expressed in its punishment. The punishment for the subversion of the *kokutai* was imprisonment with or without labor for up to ten years. In Japanese criminal law, there is a general distinction between imprisonment with labor and that without labor. While the former is a penalty for infamous crime, political crime is sanctioned with the latter.⁸⁰ Moreover, the *Daishinin*, the

⁷⁵ See Okudaira, *Chian Iji Ho shoshi*.

⁷⁶ For the concept of *kokutai*, see Nagao Ryuichi, “‘Kokutai’ to ‘kensei’ (National Polity and Constitutional Government),” *Nihon kenpo shiso shi (A History of Japanese Constitutional Thought)* (Tokyo: Kodansha, 1996), 10-35.

⁷⁷ The Constitution of the Empire of Japan, art. 4.

⁷⁸ “Our Imperial Ancestors (*waga koso koso*) have founded Our Empire on a basis broad and everlasting and have deeply and firmly planted virtue; Our subjects ever united in loyalty (*chu*) and filial piety (*ko*) have from generation and generation illustrated the beauty thereof. This is the glory of the fundamental character of Our Empire (*kokutai no seika*), and herein also lies the source of Our education (*kyoiku no engen*).” Kyoiku Chokugo in Gluck, *Japan’s Modern Myth*, 121.

⁷⁹ Okudaira, *Chian Iji Ho shoshi*, 50-59.

⁸⁰ For instance, the current penal code punishes a criminal concerning an insurrection by imprisonment

highest court in the prewar judicial system, provided for lower courts guidance to choose imprisonment with labor over that without labor in the *Chian Iji Ho* cases.⁸¹ This showed that there was a common understanding among the legal elites that the subversion of the *kokutai* was immoral and shameful. In the situation that a feeling of being close to the *tenno* determined the morality of the governing elites, as Maruyama has sharply pointed out, “[i]t was therefore only natural that these people should come to identify their own interests with those of the Emperor, and that they should automatically regard their enemies as violators of the Emperor’s powers.”⁸² In this political and intellectual climate, there were few, if any, chances that people effectively exercised freedom of expression.

However, the core value of free expression lies in an unlimited free exchange of ideas and opinions. Particularly in liberal democracy, the central meaning of freedom of expression should consist in criticizing openly governmental officials and their policies. When he attacked the Sedition Act of 1798, James Madison formulated a universal and perpetual principle of freedom of expression in liberal democracy.⁸³ There is a deep connection between popular sovereignty and freedom of expression. Where the people enjoy sovereignty, legislative as well as executive abuses of delegated powers should be carefully watched to keep sovereign power in the people’s hand. The guarantee of free expression from prior restraint is not powerful enough to discharge sovereign functions on the part of the people. The idea of free expression should expand from mere exemption from prior restraint to immunity from subsequent punishments. If the people’s choices prevail over hereditary elements in liberal democracy, the people must be entitled to examine and discuss freely the merits and demerits of candidates for public offices and their policies. At all events, statutes as the *Chian Iji Ho* fundamentally conflict with “the right of freely examining public characters and

without labor (or death penalty). Penal Code, art. 77.

⁸¹ See Okudaira, *Chian Iji Ho shoshi*, 60.

⁸² Maruyama, “Theory and Psychology of Ultra-Nationalism,” 13.

⁸³ The Virginia Resolutions in Jonathan Elliot, ed., *The Debates in the Several States Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* (2nd ed. reprint. New York: Burt Franklin), vol. 4; James Madison, “Report of 1800,” in David B. Mattern et al., eds., *The Papers of James Madison* (Charlottesville: University Press of Virginia, 1991), vol. 17.

measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.”⁸⁴ Protection of freedom of expression under popular sovereignty is required to commit to “the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁸⁵ In this respect, the postwar constitution is much more promising.

The third point of new substances of the Constitution of Japan is separation of citizenship from soldiership. In the ancient Greek polis, only citizens who defended their homeland with arms could participate in politics. Since then to be a citizen had meant more or less to be a soldier. That was partly why women had been excluded from the political sphere. However, because modern war has become total war and the home front has come to gain a real sense, the connection between citizenship and soldiership has loosened.⁸⁶

In the Meiji constitutional system, the *tenno* was also the supreme commander of the Army and Navy.⁸⁷ The *tenno* also held the prerogative to declare war and make peace, which he could exert without the consent of the Imperial Diet.⁸⁸ Furthermore, the *tosui-ken*, the power concerning military strategies and tactics, was interpreted as independent of the government, although there was no explicit provision on its independence in the Meiji Constitution. It was situated outside the reach of the civilian government as a product of pre-constitutional practices in the early Meiji period. When the ministers of the War and of the Navy were appointed from ranking officers in active service,⁸⁹ the matters related to the *tosui* were expansively understood because a cabinet could not maintain

⁸⁴ The Virginia Resolutions, in Elliot, ed., *Debates*, 4:529.

⁸⁵ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁸⁶ In the United States, woman suffrage was constitutionalized after World War I. See Amendment XIX to the Constitution of the United States of America (1920). In Japan, as mentioned above, women have enjoyed their right to vote since December 1945, four months after the end of World War II.

⁸⁷ See the Constitution of the Empire of Japan, art. 11.

⁸⁸ See the Constitution of the Empire of Japan, art. 13. See also Ito, *Commentaries*, 29.

⁸⁹ The principle that ministers of the Army and of Navy should be a general or a lieutenant general, or an admiral or a lieutenant admiral in active service was explicitly established in 1900. Since then it had effect except during the period from 1913 to 1936, when political parties formed the government. See Masuda Tomoko, *Tenno-sei to kokka (The Emperor System and the State)* (Tokyo: Aoki Shoten, 1999), 92.

itself without the assistance of the Army and Navy. The system lacked civilian control, which is considered one of the most rudimentary institutions for liberal democracy.⁹⁰ The independence of the *tosui-ken* was widely regarded as “an effective springboard for the rise of extreme militarism.”⁹¹

In clear contrast, the postwar constitution renounces war, denies land, sea, and air forces, and repudiates the right of belligerency of the state.⁹² An ideal that has inspired postwar Japan is that “all peoples of the world have the right to live in peace, free from fear and want.”⁹³ In “an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth,” “the justice and faith of the peace-loving peoples of the world” constitutes “universal” “laws of political morality”.⁹⁴ The newly reborn Japan commits herself to such political morality. The concept of peace non-dependent upon arms in fact has released citizenship from its close connection to solidership.

With the new style, process, and substance, the postwar constitution has brought the Japanese people to a fundamentally new political life. The *tenno*-topped vertical relationship no longer was the essential characteristic of the Japanese political community. In the Meiji constitutional system, the *tenno* who succeeded the throne in “a line of Emperors unbroken for ages eternal” and “sacred and inviolable” conferred “titles of nobility, rank, orders and other marks of honor.”⁹⁵ However, even the symbolic *tenno* system of the postwar constitution is based upon a horizontal relationship among the sovereign people.⁹⁶ The people have become the ultimate source of values in general and political legitimacy in particular. The Constitution of Japan marks a revolutionary change in political structure.

How can we theorize the new constitution with these distinctive features independently of

⁹⁰ See Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 241-251.

⁹¹ Miyasawa Toshiyoshi, *Kenpo (Constitutional Law)* 5th ed. (Tokyo: Yuhikaku, 1962, 1973), 33 (translation, in Tanaka, *The Japanese Legal System*, 634).

⁹² See the Constitution of Japan, art. 9.

⁹³ The Constitution of Japan, preamble, par. 2.

⁹⁴ The Constitution of Japan, preamble, pars. 2 & 3.

⁹⁵ The Constitution of the Empire of Japan, arts. 1, 3, and 15.

⁹⁶ Article 1 of the Constitution of Japan reads that “The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.”

foreign imposition and domestic continuity? Weaknesses of the conventional views help to identify a third way. What is wrong with them?

Both the external imposition theory and internal continuity theory suffer from an oversimplification of history. The Allied Powers and the United States itself could not be regarded as monolithic. The conflict between the Department of State and the Supreme Commander for the Allied Powers is a well-known fact.⁹⁷ Even within GHQ, there was serious antagonism between the Government Section that sought the thorough democratization of Japan and the G2 that favored a compromise with the Japanese conservatives to adopt a hard anti-communism policy.⁹⁸

Moreover, the Japanese government did not necessarily share common interests with the Japanese people. Creation and reception of the postwar constitution was more complicated and sophisticated than both the imposition and continuity theorists suppose. We have to examine more precisely how different categories of people responded to the reality the defeat in the war had brought to Japan. Participants were classified at least into the government elite, liberals in the old era, the *tenno* family members, justices of the Supreme Court, the media, intellectuals on the periphery of the established regime, and common citizens.

Apparently, the Japanese government could not understand the meaning of the defeat in the war and the ensuing occupation. The Japanese government as well as intellectual elite tried to keep the *tenno* system intact. The old *kokutai* ideology profoundly captivated them. Thus, many of them had to emphasize the continuity in the Japanese tradition of the *tenno* as unifying symbol after the government published its official draft providing for popular sovereignty with the symbolic *tenno* system. Typically, Kanamori Tokujiro, the minister of state in charge of constitutional revision in the first Yoshida cabinet, stated again and again in the deliberation in the Imperial Diet that the new constitution would not change the *kokutai* as understood in a moral sense. In his view, the *tenno* was

⁹⁷ See, e.g., Koseki, *Tanjyo*, 218-254.

⁹⁸ See Takemae Eiji, *Inside GHQ: The Allied Occupation of Japan and Its Legacy* (New York: Continuum, 2002); Herbert Passin, "The Occupation---Some Reflections," Carol Gluck & Stephen R. Graubard, eds., *Showa: The Japan of Hirohito* (New York: W.W. Norton, 1992), 107-129.

a moral, not a political or legal figure, and *akogare no mato* (the center of national adoration).⁹⁹ At the end of the defeat, however, to the governmental leaders and established intellectuals, the *kokutai* meant the *tenno* in one line unbroken for ages eternal governing the state as sovereign. Kanamori's explanation distorted the legal and political reality and obscured the revolutionary innovation of the idea of popular sovereignty. In open discussion, however, he had to admit that the new constitution would have the *kokutai* in a political sense.

Minobe Tatsukichi, a liberal academic giant in the Meiji constitutional system, tried to cope with reconstruction of a political order through his liberal *tenno* organ theory.¹⁰⁰ However, Minobe could not respond well to the new situation. That has vividly indicated that the postwar constitution was discontinuous with the Meiji Constitution. While the *Tenno Showa* himself never seemed to realize what the symbolic *tenno* should look like, his younger brother Prince Mikasa openly argued for democratization of the *tenno* family, which clearly marked the arrival of a new era. Fifteen justices of the Supreme Court expressed diversified opinions on lese majesty under the new constitution in the Placard Case, which also indicated a beginning of a new era because the decision showed that legal elites were no longer monolithic.

On the other hand, the media conveyed public discussions on the constitutional revision to the people. It was true that they were under censorship by GHQ for carrying out the occupational policy smoothly. But in the early occupation era, GHQ censored nationalist and militarist speeches and encouraged liberal democratization of the media. In public discussion, liberal democratization of politics was a central topic for newspapers and journals. Along with reports of what was happening domestically and internationally, they offered space to opinion leaders for discussing the necessity of constitutional revision, the *tenno* institution, popular constitutional convention,

⁹⁹ For Kanamori's explanation of the aim of the government draft, see Sato, *Seiritsushi*, 4: 559-563.

¹⁰⁰ Against original intents, Minobe turned the Meiji Constitution into a charter for liberal democracy with his outstanding art of interpretation. For Minobe's constitutional theory in the Meiji system, see Chapter 1 section 8. For his attitude toward constitutional revision in the postwar period, see Chapter 2 section 6.

governmental systems, protection of human rights, and so on.¹⁰¹ Further, the scoop of the *Mainichi Shinbun*, one of the major newspapers, was influential enough to change the course of constitution-making in postwar Japan forever.¹⁰² Whatever the limits might have been, a wide exchange of new constitutional conceptions actually was carried out in the media. Further, intellectuals on the periphery of the established regime actively participated in public discussions on how to create a constitutional order in postwar Japan. For example, the *Kenpo Kenkyukai* (the Constitutional Research Group) proposed a political system of the principle of popular sovereignty and the ceremonial *tenno* institution and a model of the welfare state. Its leader Takano Iwasaburo even presented a republican form of government by himself. The *Kokumin No Kokugo Undo* (the People's National Language Movement League) successfully lobbied with much enthusiasm writing the constitution in colloquial and plain Japanese. The movement surely deserved the credit for the popularization of the new fundamental law.

Meanwhile, many common Japanese citizens demonstrated frank preferences for a more moderate *tenno* system over the *kokutai* expressed in the Meiji Constitution, though how to obtain food for the following days was unfortunately a much more serious problem for them than how to organize a new nation.¹⁰³ In the first general election in the postwar era, the people with universal suffrage elected thirty-nine women, ninety-three Socialists, and five Communists as their representatives.¹⁰⁴ In the first general election under the postwar constitution, furthermore, the people gave the Socialists the status of the leading party. Katayama Tetsu, the chairman of the Socialist Party, formed a left-center coalition cabinet. In fact, the Constitution of Japan brought

¹⁰¹ See Ariyama Teruo, *Segoshi no nakano kenpo to janarizumu* (The Constitution and Journalism in Postwar Japan) (Tokyo: Kashiwa Shobo, 1998).

¹⁰² For the *Mainichi* scoop, see Chapter 2 sections 4 & 5.

¹⁰³ On February 4, 1946, the *Mainichi Shinbun* reported an opinion poll about the constitutional revision. It showed that while only 16 percent of people supported the emperor system in the Meiji Constitution, 45 percent supported an emperor system as a moral, not political, center and 28 percent supported a system in which the emperor shares sovereignty with the people. 9 percent of people disapproved of the emperor system. *Mainichi Shinbun*, February 4, 1946, in Kizokuin Jimukyoku Chosabu ed., *Kenpo kaisei nikanssuru shoron shuroku* (A Collection of Articles and Essays on the Constitutional Revision) (Tokyo, 1946), 188-189.

¹⁰⁴ See Ishikawa, *Deta sengo seijishi*, 115.

unprecedented incidents to postwar politics.

We thus have to have a theory reflecting such complicated factors of constitution-making in postwar Japan. We should explore a new perspective for making the Constitution of Japan,¹⁰⁵ from which we can measure the wider constitutional experiences of the Japanese people as a whole in the aftermath of defeat.

Another weakness is that both imposition and continuity theories do not take seriously the reason why the Japanese people now have the Constitution of Japan. Prewar Japan to some extent succeeded in developing liberal democratic politics with the Meiji Constitution. However, the success turned out to be essentially limited because the ultra-nationalistic movement in the 1930s replaced a quasi-parliamentary government system based upon political party politics with a totalitarian regime. Thus there was something seriously wrong with the Meiji constitutional regime. However, the governmental leaders and liberal intellectuals who were extremely reluctant to amend the Meiji Constitution failed to see a possibility that it would be interpreted in a direction exactly opposite to Minobe's liberal democratic interpretation. For them, in essence, the prewar constitution was nothing but an instrument of rule over the ruled. If the Potsdam Declaration had required Japan to realize a liberal democratic political system, and indeed did, a new conceptualization of a constitution was necessary and, unfortunately, it did not come to be presented from the orthodox school of thought. Outsiders in the constitutional scholarship and governmental elite circle, such as Takano Iwasaburo, Suzuki Yasuzo, Mortito Tatsuo, and Yamamoto Yuzo expressed new ideas on constituting political order.

It was true that when the Constitution of Japan was established, there is no evidence that the Japanese people as a whole mobilized for freedom and a new government.¹⁰⁶ It was also true that the

¹⁰⁵ Koseki Shoichi's *Shinkenpo no tanjyo* has offered a new perspective beyond the traditional narrative. See Koseki, *Tanjyo*, introduction.

¹⁰⁶ West Germany was also occupied by the Allied Powers. Unlike Japan, the military occupation was direct but constitutional making was more autonomous. The Parliamentary Council made a draft of fundamental law. However, there was no popular participation in the process of creating the Bonn Basic Law. See Ashibe Noburyoshi, *Kenpo seitei kenyoku (The Power to Create a Constitution)* (Tokyo: Tokyo Daigaku Shuppankai, 1983),

Japanese government did not have a wide range of options. Indeed, Japan had lost its sovereignty as an independent state. The Allied occupation was surely crucial. However, the situation at that time was more complicated than simply stating that the constitution was imposed upon the Japanese government or that the true tradition of Japan was condensed in the postwar constitution.

As discussed above, the imposition theory based upon the threat in the February 13 meeting has no convincing evidence. An important question comes down to an interpretation of the terms of the Potsdam Declaration that set the conditions of the occupation. The main provisions of the Potsdam Declaration¹⁰⁷ claimed the following:¹⁰⁸

Article 10: The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

Article 12: The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

On August 10, 1945, the Japanese government was ready to accept the Potsdam Declaration “with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler.”¹⁰⁹ The Allied Powers did not answer directly to the Japanese request but issued the following statement on their position (the so-called Byrnes reply).¹¹⁰

“From the moment of surrender the authority of the Emperor and the Japanese government to rule the state shall be subject to the Supreme Commander of the Allied Powers who will take such steps as he deems proper to effectuate the surrender terms.”

“The ultimate form of government of Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people.”

164-165.

¹⁰⁷ Proclamation Defining Terms for the Japanese Surrender, Signed at Potsdam and Issued by the President of the United States (Truman) and the Prime Minister of the United Kingdom (Attlee) and Concurred in by the President of the National Government of China (Chiang), July 26, 1945.

¹⁰⁸ The Potsdam Declaration, *FRUS*, 1(1960): 895-897 in RM024.

¹⁰⁹ Japan's Qualified Acceptance, Legation de Suisse Washington, D.C., August 10, 1945 in RM025.

¹¹⁰ U. S. accepts Japan's surrender (8/11/45), Secretary Byrnes, *Political Reorientation of Japan*, Appendix II, 415 in RM026.

Then the Japanese government officially accepted the Potsdam Declaration on August 14. In the Imperial Rescript of August 14, 1945, the *tenno* told his subjects that he accepted the Potsdam Declaration in “Having been able to safeguard and maintain the structure of the Imperial State”.¹¹¹ The Japanese government elite believed that they could retain the *kokutai*, the governmental system in which the *tenno* in one line unbroken for ages eternal holds the prerogative to govern Japan as sovereign.¹¹² However, a serious problem is whether their belief had a reasonable basis. A few Japanese leaders suspected that Article 12 of the Potsdam Declaration and the Byrnes reply would be inconsistent with the idea of the *kokutai*.¹¹³

At any rate, the Allied requirement could be interpreted in a way that the Japanese government had to establish popular sovereignty or a popularly approved *tenno* system. Thus, the acceptance of the Potsdam Declaration opened the possibility of a drastic change in political structure in postwar Japan. But the government optimistically relied upon their self-seeking interpretation.

Given the fact that some fanatic military men argued for continuing the war and dying an honorable death rather than surrendering, it was somewhat understandable that the government had to pretend to end the war with maintenance of the *kokutai*. However, most Japanese elites were so deeply instilled with the *kokutai* ideology that they could not look at the international environment with great composure. The interpretation of the government leaders on the surrender was that the Japanese government, not the Allied powers could decide a form of government. The phrases such as “the revival and strengthening of democratic tendencies among the Japanese people” and “the freely expressed will of the Japanese people” were understood in favor of maintaining the *kokutai*. The governmental elite intentionally or unintentionally ignored the possibility that the terms of

¹¹¹ Japan surrenders (8/14/45) Emperor Hirohito: Imperial Rescript, in RM027.

¹¹² For the Japanese acceptance of the Potsdam Declaration, see Sato, *Seiritsushi*, 1: 8-31. For the American side, see Dale M. Hellegers, *We the Japanese People: World War II and the Origins of the Japanese Constitution* (Stanford: Stanford University Press, 2002), vol. 1; Sato, *Seiritsushi*, 1: 32-56.

¹¹³ Toyoda and Shimomura Notes in Sato, *Seiritsushi*, 1: 23.

surrender might require that popular sovereignty be realized or at least that a new government be based upon a radical transformation of the political structure.

In following this self-seeking interpretation, few governmental and intellectual elites believed that a fundamental change of the Meiji Constitution was necessary for reconstructing the political order. The government reluctantly established a committee that was in charge of constitutional problems after MacArthur offered a suggestion. The name and discussion of the *Kenpo Mondai Chosa Inkai* (the Committee for the Investigation of Constitutional Problems), widely known as the Matsumoto Committee, well expressed the general atmosphere at that moment. The first obligation of this committee consisting of truly distinguished constitutional scholars and legal bureaucrats was not to make a draft of a new constitution, but only to investigate constitutional issues, if any, in the aftermath of the lost war. In addition, the committee decided to examine the Meiji Constitution article by article, rather than to explore its problems from different angles by adopting comparative constitutional approaches.¹¹⁴

The Matsumoto committee's draft of constitutional revision changed only several phrases of the Meiji Constitution.¹¹⁵ Articles 1 through 4 were substantially untouched and there were no institutions for executing the requirement that "Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established."¹¹⁶ On February 1, 1946, the *Mainichi Shinbun* published a draft that was very close to the final draft of the Matsumoto Committee.¹¹⁷ This scoop made the secret preparation of the Matsumoto Committee known to the public. GHQ observed that "This is extremely conservative in character and leaves substantially unchanged the status of the Emperor with all rights of sovereignty vested in him. For this reason (along with others), the draft was poorly received by the press and the public."¹¹⁸ In light of the

¹¹⁴ For activities of the Matsumoto committee, see Sato, *Seiritsushi*, 1: 245-374; 2: 485-645

¹¹⁵ For a few drafts of the Matsumoto Committee, see Koseki, *Tanjyo*, 91-96; *Birth*, 57-60.

¹¹⁶ The Potsdam Declaration, art. 10.

¹¹⁷ For the translation of and comments on the Matsumoto Committee's draft in *Mainichi Shinbun* by the Government Section of GHQ, see Takayanagi, *Seitei Katei*, 1: 40-75.

¹¹⁸ Takayanagi, *Seitei Katei*, 1: 40-42.

international opinions that were more or less severe to the *tenno* and the fact of the forthcoming inauguration of the Far Eastern Commission, GHQ could not approve such a conservative plan because the official publication of the Matsumoto Committee's draft would show that the early occupation had failed and lead complaining parts of the Allied powers to require GHQ to take a harder line to the Japanese government in general and the *tenno* in particular. As a political and practical matter, on the other hand, it was not desirable for GHQ to directly command the Japanese government to make a more democratic constitutional draft. That was why GHQ counseled the Shidehara cabinet to adopt a constitutional plan similar to its draft for the interests of the Japanese government as well as its own.¹¹⁹

My concerns reside in the Japanese government's failure to propose a more liberal and democratic draft of constitutional revision. Undoubtedly, Matsumoto's leadership was questionable because of his stubbornness, arrogance, and tunnel-vision. However, the committee as a whole had serious shortcomings. The members of the Matsumoto Committee had been convinced by legal formalism and technicality because of their *kokutai* obsession and thus missed an opportunity to correct their attitude by themselves to avoid "the imposition." More generally, the course of making the current constitution would have been totally different if the Japanese government had had a better understanding of the international environment of the day and of the United States. American people created their constitution, when they believed that they could establish good government "from reflection and choice," not by "accident and force".¹²⁰ American constitutional law has always been full of innovative experiments such as popular sovereignty, a right to revolution, constitutional conventions, a written constitution, the separation of powers based upon checks and balances, a presidential system, judicial review, and federalism. Unfortunately, only extremely poor understandings of American constitutional law were accumulated in the prewar Japanese

¹¹⁹ See Tanaka, *Oboegaki*, 170-179.

¹²⁰ Clinton Rossiter, ed., *The Federalist Papers* (New York: New American Library, 1961), no. 1 (Hamilton), 1.

constitutional academic circle.¹²¹ That was partly because the prewar Japanese legal system was mostly introduced from German law, and partly because the constitutional scholarship in prewar Japan paid much more attention to the instrument of government than to the bill of rights.¹²² Establishment of a parliamentary government system was the most pressing task liberals took care of in prewar Japan. Liberals regarded judicial review as an obstacle to strengthening the weak Diet, while conservatives proposed it for enhancing the *tenno's* prerogatives. At any rate, various American constitutional experiences were more or less foreign to most Japanese governmental and intellectual leaders.

In this way, the conventional theories have not recognized causes on the Japanese side to “impose” an American drafted constitution. Matsumoto triumphantly lectured the GHQ staff on the significance of bicameralism, when Whitney presented to the Japanese members GHQ’s draft of a constitution at the critical meeting of February 13, 1946.¹²³ When most fundamental ideas were at stake, Matsumoto’s behavior seemed not only out of place but also quite embarrassing. However, that was a cool reality for the Japanese people in 1946. As Koseki Shoichi has pointed out, Matsumoto and the Japanese government had no “meaningful constitutional debate pitting ideas one against another”, “[a]side from their discussion about protecting the emperor and ‘preserving the national polity’”.¹²⁴ If there was an “imposition” of a constitution, that meant the defeat of the political ideology and constitutional conception of the Japanese governmental and intellectual elite.

Thus, a third way should search spheres outside the power elite for a new constitutional meaning. The government’s failure to adapt generated “the imposition.” A clue for a new theory

¹²¹ See Minobe Tatsukichi, *Beikoku kenpo no yurai oyobi tokushitsu (The Origins and Characteristics of the American Constitution)* (1918).

¹²² For instance, Minobe’s *Kenpo satsuyo (Outline of Elements of Constitutional Law)*, one of the most influential constitutional textbooks, devotes about 50 pages of a total of 626 pages (about 8 percent) to topics related to protection of rights of the subjects. See also Tanaka Hideo, “The Conflict between Two Legal Traditions in Making the Constitution of Japan,” Ward & Sakamoto, *Democratizing Japan*, 107-132; Tanaka, *Oboegaki*, 205-231.

¹²³ See Takayanagi, *Seitei Katei*, 1: 330-332. Indeed, the Government Section had decided to write a provision of a shingle house legislature as a bargaining chip. See *ibid.*, 1: 120-122.

¹²⁴ Koseki, *Tanjyo*, 172; *Birth*, 109

should be found in people free from the *kokutai* ideology, which was not appropriate in a new era for liberal democratization.

This reflection leads to recognition of a different weakness of the conventional views, that is, both the external imposition theory and internal continuity theory have never appreciated Japanese initiatives such as the *Kenpo Kenkyukai* (the Constitutional Research Group) and the *Kokumin No Kokugo Undo* (the People's National Language Movement League). In addition, the Japanese government did not accept the American draft literally but attempted to “japanize” it. Among other things, the japanized draft deliberately omitted protection of rights of foreigners.¹²⁵ In the Imperial Diet, moreover, the Socialist Party successfully argued for the right to maintain the minimum standards of wholesome and cultured living, which has become Article 25 of the current constitution. No welfare right was found in either the GHQ or Japanese government drafts.¹²⁶

People did discuss a relationship between popular sovereignty and the symbolic *tenno* system in public. A crucial issue was whether the *kokutai* had changed. As a part of japanization, the government draft purposefully used an extremely ambiguous phrase on the relationship: whereas the

¹²⁵ During the negotiations with the Government Section of GHQ, the Japanese government changed provisions of protection of foreigners as follows. Article 13 of GHQ's draft of February 13, 1946 reads that “All natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex, social status, caste or national origin.” Takayanagi, *Seitei Katei*, 1: 274. Articles 13 and 14 of the Japanese draft of March 2 reads that “All the people are equal under the law there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin” and that “Aliens shall have the right of equal protection of the law.” Article 13 of the Japanese draft of March 5 reads that “All natural persons, regardless of Japanese nationality, are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, family origin, or national origin.” Article 13 of the Japanese draft of March 6 reads that “All natural persons are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.” Article 13 of the Japanese draft of April 13, reads that “All the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin.” The April 13 draft was slightly revised and introduced into the Imperial Diet to deliberate. The article has become article 14 of the Constitution of Japan and its article 10 reads that “The conditions necessary for being a Japanese national shall be determined by law.” See Sato, *Seiritsushi*, 3: 69-363. Sato Tatsuo, chief of the Second Division of the Cabinet Legislation Bureau, was a main person in charge of the negotiations with the Government Section, including 30 hours long negotiation from March 4 to 5. See also Koseki, *Tanjyo*, 178-191, *Birth*, 114-122. The current constitutional scheme shows that protection of rights of foreigners is not necessarily a constitutional concern. Because Japan was an empire with colonies, treatment of foreigners might be a serious problem after a defeat. If the initial constitutional draft had not been japanized, protection of foreigners would have been more effective. See Koseki, *Tanjyo*, 277-280; *Birth*, 179-181.

¹²⁶ See Takahashi Hikohiro, *Keisei*, 104-146.

English text of Article 1 provided that the *tenno* derives “his position from the sovereign will of the People,” the Japanese version used “nihon kokumin shiko no soi” (the supreme general will of the People).¹²⁷ After complications such as the Socialist interpellations and GHQ’s intervention, popular sovereignty has been finally declared straightforwardly in the postwar constitution. With the provision of popular sovereignty, it has become crystal-clear that the Japanese people, not the *tenno*, have final power to decide political matters, at least on paper. As a political and social matter, however, there has been ambiguity in a relationship between the principle of popular sovereignty and the symbolic *tenno* institution. In fact, some conservatives have attempted to restore the *tenno*’s authority as expansively as possible. At the time of establishing the postwar constitution, as we saw, the government pretended that the new constitution had not changed the *kokutai* in an ethical sense. Retrospectively, the compromise was to some extent inevitable because the ruling elite were so preoccupied by the mission to maintain the *kokutai* one way or another that frank recognition of the change of the *kokutai* might lead to repudiating the postwar constitution itself.

My argument of the postwar constitution as an unfinished constitutional revolution refuses to regard both imposition and continuity as its distinctive feature. A third way lies in reconsideration of the constitutional text itself and the deliberation process. The government does not necessarily monopolize public visions of constituting political order. Rather, the Japanese people as a whole for the first time have struggled for self-consciously constituting a new political order even within the limits of the international and national political situation. The third way discovers positive participation and substantial discontinuity based upon the idea of novelty in the process of making the postwar constitution. In the process, the tradition of the *tenno* institution became an object of consideration, deliberation, and choice. Thus, the Japanese people even with help from the outsider were successful in taking the *tenno* into a constitutional framework. Despite serious limits under the occupation, in short, the Japanese people as a whole have experienced a republican moment by

¹²⁷ Sato, *Seiritsushi*, 3: 336.

making the tradition in government relative. As a result, political legitimacy is no longer found in the tradition but in mutual deliberation among the people. Once popular sovereignty is declared, furthermore, the search for political legitimacy is never ending because the absolute value-giver such as the prewar *tenno* no longer exists outside the people. The establishment of the Constitution of Japan is only a beginning of beginnings.

It is true that if the Constitution of Japan had been established by popular vote, the Japanese people could have had a precious opportunity to express their own commitment to liberal democratic values. Thus the constitutional revolution thesis would be much more easily justifiable. However, it is also true that after the defeat, a significant number of the Japanese people were forced to be self-consciously confronted with the difficult task of constituting political order and struggled to initiate a new politics that is based upon a fundamentally innovative idea of popular sovereignty to come to terms with the *tenno* institution. We cannot underrate their first experience of public discussion on the constitution of political legitimacy and public good for the nation as the internal continuity theory does. If popular sovereignty means something positive, it must be a wide range of robust public discussions between the government elite and the common citizens. From this perspective, we cannot emphasize such an experience too much.

Popular sovereignty is a more dynamic fiction than the *tenno* sovereignty it has replaced. Government by the people is essentially paradoxical because the people are plural and thus it is inevitable in the real world of politics to split the people between the governing minority and the governed majority.¹²⁸ However, popular sovereignty always challenges the governing minority to reform political and social facts to adjust to ideals its concept inspires.¹²⁹ The ambiguity between the principle of popular sovereignty and the symbolic *tenno* system should be clarified in the later

¹²⁸ As Maruyama Masao has observed, democracy based upon popular sovereignty needs a trinity of idea, movement, and institution and its idea and movement are endlessly challenging because the paradoxical rule of the people consists in only process, or movement. Maruyama Masao, "Sengo minshushugi no 'genten' ('The Starting Point' of Postwar Democracy)," *Tokuho Kenpo no hyakunen vol. 3 Kenpo no saisei* (Tokyo: Sakuhinsha, 1989) in *Maruyama Masao shu* (Tokyo: Iwanami Shoten, 1996) 15: 57-70.

¹²⁹ See Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988), 306.

political process by the exercises of the new principle of popular sovereignty on the part of the people themselves.

If the postwar constitution, as I have sketched here and will lengthily argue later, is regarded as an unfinished constitutional revolution, making it has meant merely a starting point. The internalization of liberal democratic values has been the most important task for the Japanese people. The Constitution of Japan itself established at least a basis upon which public discourse could work well. On this basis, common citizens and the government elite, for the first time, can share a common language with which dialogue is practiced. The whole process has been a constitutional revolution in progress in Japan¹³⁰

Chapter 1 “The Meiji Constitution: Between Absolutism and Constitutionalism” will discuss the Meiji constitutional system from the viewpoint of liberal democracy. After briefly reviewing the process of establishing the Constitution of the Empire of Japan of 1889 and its prominent features, I will examine conflicts between democratic elements and undemocratic factors in the system. The constitutional text and its original intention were clearly antagonistic to political parties and did not permit parliamentary government system to operate. However, thanks to the Taisho Democracy Movement, a parliamentary cabinet system based upon political party politics was established as a constitutional practice in the 1920s. Minobe Tatsukichi made a remarkable contribution to establishing a cabinet government system through his excellent interpretation. Examination of the controversy between his liberal theory and Hozumi Yatsuka and Uesugi Sinkichi’s conservative interpretations based upon the idea of divine right (the *Tenno Kikansetsu Ronso*, the Controversy over the *Tenno* Organ Theory) will show the considerable interpretive leeway the Meiji Constitution allowed. Minobe’s non-originalist interpretation provoked a fanatic right-wing movement in the

¹³⁰ In the dissertation, I will place emphasis on public discourse, not secret histories, of political events in postwar Japan because I believe that from the perspective of public discourse and popular commitment, it is more important to theorize how the people understand ongoing political events and respond to them than to discover hidden truths afterwards.

1930s. The *Tenno Kikansetsu Jiken* (the Incident of the *Tenno* Organ Theory) forced Minobe to retire from public life. The government declared that his Organ Theory was against the *kokutai* ideology and banned his three main books. This incident finally led to the collapse of the Meiji constitutional system. In tracing the incident, I will consider the limits of the Meiji Constitution. The Meiji constitutional regime was based upon the monopolization of values by the *tenno*, which ultimately rejected the liberal democratization of politics. This chapter will clarify problems of the Meiji constitutional system, from which constitutional writing in the postwar period will be evaluated.

Chapter 2 “The Failure of the Japanese Government to Take a Chance of Constitutional Revolution” will examine how the Japanese government responded to the reality the defeat in war had brought. The governing elite did not pay much attention to the difficult situation common citizens faced. It was the most important task immediately after the defeat for them to retain the *kokutai*, the government system in which the *tenno* in one line unbroken for ages eternal held and exercised sovereign power. They did not believe by themselves that the Potsdam Declaration required the Japanese government to revise the Meiji Constitution to achieve the goal of liberal democratization of politics the Declaration had set forth. However, they believed that the Meiji Constitution was simple and flexible enough to achieve the goal with its minor repair and revision and repeal of implementing statutes and orders.

Nonetheless, the Japanese government had to come to prepare constitutional revision anyway. The starting point of constitutional reform in postwar Japan was the suggestion of General Douglas MacArthur to Prince Konoe Fumimaro, the deputy prime minister of the Higashikuni cabinet. Even after the Shidehara cabinet was formed, Konoe and the Office of the Privy Seal continued to assume responsibility for constitutional revision. Their activities incurred repulsion of the government. The Shidehara cabinet established the *Kenpo Mondai Chosa Inkai* (the Committee for the Investigation of Constitutional Problems), over which Matsumoto Joji presided. The name of the committee well indicates the atmosphere of the governing elite. The rivalry of Konoe and the

Office of the Privy Seal stimulated formation of the Matsumoto Committee. Although this committee consisted of outstanding constitutional scholars of the day and top legal bureaucrats, its work failed to present a grand design for the new postwar era. The members had been so infatuated with the idea of the *kokutai* that they could not determinedly face up to the problems the Meiji constitutional regime inherited. After all, they were so close to the center of power in the established regime that they could easily identify themselves with the power structure. Because Minobe Tatsukichi, the liberal giant in the old era, represented the good governing elite, his constitutional thought in the postwar period is worth exploring. His theory reveals the limits of the Meiji constitutional system. Without ideals and passions, the Japanese government experienced a second defeat.

In Chapter 3 “Making of the Postwar Constitution: The First Public Deliberation on Constituting Freedom,” I will reexamine the process of making the Constitution of Japan from the perspective of its revolutionary characteristics. The failure of the government does not necessarily mean that the Japanese people were unable to present innovative ideas of liberal democratization of politics. In fact, Takano Iwasaburo and the members of the *Kenpo Kenkyukai* (the Constitutional Research Group) framed a draft of popular sovereignty with the ritualistic *tenno* institution. They were on the periphery of the established regime. In fact, some of them suffered persecution in the old era. Thus they were able to conceive freely a constitutional order for postwar Japan. More importantly, they were intellectuals in various disciplines without any orthodox constitutional scholarship and thus could come up with a grand design of constitutionalism appropriate for the new era through deliberation among them. This plan had an influence upon the GHQ’s work on constitutional revision.

Another important element of the process of making the postwar constitution was that the constitution was framed as the result of public deliberation among the Japanese people for the first time in their history. Because of GHQ’s directive on liberal democratization, election law was

revised to vest women with suffrage in December 1945. The general election of April 1946 was held under universal suffrage for the first time. Its return of 39 women and 98 leftist representatives well indicated that a new era had come. In the ninetieth Imperial Diet, the newcomers along with traditional conservatives participated in deliberating on the new constitution. In comparison with the Meiji Constitution, which was secretly prepared by an extremely limited number of leaders and granted to the subjects as a benefit by the merciful *tenno*, the postwar constitution can be regarded as an outcome of public deliberation among the Japanese people. Through deliberation, politics in postwar Japan started to transform its nature. The government had to explain and defend a foundation of the *tenno* system. Such a thing had never occurred in Japanese history. The will of the imperial founder and ancestors was firmly believed to control the current will of the *tenno*, that is, the state. In this fiction the government had no need to justify its political power when it resorted to the will of the *tenno*. But now even the traditional authority could not be justified by itself. The creation of the postwar constitution began to transform political power from a vertical relation based upon order and subject to a horizontal relation based upon mutual persuasion by speech.

Chapter 4 “New Constitutional Principles: Popular Sovereignty and the Liberal Democratization of Politics” will consider the basic principles of the postwar constitutional system. My concern lies in how the postwar constitution guarantees liberal democracy to function well. Close attention must be paid to the writing style of the postwar constitution. Its colloquial Japanese with *hiragana* and Chinese characters and punctuation marks has made the postwar constitution easy for common citizens to read. Reading the fundamental law of the land is the most rudimentary form of participation in politics. Moreover, this change in the writing style came completely from the Japanese initiative. The enthusiastic petition of the *Kokumin No Kokugo Undo* (the People’s National Language Movement League) moved flexible legal bureaucrats to write the constitution in a colloquial and simple way. In the Meiji constitutional system, the constitution was after all nothing other than a tool of the governing elite for ruling the common citizens. In sharp contrast, the

colloquialism has made the postwar constitution a baseline shared by both the common citizens and the governing elite. If constitutionalism means something, it should be when common citizens who are more or less subjects of rule can understand what the fundamental law provides for.

The main purpose of the postwar constitution is to guarantee due respect for human dignity as individuals. To achieve the purpose, according to its basic structure, the new constitution has adopted the principle of popular sovereignty and thorough pacifism. The Meiji constitutional system failed to protect individual autonomy because of the *kokutai* ideology that monopolized all values. One line unbroken for ages eternal with unification of the state and Shinto denied even inner freedoms in principle. The postwar constitutional regime has successfully taken the *tenno* into its inside and thus abolished the *kokutai* ideology. To reinforce protection of fundamental human rights, the postwar constitutional system has introduced judicial review, which is regarded as one of the most important institutions for realizing liberal democracy. This had also sparked transformation of politics to rationalization of one governmental organ's action based upon reasons that can convince other organs.

Furthermore, popular sovereignty is without any doubt the most eminent feature of the postwar constitution. Nothing expresses the principle of popular sovereignty better than the amendment process. If sovereignty means the decisive power over fundamental matters in a political community, the very power to create a constitution well shows its attribute. Once a constitution is established, sovereign power changes its appearance to the power to amend the constitution. The postwar constitution displays profound commitment to popular sovereignty when it adopts a mandatory popular vote system in the amendment process.

A constitutional regime does not stand by a constitution alone. It needs various implementing statutes and constitutional practices to support and reinforce the fundamental constitutional values it has chosen. The aspect of consolidation should be carefully examined. In the case of the postwar constitution, it is all the more important to pay attention to efforts to consolidate

the constitutional system because the government was quite reluctant to frame the new constitution. Unlike conventional explanations on the making of the postwar constitution, therefore, my analysis will advance as far as the Katayama cabinet. The Socialist Party became the leading party in the House of Representatives as the result of the first general election under the new constitution on April 25, 1947. Even a plurality of the left in the Diet was regarded as revolutionary and this fully announced that a new era had come. Generally this left-center coalition cabinet developed a poor reputation but because the Socialist Party occupied only about one third of the seats of the House of Representatives, compromises with conservative coalition partners were necessary. Even so, legal reforms such as change in the feudalistic family law system, abolition of crimes against the imperial family in general, lese majesty in particular, liquidation of the Ministry of the Interior and police reform, and establishment of the Supreme Court are very important achievements in the early reborn nation, which all consolidated the constitutional revolution in ideas. Finally, I will consider missing opportunities for the Japanese people to express themselves in popular referendum. The Japanese government and MacArthur's GHQ shared common interests in evading popular selection of the fundamental law. Potentials of popular sovereignty will be focused on.

In Chapter 5 "Transformation of Politics: The Symbolic *Tenno* System and Rise of Reason," I will explore how the Japanese people conceptualized the new governmental principles immediately after the establishment of the postwar constitution. First, by reviewing high school textbooks, I will discuss perceptions of democracy in the postwar era. Democracy was indeed understood as in relation to a bright future and prosperity. This optimistic view on democracy leads us to ask a serious question. My main concern here lies in a relationship between the principle of popular sovereignty and the symbolic *tenno* institution. Democracy might be distorted by the retention of the *tenno* institution, which once had absolute influence upon people's way of thinking. When the constitution was framed, indeed, the government in a sense had to pretend that the *kokutai* was still the same as in the Meiji Constitution because the governing elite were profoundly captive of

the *kokutai* ideology. Without pretense, creation of the postwar constitution might have been extremely difficult. Thus the government repeatedly stated that the *tenno* in the new constitution had still been unchangeably as *akogare no mato* (the center of adoration), although the symbolic *tenno* institution with no real political powers is in fact totally different from the *tenno* system in which he as sovereign held and exercised the power to govern the state deriving from the divine will of the imperial founder. Thus public discourse on the postwar constitution was formed along dichotomous ideas of continuity and discontinuity.

I will examine how people responded to this ambiguity in a relationship between popular sovereignty and the symbolic *tenno* institution in the early postwar period. How did the *tenno* and his family act in the new constitutional system? While it seemed that the *tenno* never understood the status of the symbol, his brother openly challenged the traditional manner and advocated equality of men and women. We will see that some intellectuals who were regarded as liberals in the old era prepared the ground for accepting a symbolic *tenno* institution. The arguments of historian Tsuda Sokichi and philosopher Watsuji Tetsuro deserve special attention. Especially, reexamination of the controversy between Watsuji and Sasaki Soichi over the change in the *kokutai* will clarify features of public discourse on the new constitution in the postwar period and limits of traditional constitutional thinking. Further, an important debate was carried out between the thesis of August Revolution by Miyasawa Toshiyoshi, a constitutional law scholar, and the theory of Nomos Sovereignty by Odaka Tomoo, a legal philosopher. Through this debate it became clear that the discourse of discontinuity prevailed over that of continuity. By developing the August Revolution thesis, moreover, I will argue that the whole process of making the postwar constitution should be regarded as an unfinished constitutional revolution. On these premises, understanding of the *tenno* institution and the symbol itself in the new constitution will be explored in detail. Finally, examination of the Placard case over lese majesty will indicate a new beginning of constitutional discourse in the postwar era. Politics has transformed its nature to one based upon mutual

persuasion by speech.

While many people argued heatedly for continuity between the two constitutions and most really wanted to see it, there were a few frank and solid discussions that recognized discontinuity and advocated the newness of the postwar constitution. Through the public discussions in the early postwar period, the perception of discontinuity gradually became a common foundation for the postwar constitution. Whatever might have been argued for the symbolic *tenno* system, it clearly is different from the old *tenno* institution based upon the idea of one line of *tennos* unbroken for ages eternal. The substance of the symbolic *tenno* institution all depends upon the political will of the sovereign people. In fact, the postwar constitution has anyway taken the *tenno* into its constitutional frame, which was the most urgent problem for the Meiji constitutional regime.

Liberal democracy based upon popular sovereignty needs constant reforms to fulfill its promise. The postwar constitution has provided the people with a framework in which they have a final voice on critical matters of the state. Claude Lefort's argument is suggestive: "modern democracy invites us to replace the notion of a regime governed by laws, of a legitimate power, by the notion of a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate---a debate which is necessarily without any guarantor and without any end."¹³¹ A liberal democratic system has to simultaneously guarantee promotion of a majority will and protection of a minority, which is an extremely challenging task. This task has to be carried out by the sovereign people through endless public discussions. With the postwar Constitution, Japan has reached this stage of modern democracy, and it is time for constitutional theory to acknowledge fully this crucial turning point.

¹³¹ Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Cambridge University Press, 1988), 39.

Chapter 1

The Meiji Constitution: Between Absolutism and Constitutionalism

1. Introduction
2. Path to the Meiji Constitution
3. Prominent Characteristics of the Meiji Constitutional System
4. Relationship between the Imperial Diet and the Government
5. Pluralism in Advisory Institutions
6. Protection of the Rights of Subjects and the Judiciary
7. The Meiji Constitution in Operation
8. Two Schools of Constitutional Interpretation: The Organ Theory Controversy
9. Conclusion: Difficulties to Overcome in the Meiji Constitution

1. Introduction

The Constitution of the Empire of Japan, or the Meiji Constitution, was promulgated on February 11, 1889, and put into effect on November 29, 1890. After World War II, it was replaced by the Constitution of Japan, which is currently effective. It governed Japan for about fifty-six and a half years. This Meiji Constitution was the first written constitution in a modern sense in Japanese history.

Soon after opening the country to the world in 1854, the Tokugawa Shogunate was overthrown and a *tenno* (emperor)-centered regime was restored in 1868. The Meiji Restoration was one way of responding to the impact from the Western civilization. The leaders of the time chose the *tenno* as their partner for carrying out modernization of the state. By appealing to traditional authority, on the one hand, they placed the *tenno* on the apex of power structure to integrate the people as a modern state. On the other hand, however, they had to emphasize that they were acting for the public good, not private interests to expand the foundation of political power in a nation state.¹ Thus, the Charter Oath in March 1868 adopted the principle of respecting public discussion

¹ See Matsumoto Sannosuke, *Meiji Shisoshi: Kindai koka no sosetsu kara ko no kakusei made (A History of Meiji Japanese Thought: From the Creation of a Modern State to the Awakening of the Individual)* (Tokyo: Shinyosha, 1996), 28-44.

by old feudal units.² Nonetheless, it is different from the Western idea of public discussion based upon a distinction between the private and the public.³

In modernization, the leaders decided to transform Japan from the *Ritsuryo* state (the state based upon legal codes introduced from ancient China) to a constitutional state in a more or less Western sense. We have to ask how modern constitutionalism, the core of which lies in the limitation of state power to enhance individual rights and liberties, was introduced to Japan. The idea of modern constitutionalism was in essence foreign to the traditional way of government in Japan: let the people lean upon the government but not inform them of truth. The leaders who wanted more or less the powerful state to cope with the Western advanced powers tended to pursue the traditional governing style. Upon the influence of Western political thought, however, some people enthusiastically advocated participation in the political process, protection of fundamental human rights, and a parliamentary government system. The movement for advocacy of liberal democracy was intense and wide-spread enough for the governing leaders to realize what they would not choose and make some compromise to its claims. As a result, the Meiji constitutional regime was constitutional in some parts and despotic in others.

This chapter will explore how the Meiji Constitution was created, operated, and destroyed to clarify the conditions around the postwar constitutional making and particularly its problems that have to be solved in framing a new constitution. Because both the external imposition theory and the

² The Charter Oath of March 14, 1868 in Ray A. Moore & Donald L. Robinson, eds., *The Japanese Constitution: A Documentary History of its Framing and Adoption, 1945-1947* (Princeton: Princeton University Press, 1998), document 002 (hereinafter cited as RM002).

- (1) Deliberative assemblies shall be established and all measures of government decided in accordance with public opinion.
- (2) All classes high and low shall unite in vigorously carrying on the affairs of State.
- (3) All common people, no less than the civil and military officials, shall be allowed to fulfill their just desires so that there may not be any discontent among them.
- (4) All the absurd usages of old shall be broken through and equity and justice to be found in the workings of nature shall serve as the basis of action.
- (5) Wisdom and knowledge shall be sought throughout the world for the purpose of promoting the welfare of the Empire.

³ See theories of emphasizing public discourse, see Jurgen Habermas, *The Structural Transformation of the State Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, Mass.: MIT Press, 1991, 1962), translated by Thomas Burger; Bruce A. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980).

internal continuity theory oversimplify the constitutional experience of the Japanese people, we have to confirm the starting point of their modern constitutionalism. The aim of this preparatory chapter is to obtain a perspective from which we will be able to theorize as the third way the constitutional experience in postwar Japan by clarifying the features and problems of the first modern Japanese constitutional regime. It will show that the idea of the *kokutai*, the government system in which the *tenno* in one line unbroken ages for eternal held and exercised sovereign power, was the essential obstacle to liberal democratization of politics in the postwar era, which both theories either intentionally or unintentionally fail to identify.

First in this chapter, we will review the path to creation of the Meiji constitutional regime. When the Meiji Constitution was established, the governing leaders attempted to reserve their power in it. Thus the government system was apt to be absolutist. For example, the *tenno* was vested with various prerogatives in almost all areas and the government was independent of the Imperial Diet. However, because the constitutional regime was created to cope with the popular movement for political participation, the governing leaders had to make some concession to liberal democratic claims. They had to establish the popularly elected House of Representatives anyway. Thus, the path itself reveals its complicated characters mixed between absolutism and constitutionalism.

Then we will examine the conspicuous features of the Meiji Constitution. Its fundamental principle was that the *tenno* (the emperor) in one line unbroken for ages eternal should reign and govern forever as sovereign. Thus direct governance of the emperor was principled in the Meiji regime. We will discuss its governmental structure from perspectives of a relationship between the Imperial Diet and the government, various advisory institutions, and protection of rights. Then we will examine the actual operation of the Meiji Constitution. A conflict of absolutism and constitutionalism seemed to be solved in a way that parliamentary government became a political practice in the 1920s. However, the fanatic ultra-nationalist movement vandalized the Meiji constitutional system, which led Japan to the defeat in World War II. Finally, we will consider the

debate of constitutional interpretation between conservative Hozumi and Uesugi and liberal Minobe. While the former enthusiastically represented an absolutist part of the Meiji Constitution, the latter vividly showed how liberal the constitution was. The discussion in this chapter will identify the most serious problem of the Meiji Constitution: the *tenno* in one line unbroken for ages eternal was situated outside the constitutional framework, which inherently limited liberal democratization of politics.

2. Path to the Meiji Constitution

The Meiji government pursued modernization of society to avoid colonization by the Western advanced powers in the imperialist competition. The leaders of this new government adopted the policies of *fukokukyohei* (enriching the wealth and military strength of the country), *shokusanogyo* (promoting industry and increasing products), and *bunmeikaika* (cultivating human intelligence and progressing civilization, particularly Westernization). Along these goals, the government came to believe that Japan should have a Western type of written constitution. There were several factors which made them believe so.⁴

One of the external factors was that the government had to amend unequal treaties with Western advanced countries to keep independence of the country. According to the then existing treaties, the Japanese government did not enjoy tariff autonomy or exercise jurisdiction over foreigners in Japan. The advanced countries had a good excuse that they were afraid of unfair treatment of their own peoples because Japan did not have a well established Westernized legal system. To start negotiations for renewal of treaties with the Western countries, it was necessary for the Japanese government to enact a Western style of statutes and accordingly establish

⁴ See Inada Masatsugu, *Meiji kenpo seiritsushi* (History of the Birth of the Meiji Constitution) 2 vols. (Tokyo: Yuhikaku, 1960, 1962); Kenneth Colegrove, "The Japanese Constitution," 31 *American Political Science Review* 1027-1049 (1937); George M. Beckmann, *The Making of the Meiji Constitution: The Oligarchs and the Constitutional Development of Japan, 1868-1891* (Lawrence: University of Kansas Publications, 1957); George Akita, *Foundations of Constitutional Government in Modern Japan, 1868-1900* (Cambridge, Mass. : Harvard University Press, 1967).

administration of justice. A constitution is the most basic in a legal system. Furthermore, many governmental elites at that time believed that constitutionalism was a source of wealth and strength for Western advanced countries and that Japan as a developing country should follow Western constitutionalism to achieve its goal of the nation's wealth and strength.⁵

As internal factors for establishing a constitution, there were necessities to the *hanbatsu* government with serious difficulties (*hanbatsu* means clans based upon homelands of the leaders of the Meiji Restoration, particularly *Satsuma* and *Choshu*). Japan was experiencing a rapid development of society. The old governmental system was effective for a decentralized feudal agrarian state. However, it was obsolete in a centralized capitalist state toward which Japan was proceeding. Bureaucratic despotism, arbitrariness of conjectural judgment, and inconsistency in policy were the objects of criticism of the *hanbatsu* government. Thus it was necessary for the Meiji government to secure the consistent policy-making process and organization of top governmental personnel. The government elites thought that a written constitution would well serve these purposes. From a viewpoint of real politics, in addition, a new constitutional regime was expected to maintain balances of powers among the *hanbatsu* oligarchs and between old *hanbatsu* leaders and newly empowered bureaucrats.⁶ At any rate, the *hanbatsu* oligarchs who were outsiders in the elite circle of the old regime had to create a new stable political order to avoid a legitimacy crisis even if they appealed to the authority of the rediscovered and revitalized emperor.⁷

Furthermore, and most importantly, the *Jiyu Minken Undo* (the movement for parliamentary government and people's rights to freedom and to participate in the political process) was so vehement that the Meiji government elites had to make some compromise with people's demands to establish representative government if they wanted to keep their power to rule intact. The *Jiyu*

⁵ See Nagai Hideo, "Meiji kenpo no seitei (Establishment of the Meiji Constitution)" (1962) in Yasuda Hiroshi & Minagawa Masaki, eds., *Meiji kenpo taisei* (The Meiji Constitutional Regime) (Tokyo: Tokyodo Shuppan, 2002), 153-156.

⁶ See Nagai, "Meiji kenpo no seitei," 156-158.

⁷ For the problems of legitimacy and authority with which the new leaders were confronted, see Bernard S. Silberman, *Cages of Reason: The Rise of the Rational State in France, Japan, the United States, and Great Britain* (Chicago: University of Chicago Press, 1993), chaps 6 & 7.

Minken Undo was a popular movement that nationally developed to claim both negative freedom and positive freedom from 1874 into the 1880s.⁸ The movement severely criticized the monopoly of political power by the *hanbatsu* oligarchs and strongly demanded the right to participate in the government process. In the *Jiyu Minken Undo*, people proposed a lot of constitutional plans through discussing what organization of the state was good for the people. They enthusiastically advocated, among other things, a constitutional government, a parliamentary system, natural rights theory, and local self-government. Its central claim resided in establishing a parliament. In January 1874, Itagaki Taisuke⁹ and others submitted a petition for establishment of a parliament composed of publicly elected representatives.¹⁰ Similar petitions followed and newspapers deeply associated with the movement heatedly argued for opening a diet. To cope with the desires of people to have civil rights and civil liberties and a parliamentary government, the *hanbatsu* government was compelled to present their own conception of the new state. Because Western constitutional ideas were prevalent all through the debate, the *hanbatsu* government itself needed to show their plan in a Western constitutional fashion.

The making of a written constitution, therefore, meant to the government elites self-restraint on the one hand and preservation of their leadership on the other. In July 1881, Iwakura Tomomi expressed fundamental principles and opinions on constitutional government. The documents were drafted by Inoue Kowashi, who would soon play an important role in writing the Meiji Constitution through rendering assistance to Ito Hirobumi, the chair of the committee for drafting the constitution. The opinions would be mostly adopted in the Meiji Constitution. The main fundamental principles were the following:

1 The Constitution shall emanate from the emperor and the policy of a gradual approach toward constitutional government shall prevail.

⁸ For the *Jiyu Minken Undo*, see Emura Eiichi, ed. *Jiyu minken to meiji kenpo (People's Right to Participate in Politics and the Meiji Constitution)* (Tokyo: Yoshikawa Kobunkan, 1995).

⁹ Itagaki was once a member of the new government and resigned after his defeat of the debate on diplomatic policy toward Korea. He had become one of the most prominent and formidable leaders of this movement and organized the *Jiyuto* (Liberal Party) in October 1881.

¹⁰ This famous petition is generally understood to mark the beginning of the movement

2 Law of succession to the throne have followed traditional rule since the ancestors. It shall be provided in the Imperial House Law separated from the Constitution.

3 The emperor shall have supreme command over the army and navy, declare war, make peace, conclude treaties, appoint and dismiss all civil and military officers, confer marks of honor, order pardons, and open and close parliament and dissolve its house.

4 Ministers of state shall be responsible to the emperor.

5 Parliament shall consist of two houses: An upper house composed of members appointed by the emperor and members elected from among the ranks of peers and former *samurai*, a lower house of popularly elected representatives. The election law for the lower house shall include a property qualification for the suffrage.

6 When parliament does not pass an annual budget bill, the government may execute the provisions of the budget of the previous year.

7 Rights and duties of subjects shall be provided.¹¹

The opinions attached to the fundamental principles shows their way of thinking about constitutional government. The first opinion says that when Japan introduces constitutional government, it is important to “decide on a system of constitutional government that is suitable to [Japan’s] national polity and customs.”¹² Generally, there are two models of constitutional government under monarchy in the world: English and Prussian. In the opinion’s analysis, the English Parliament enjoys administrative power as well as legislative power. The king has power only in name, and the prime minister holds real power over state affairs. The prime minister is a leader of the majority party in the parliament. Political party politics leads to unification of legislative and administrative powers in the parliament. In England, therefore, “Although, in name, sovereignty is shared by the king and parliament, in reality sovereignty lies chiefly in parliament.” This situation looks like that of Japan from the middle to early modern age, where the emperor reigned as the spiritual authority but the *shogun*, the top officer of the military, governed the country. On the Prussian model, in sharp contrast, the king both reigns and rules the country. The king shares legislative power with the parliament but holds administrative power by himself. The prime minister is appointed by the king without any relation to his status in the parliament. As practice, the king

¹¹ See Iwakura, “*Taikouryou* (The Fundamental Principles),” in Tsutsui Wakamizu, Banno Jyunji, Sato Kouji, and Nagao Ryuuichi, eds., *Nihon kenposhi* (*History of Japanese Constitutional Law*) (Tokyo: Tokyo Daigaku Shuppankai, 1976), 104-105; Inada, *Meiji kenpo seiritsushi*, 465-491. See also, Beckmann, *The Making of the Meiji Constitution*, 59, 143-148; Colegrove, “The Japanese Constitution,” 1040-41.

¹² Iwakura, “Opinion on the Constitutional Government,” in Beckmann, *The Making of the Meiji Constitution*, 144.

selects as the prime minister a person who is expected to gain support from the parliament; political parties never play a formally decisive role in the administration of state affairs. When she establishes a constitutional government, Japan starts something new, and thus has to decide which model she will copy. The first opinion recommends taking the Prussian rather than English model for two reasons. First of all, whereas England has a long time two-party system that secures changes of cabinet, political parties had not organized yet in Japan. In such a situation, speculation grows, a few large parties would not be formed but numerous small parties would spring up. As a result, they would fight with one another to seek administrative power, and instability in the government might lead to resort to arms to overcome difficulties in the political agenda. Secondly, as the first opinion points out, there is a shortage of capable candidates for the prime minister in the country. It implies that the *hanbatsu* oligarchs should maintain the power to govern. The opinion concludes with expressing deep suspicion against people who have praised the English model because they ignore the current condition of Japanese society. It is impossible for a Japanese political party system to develop rapidly and firmly enough to establish as steady a constitutional government as England enjoys now. Gradual advancement on the Prussian model should be recommended.

The second opinion goes further to state that the government should be based upon the emperor's prerogative, not the will of parliament. When a new constitution is framed by following the Prussian model, it is necessary for it to have three provisions. It must have a provision that the emperor holds the right to appoint and dismiss ministers and other higher officials. The ministers of state thus "depend upon the favor of the Emperor and the trust of the nation, and they are not controlled by the opinions of the people." To avoid a system of collective responsibility of the cabinet as in England, the new constitution must provide that responsibilities of ministers are divided into instances of collective and individual responsibilities as in the French Constitution of 1875. In order to cope with the parliament, moreover, the new constitution must copy Article 109 of

the Prussian Constitution that provides that taxes of the previous year shall remain in force.¹³ And the third opinion criticizes two proposed constitutional plans from the second and third points of the second opinion.¹⁴

Making the Meiji Constitution proceeded along Iwakura and Inoue's argument above. One day after the dismissal from the government of Okuma Shigenobu, a champion of the English style of parliamentarism, the *hanbatsu* government finally made public their decision to move to a constitutional government. The imperial rescript was issued on October 12, 1881, which stated that the government promised to establish a constitution and convoke a diet by the year of 1890.¹⁵

After he returned from his constitutional research trip to Europe, mainly Prussia,¹⁶ Ito Hirobumi was appointed the chairman of a consultative committee on drafting a constitution and other important laws. He shared with his fellow oligarchs a vision of constitutionalism: a written constitution only confirms the monarch's sovereign right to govern and the monarch is situated above both legislative and administrative powers without any legal interference. Constitutional government meant to Ito and other *hanbatsu* members above all a constitutional monarch with a systematic and efficient rule through legal institutions. The idea of limited government that is the indispensable element of modern constitutionalism was deliberately ignored because Ito and his allies had to find reasons and ways to fight back at people's natural right to participate in politics widely inspired in the *Jiyu Minken Undo*.¹⁷

It was true that Ito and his fellows firmly rejected the personal arbitrariness of a monarch.¹⁸ Given the fact that a parliament would be convoked soon, however, they had to create an institution of a powerful monarch who is the sole source of political legitimacy in general and the impending constitution in particular to avoid the parliamentary government the *Jiyu Minken Undo* heatedly

¹³ Iwakura, "Opinion on the Constitutional Government," 146-147.

¹⁴ Iwakura, "Opinion on the Constitutional Government," 147.

¹⁵ The full text of the imperial rescript, see Inada, *Meiji kenpo seiritsushi*, 1: 527.

¹⁶ For Ito's trip to Europe, see Inada, *Meiji kenpo seiritsushi*, 1: 565-598.

¹⁷ Ito's letter to Iwakura, see Inada, *Meiji Kenpo seiritsushi*, 1: 584-585.

¹⁸ For example, Ito's letter to Iwakura, see Hiratsuka Atsushi ed., *Ito Hirobumi hiroku* (Tokyo: Shunjusha, 1929), 292.

advocated. Direct governance by the emperor would have to be the fundamental principle of the new constitution so that the *hanbatsu* oligarchs could keep their ruling powers intact. Ito compared the Prussian constitutional government to a large machine by which all things run in order. Although the monarch seemed to be one part of the machine from the text of the constitution, in reality he had never been an inner part but operated the machine from the outside. The monarch was the superintendent who took care that everything should not be stagnant.¹⁹ In Prussia under the leadership of Chancellor Bismarck, Ito discovered a solid foundation of his version of constitutionalism. He found that a combination of the Japanese tradition of over 2500 years and a Western idea of legality well served an efficiently organized government.²⁰ The *hanbatsu* oligarchs perceived constitutional government mainly as structuring powers in terms of stability and rationality.²¹ Their concerns did not reside in rule of law but in rule by law. In sum, they understood the constitution as an elitist instrument for ruling the people. The idea that the constitution is a channel for arranging various private interests among the people for the public good was entirely foreign to them. From this perspective, the forthcoming constitution would be unlikely to create a common basis upon which public dialogue between common citizens and the government elites could be performed well.

For the *hanbatsu* government, the basic strategy of making a constitution was the *kintei kenpo shugi* (the principle that the emperor grants to the subjects a constitution as his charity). It was the emperor that would create a new constitutional order. Following this principle could successfully make the emperor situated outside the constitution, even if the constitution would provide for the powers of the emperor. It was quite natural, therefore, that the *mintei kenpo shugi* (the principle that the people collectively establish a constitution) was left out of consideration from the very beginning. As a consequence of the *kintei kenpo shugi*, only a small number of elites were allowed to discuss the new organization of political power and prepare documents the limited discussion reflected. Most

¹⁹ Ito's letter, Hiratsuka ed., *Ito Hirobumi hiroku*, 307-308.

²⁰ Ito's letter to Iwakura, Inada, *Meiji kenpo seritsuahi*, 1: 585.

²¹ Kido & Okubo, see Matsumoto, *Meiji shisoshi*, 28-44.

importantly, the deliberation of a new constitution was in secret. Various private constitutional plans that were published and discussed during the *Jiyu Minken Undo*---they included provisions for a parliamentary government system---were regarded as irrelevant to the preparatory activities of the government except for only a negative meaning that they showed what the new constitution must not look like.²²

On February 11, 1889, the Emperor Meiji granted the Prime Minister Kuroda Kiyotaka a scroll with the text of the constitution in the audience chamber of the imperial palace. Kuroda received the scroll with a profound bow. The ceremony lasted for less than ten minutes.²³ People generally welcomed the new constitution and celebrated its promulgation as an unprecedented event. The celebratory events all over Japan were sponsored by the government, although people did not know the contents of the new document they celebrated.²⁴ Only about thirty high officials had opportunities to see governmental drafts and express their opinions toward a constitution of a new regime.²⁵ People were overjoyed at the promulgation itself before they came to discern “gems” from “tiles” in the Meiji Constitution.²⁶

What people celebrated was, thus, not the contents of the Constitution but the fact that Japan joined a club of constitutional states in the world. At that time, a written constitution was to a considerable degree conceived as something associated with advanced civilization and progress. Two months after the promulgation, for example, Ienaga Toyokichi, future professorial lecturer at Waseda, Keio, and the University of Chicago, delivered a speech as a Ph.D. candidate in political science at

²² See Tsutsui, *Nihon kenposhi*, 102.

²³ For the ceremony of promulgation of the Meiji Constitution and its meaning, see Carol Gluck, *Japan's Modern Myth: Ideology in the Late Meiji Period* (Princeton, N.J.: Princeton University Press, 1985), 42-49.

²⁴ For the state of ceremonial affairs around the country before and on the promulgation day and memoirs on the promulgation, see Sakuhinsha henshubu ed., *Tokuhon Kenpo no Hyakunen: Daiichikan Kenpo no tanjyo (Reader: For One Hundred Years of Constitutions, vol.1 The Birth of the Constitution)* (Tokyo: Sakuhinsha, 1989), 131-219.

²⁵ See Ienaga Saburo, *Rekishi no nakano kenpo (Constitutions in History)* (Tokyo: Tokyo Daigaku Shuppankai, 1977), 1: 54.

²⁶ The words “gems” and “tiles” were used by Nakae Chomin, a theoretical leader of the *Jiyu Minken Undo*. See Kotoku Shusui, *Chomin sensei in Tokuhon kenpo no hyakunen*, 188-189. See also, Nakae Chomin, “Kenpo happu no seiten ni tsuite jinmin no kietsu (People's Joy on the Ceremony of the Promulgation of the Constitution),” *Toun Shinbun*, February 10, 1889 in Matsunaga Shozo, ed., *Nakae Chomin hyoronshu (A Collection of Essays of Nakae Chomin)* (Tokyo: Iwanami Shoten, 1993), 218-220.

Johns Hopkins University, claiming that the process from the Restoration to establishment of the Meiji Constitution could be understood as self cultivation by the Japanese people and that positive commitment to politics by enlightened people led to the constitution. Developments in trade, publishing, railroads, telegraphy, higher education, and science, and the spread of Christianity, in Ienaga's view, made feudalistic despotism unexecutable in Japan. He believed that the Meiji Constitution brought Japan into a new era of freedom.²⁷

To the leading newspapers' surprise, in fact, the Meiji Constitution was more democratic than people had expected.²⁸ However, we should not miss the fact that the day of the promulgation ceremony was deliberately chosen because February 11 was the *kigensetsu*, anniversary of the mythical founding of the empire. Indeed, the Meiji Constitution was established when the Emperor Meiji swore "to the Imperial Founder of Our House and to Our other Imperial Ancestors" that he "shall maintain and secure from decline the ancient form of government."²⁹ This is a symbol of the conspicuous feature of the Meiji Constitution: the most traditional authority with appearance in a Western modern style. Inconsistencies seems obvious if constitutional government meant to the *hanbatsu* oligarchs structuring political power in terms of rationality and efficiency because lineage is contingency based upon one's birth and in conflict with rationality in the modern sense.³⁰ Therefore, successful operation of the Meiji Constitution required that a subtle balance be struck between the traditional authority allegedly unique to Japan and the Western way of thinking. And, as a matter of practice, it was deeply problematic because the traditional authority situated outside the constitution always seemed ultimately to prevail.

Another important feature of making the Meiji Constitution was a lack of public criticism.

²⁷ Ienaga Toyokichi, "Japan's Preparation for her Present Constitution," in *The Constitution of the Empire of Japan* (Johns Hopkins University, 1889). See also Ienaga Toyokichi, *The Constitutional Development of Japan, 1851-1881* (Baltimore: Johns Hopkins University, 1891). Ota Masao, ed. and trans., *Ienaga Toyokichi to Meiji kensei shiron (Ienaga Toyokichi and Essays on Japanese Constitutional History)* (Tokyo: Shiyosha, 1996).

²⁸ See Nagai, "Meiji kenpo no seitei," 150-152. See also, Inada, *Meiji kenpo seiritsuhi*, 2: 926-944

²⁹ Dainihon teikoku kenpo (the Constitution of the Empire of Japan), *Tsuge-bumi*, Imperial Oath Sworn in the Sanctuary in the Imperial Palace.

³⁰ John Rawls tries to exclude contingencies from his theory of justice by using the veil of ignorance. See John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

Even after the declaration of convocation of the Diet in ten years by the imperial rescript on October 12, 1881, the people of the *Jiyu Minken Undo* still continued to advocate political participation in general and constitutional convention in particular. While it started its own preparation, the *hanbatsu* government adopted a hard line policy against opposition. By the order of the Minister of Home Affairs, the police might enforce regulations that prohibited the right to present petitions and to hold public meetings. On December 25, 1887, the *hoan jyorei* (peace preservation ordinance) was promulgated and enforced and by applying this ordinance, over five hundred people who seemed to the government dangerous to the public peace were immediately banished from Tokyo.³¹ The police might treat criticisms on the promulgated Constitution as crimes against the public peace.³²

In marked contrast, most Western constitutions were created more or less as a result of public deliberation. The debate between Federalists and Anti-Federalists in the United States is one paradigm of constitutional making in the modern era. Public deliberation including severe criticisms gives the regime much political legitimacy. The Meiji constitutional regime was based upon a system in which the most important element of a modern constitution, freedom of expression, was extremely fragile from its inception as the result of the *kintei kenpo*, a constitution “bestowed upon the nation as a gracious imperial gift.”³³ This also implies that the Meiji constitutional regime might be vulnerable to a serious leadership crisis because it had not been founded upon widely deliberated opinions, which usually accord the diffuse support to the regime all the more.

The establishing process of the Meiji Constitution shows both some kind of self-restraint and an attempt to found a solid basis of power on the part of the *hanbatsu* oligarchs.³⁴ The Meiji constitutional regime was expected to be placed somewhere between authentic absolutism and constitutionalism. From a liberal democratic point of view, therefore, it was crucially important to

³¹ See Beckmann, *The Making of the Meiji Constitution*, 80-81.

³² Obinata Sumio, “Meiji kenpo no seiritsu (The Establishment of the Meiji Constitution),” in Emura Eiich, ed., *Jiyu minken to meiji kenpo*, 221-223.

³³ Gluck, *Japan's Modern Myth*, 43.

³⁴ Ienaga Suburo points out that the framers of the Constitution rejected constitutionalism from below but at the same time denied total negation of constitutionalism. See Ienaga Saburo, *Nihon kindai kenpo shisoshi kenkyu (A Study on History of Constitutional Thoughts in Modern Japan)* (Tokyo: Iwanami Shoten, 1967), 86-92

ask how people could expand their rights to freedom and to participate in the political process under the conditions of the compromises and contradictions the Meiji Constitution involved. It was thus necessary to discern “gems” from “tiles” in the Meiji Constitution and to polish the gems carefully. As Nakae Chomin, a great philosopher nicknamed the Jean-Jacques Rousseau of the East, pointed out, constitutional development under the Meiji Constitution should be stimulated by efforts to strengthen a process in which the *onshiteki minken* (the right to participate in politics as a gift from above) is replaced by the *kaifukuteki minken* (the right as a gain from below).³⁵ From a judgment of the early public discourse on the Meiji Constitution, one can expect that the powers and structure of the Diet would be at the forefront of liberal democratization. Thus, expanding protection of civil rights did not necessarily constitute the highest priority on the liberal democratic agenda. For better or worse, the early debates on making the Meiji Constitution were characterized as state-centered.³⁶ Compared with intensified public and national interests, private and personal interests were forced to recede into the background.

3. Prominent Characteristics of the Meiji Constitutional System³⁷

(1) Dualism

Unlike Western monarchical countries, the Meiji *hanbatsu* government decided to establish a dual system of fundamental law of the nation: one was the Constitution and the other was the *Koshitsu Tenpan* (the Imperial House Law).³⁸ The *Koshitsu Tenpan*, which was put into effect at the same time as the Meiji Constitution, dealt with matters concerning the imperial family. The Imperial

³⁵ See Kotoku Shusui, “Chomin sensei,” in Inada, *Meiji kenpo seiritsushi*, 2: 925-926. Nakae Chomin, *Sansuijin keirin mondo (Discussion on Statesmanship by Three Drunken Men)* (Tokyo: Iwanami Shoten, 1965, 1887), 196-197.

³⁶ See Matsumoto Sannosuke, *Meiji shiso ni okeru dento to kindai (Tradition and Modernity in Meiji Japanese Thought)* (Tokyo: Tokyo Daigaku Shuppankai, 1996), 6-11.

³⁷ Minobe enumerated as features of the Japanese monarchy *kintei kenpo shugi*, self-determination of the imperial house, prerogative-centered principle, and separation of politics and the military. Minobe Tatsukichi, *Nihon kenpo no kihon shugi (Basic Principles of Japanese Constitutional Law)* (Tokyo: Nihon Hyoronsha, 1934), 3-100 (hereinafter cited as Minobe, *Kinoshugi*).

³⁸ For the English text of *Koshitsu tenpan*, see Ito Hirobumi, ed., *Commentaries on the Constitution of the Empire of Japan*, 2nd ed. (Tokyo: Chuo Daigaku, 1906), 171-184.

House Law was promulgated as the form of an imperial order but it did not appear even on an official gazette, unlike the Constitution. This meant that the imperial family enjoyed the right to self-determination about their domestic matters, however seriously they affected political affairs of the nation.³⁹ Theoretically, for example, the Diet could have held a power to grant consent on succession to the throne, as the British Parliament does. That was not the case, however, in the Meiji constitutional system.⁴⁰ In fact, the Diet was totally excluded from the process of decision-making on matters of the imperial family.⁴¹ And that was exactly what the framers of the system intended. It seemed to the framers that popular control of the imperial matters was absolutely out of the question. The framers considered the *Koshitsu tenpan* “a House Law” and the purpose of its enactment was to make the instructions of the imperial ancestors “more exact and express”.⁴² The semi-official commentary on the Meiji Constitution and Imperial House Law written by Ito Hirobumi explains that the consent of the Imperial Diet was unnecessary for amending the Imperial House Law. The emperor had not enacted totally arbitrarily this law because he received the family instructions from his ancestors and would hand them down to posterity. From the same reason, the subjects could not interfere with this law.⁴³ The Imperial House Law therefore coexisted with the Meiji Constitution as the ultimate authority in its field outside any democratic control.

³⁹ When the *Koshikirei* (the Order on Official Legal Form) was established in 1907, amendments to *Koshitsu tenpan* were required to be published in an official gazette. Thus, amendments of 1907 and 1918 appeared in official gazettes. See Ito Hirobumi, “Koshitsu tenpan gige” in *Kenpo gige*, Miyasawa Toshiyoshi, ed. (Tokyo: Iwanami Shoten, 1940), 128 n. 2.

⁴⁰ According to the provision of the Meiji Constitution, “The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provision of the Imperial House Law.” (Article 2).

⁴¹ *Commentaries* offers the intention of the framers. Detailed provisions on the imperial house affairs do not appear in the Constitution because “no interference of the subject shall ever be tolerated regarding them.” Ito, *Commentaries*, 6. Moreover, the Meiji Constitution provided that “No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet” (Article 74). *Commentaries* explains why no deliberation on revision of the Imperial House Law in the Diet. It is because “Imperial House Law is one that has been settled by the Imperial Family concerning their own affairs, and no relation to the reciprocal rights and duties of the Emperor or of His subjects toward each other.” Ito, *Commentaries*, 155-156. However, who is the emperor, for example, influences the rights and duties of the people very much because the Meiji constitutional system adopted the principle of direct governance by the emperor.

⁴² *Koshitsu tenpan jyoyu* (Imperial House Law Preamble) in Ito, *Commentaries*, 171.

⁴³ Ito, “Koshitsu tenpan gige” in *Kenpo gige*, 127.

(2) Divine Right

As discussed above, the Meiji Constitution was established as a benefit by the merciful emperor. The enactment derived its sole authority from the will of the emperor. A fundamental assumption was that it was the emperor who made the constitution. The principle of *kintei kenpo* unchallengeably stood solid. By following this principle, the emperor monopolized the power to make a constitution.⁴⁴ The emperor “in virtue of the supreme power We inherit from Our Imperial Ancestors, promulgate[d] the present immutable fundamental law, for the sake of Our present subjects and their descendants.”⁴⁵ The emperor was thus regarded as sovereign, although there was no Japanese word for sovereign or sovereignty in the Meiji Constitution. In his *Commentaries*, Ito Hirobumi, the chief person in leading duties of making the constitution, explained that “the relations between Sovereign and subjects were established at the time that the State was first founded.”⁴⁶ The emperor was characterized as “Heaven-descended, divine and sacred” and “pre-eminent” above all his subjects.⁴⁷

More precisely, sovereignty resided in the unbroken line of emperors, descending from Amaterasu Omikami (the legendary sun-goddess).⁴⁸ The emperor’s power to govern Japan derived from the founding myth of the state. According to *Joyu*, Preamble of the Meiji Constitution, “The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to Our descendants.”⁴⁹ Appealing to the tradition was an essential tone of constitutional

⁴⁴ The power to amend a constitution can be understood as institutionalized constitutional power. The Meiji Constitution preserved the power to project constitutional amendments for only the emperor. Article 73 of the Constitution of the Empire of Japan read “When it has become necessary in future to amend the provisions of the present Constitution, a project to the effect shall be submitted by the Imperial Diet by Imperial Order.”

⁴⁵ *Kenpo happu chokugo*, Imperial Rescript on the Promulgation of the Constitution, par. 1.

⁴⁶ Ito, *Commentaries*, 1.

⁴⁷ Ito, *Commentaries*, 7.

⁴⁸ Article 1 of the Constitution of the Empire of Japan: “The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.” Article 4: “The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.”

⁴⁹ Further, *Tsuge-bumi* (Imperial Oath Sworn in the Sanctuary in the Imperial Palace) declared that “We now establish the Imperial House Law and the Constitution. These Laws come to only exposition of grand precepts for the conduct of the government, bequeathed by the Imperial Founder of Our House and by Our other Imperial Ancestors.”

storytelling. Therefore, the Meiji Constitution was understood as confirmation, not declaration, of the status of the emperor as sovereign. Indeed, the Meiji constitutional regime was believed to be established to “make and secure from decline the ancient form of government.”⁵⁰ The “sacred and inviolable”⁵¹ emperor was not contained within the constitutional regime. The written constitution could not change the unbroken line of successions of the throne for ages eternal and that was believed to last forever because the latter created the former. At all events, popular consent played no role whatsoever in authorizing constitution-making power or sovereign will.

As a natural corollary of invoking the founding myth, a close connection between the state and Shinto was presupposed in the Meiji constitutional system. In fact, the emperor also held the status of the chief Shintoist priest. Shinto was the religion both of the imperial family and the Japanese state. To that extent, on the other hand, freedom of religion, which was supposed to be guaranteed to the subjects, was restricted not only by nature but also due to the conditions set by the constitutional provision.⁵²

Furthermore, the idea of divine right presupposed an entity responding to its rule. There had to be those who were subject to divine rule. When the idea works well, most people must accept the divine right to rule as legitimate. The Meiji constitutional regime included an ideological apparatus for acquiring popular, albeit not necessarily positive, support. The emperor promulgated the *Kyoiku Chokugo* (Imperial Rescript on Education) on October 30, 1890,⁵³ about twenty months after he promulgated the Meiji Constitution and a month before he was supposed to convoke the Imperial Diet. The logical structure of the *Kyoiku Chokugo* was the same as the Meiji Constitution. The morality the Rescript advocated was “the teaching bequeathed by Our Imperial Ancestors, to be

⁵⁰ *Tsuge-bumi* (Imperial Oath Sworn in the Sanctuary in the Imperial Palace), par. 1.

⁵¹ The Constitution of the Empire of Japan, art. 3.

⁵² Article 28 of the Constitution of the Meiji Constitution: “Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.” Unlike other freedoms such as freedom of speech, there was no reservation of law as for the guarantee of freedom of religion. See also Article 29 “Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.”

⁵³ For the English text, see Gluck, *Japan's Modern Myth*, 121.

observed alike by Their Descendants and the subjects, infallible for all ages and true in all places.”⁵⁴ In the Meiji Constitution, great emphasis was placed upon the long tradition and eternity in the future. And the Rescript set forth that loyalty and filial piety were central values in education. “Our Imperial Ancestors (*waga koso koso*) have founded Our Empire on a basis broad and everlasting and have deeply and firmly planted virtue; Our subjects ever united in loyalty (*chu*) and filial piety (*ko*) have from generation and generation illustrated the beauty thereof. This is the glory of the fundamental character of Our Empire (*kokutai no seika*), and herein also lies the source of Our education (*kyoiku no engen*).”⁵⁵

The Rescript adopted ideological strategies for not only private morality but also the public virtue the *hanbatsu* government believed would be necessary to maintain their version of constitutionalism. On the one hand, *kyodo aikoku* (united patriotism) meant fidelity, subjection, and devotion to the state, particularly the emperor. *Kyodo aikoku* was foremost emphasized because the government believed that opposition would present great danger to the forthcoming constitutional system. Traditional Confucianism did not necessarily supply such kinds of virtue. Thus a unified patriotic attitude among the subjects had to be cultivated. On the other hand, the emperor state was created more or less on the model of a patriarchic family. Logically, Confucian morality worked well here. Because the newly introduced Western thought and philosophy had tremendous influence upon private morality, there was the urgent necessity of reemphasizing *ko* (filial piety) on the part of the government. These two virtues were believed to stimulate the subjects to conform to government needs.⁵⁶

Therefore, the *Monbusho* (Ministry of Education) eagerly enforced the Rescript through its institutionalization. The *Monbusho* distributed copies of the Rescript to schools and regulated their storage, handling, and ceremonial reading by instruction rules. Pupils and students were compelled

⁵⁴ Gluck, *Japan's Modern Myths*, 121.

⁵⁵ Gluck, *Japan's Modern Myths*, 121.

⁵⁶ See Ishida Takeshi, *Meiji shiso seiji shi Kenkyu (Studies on History of Meiji Political Thought)* (Tokyo: Miraisha, 1954); Matsumoto Sannosuke, “Kazoku kokkakan no kozo to tokushitsu (The Structure and Characteristics of the Familial View of the State) in *Meiji shiso ni okeru dento to kindai*, 23-47.

to attend ceremonies such as *hodoku* (reading the Rescript reverently) and *hotai* (saluting the Rescript) in schools. Through school textbooks that the *Monbusho* had come to publish, moreover, *kyodo aikoku* and *ko* were implanted in their minds.⁵⁷ Later, the Rescript on Education appeared in public ceremonies and became an important basis of national morality. *Kokoku sekishi, messhi hoko* (as children of the emperor, selfless devotion to the state he governs) were repeatedly emphasized. As a result, the governmental system based upon the idea of divine right required the state to monopolize not only public but also private morality. All aspects of human life depended upon the divine right to rule inherited from the emperor's ancestors in an unbroken line and bequeathed to everlasting posterity, which even the emperor as sovereign could not by himself change.

(3) The Imperial Prerogative-centered Governmental System

The fundamental premise of the Meiji constitutional system was that the emperor directly governed the people with advisory supports. The emperor “combin[ed] in Himself the rights of sovereignty” and “exercise[d] them, according to the provisions of the present Constitution.”⁵⁸ This meant that the emperor held sovereign powers as a whole but did not necessarily exercised them by himself. In terms of the Constitution, the emperor exercised “the legislative power with the consent of the Imperial Diet”⁵⁹ and the executive power with advice of the ministers of state.⁶⁰ The courts of law exercised judicial power “in the name of the Emperor.”⁶¹

The emperor as constitutional monarch was no longer an absolute sovereign.⁶² Constitutional limitations were imposed on the emperor. The governmental affairs were mostly

⁵⁷ For the institutionalization of the Rescript by the *Monbusho*, see Gluck, *Japan's Modern Myths*, 146-150.

⁵⁸ The Constitution of the Empire of Japan, art. 4.

⁵⁹ The Constitution of the Empire of Japan, art. 5.

⁶⁰ The Constitution of the Empire of Japan, art. 55.

⁶¹ The Constitution of the Empire of Japan, art. 57.

⁶² *Commentaries* expressed an aversion for despotism. “The combination of all the governmental powers of the State in one person, is the essential characteristic of sovereignty, and the carrying of those powers into effect in accordance with the provisions of the Constitution, denotes the exercise of sovereignty. When the essential characteristic of sovereignty exists without its exercise in the manner just stated, the tendency will be towards despotism. When, on the other hand, there is such exercise of sovereignty without its essential characteristic, the tendency will be towards irregularities and supineness.” Ito, *Commentaries*, 8.

performed with the support of his advisers. However, the emperor kept a wide range of political powers intact in the Meiji constitutional system. The Constitution was thus regarded as mere self-restraint by the emperor. The Meiji constitutional regime was characterized as imperial prerogative centered.

According to Minobe Tatsukichi, there were four features of the prerogative-centered style of the Meiji constitutional regime.⁶³ First, the Imperial Diet only participated in the governmental process. Because it was the emperor, not the Diet who enjoyed the legislative power,⁶⁴ the Diet was intended to play a subsidiary role in the legislative process. It had no official power to directly order the people. Decisions made by the Diet did not constitute the will of the state by itself until the emperor gave sanction to them.⁶⁵ Law was promulgated not as an expression of the Diet's will but as a presentation of the will of the emperor.

As a consequence of its subsidiary role, secondly, the Imperial Diet could not act by itself. Only the emperor was entitled to convoke the Diet. It was also the emperor's prerogatives to open, close, and prorogue the Diet and to dissolve the House of Representatives.⁶⁶ The Diet had no right to assemble voluntarily.⁶⁷ Further, members of both the House of Peers and the House of Representatives were denied a right to ask the emperor to convoke the Diet.

Third, even without the consent of the Imperial Diet, actions of the government were presupposed to be maintained by the exercise of a wide range of the imperial prerogatives. The emperor might issue emergency imperial ordinances instead of laws, if it was urgently necessary for the government to maintain public safety or to avert public calamities when the Diet was closed.⁶⁸ In the same way, if there was urgent necessity for maintenance of public safety, the government might "take all necessary financial measures" by the form of an imperial ordinance without the consent of

⁶³ See Minobe, *Kihonshugi*, 86-89.

⁶⁴ See the Constitution of the Empire of Japan, art. 5.

⁶⁵ See the Constitution of the Empire of Japan, art. 6.

⁶⁶ See the Constitution of the Empire of Japan, art. 7.

⁶⁷ See Ito, *Commentaries*, 14.

⁶⁸ See the Constitution of the Empire of Japan, art. 8. The government had to present such urgent Imperial ordinances to the Imperial Diet at the next session in order to obtain its approval. See *ibid.*, art. 8 par. 2.

the Diet which could not be convoked.⁶⁹ When the Diet did not vote on the budget or when the budget could not be made, moreover, the government should execute the budget of preceding year.⁷⁰ These three cases all exemplified a way of governmental legislative actions without the participation of the Imperial Diet. As a matter of emergency policy, when it came to a state of siege, things were more decisive. The emperor had the right to declare a state of siege⁷¹ and the constitutional rights of the subjects would become suspended under it.⁷²

Fourth, the Meiji Constitution allowed the emperor to enjoy a wider range of prerogatives than most Western monarchies did. The emperor held the power to project constitutional amendments,⁷³ along with executive prerogatives such as powers to appoint and remove official,⁷⁴ determine administrative organizations,⁷⁵ conclude treaties,⁷⁶ bestow honors,⁷⁷ grant pardons,⁷⁸ command the Army and Navy,⁷⁹ and determine military organizations.⁸⁰ Several prominent features are worth special note. First of all, the emperor might issue imperial ordinances without any statutory delegation “for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects.”⁸¹ This meant that the government might be a legislator on substantial matters. Matters on foreign affairs were also beyond the control of the Imperial Diet.⁸² Only the emperor could conclude treaties. No parliamentary consent was required. Declaration of war and

⁶⁹ See the Constitution of the Empire of Japan, art. 70. The government had to submit such measures taken as a form of an Imperial ordinance to the Imperial Diet at the next session in order to obtain its approval. See *ibid.*, art. 70 par. 2.

⁷⁰ See the Constitution of the Empire of Japan, art. 71.

⁷¹ See the Constitution of the Empire of Japan, art. 14, par. 1.

⁷² See the Constitution of the Empire of Japan, art. 31. However, this prerogative had never been exerted. See Miyasawa Toshiyoshi, *Kenpo (Constitutional Law)* 5th ed. (Tokyo: Yuhikaku, 1973), 35.

⁷³ See the Constitution of the Empire of Japan, art. 73.

⁷⁴ See the Constitution of the Empire of Japan, art. 10.

⁷⁵ See the Constitution of the Empire of Japan, art. 10.

⁷⁶ See the Constitution of the Empire of Japan, art. 12.

⁷⁷ See the Constitution of the Empire of Japan, art. 15.

⁷⁸ See the Constitution of the Empire of Japan, art. 16.

⁷⁹ See the Constitution of the Empire of Japan, art. 11.

⁸⁰ See the Constitution of the Empire of Japan, art. 12.

⁸¹ The Constitution of the Empire of Japan, art. 9.

⁸² The framers of the Constitution confirmed exclusion of the Diet from matters on foreign affairs. “The principal object of the present Article [13] is to state that the Emperor shall dispose of all matters relating to foreign intercourse, with the advice of His Ministers, but allowing no interference by the Diet therein.” Ito, *Commentaries*, 30-31.

making peace also belonged to the imperial prerogative. Here again the Diet did not have any power to intervene either.⁸³ The most important area, however, that was outside the parliamentary political process was *tosui-ken*, the power to command the military forces. The advice of the government was not necessary for the power, not to mention the consent of the Imperial Diet. It was called independence of *tosui-ken*, which turned out to be one of the most serious causes of the breakdown of the Meiji constitutional system.

(4) Independence of *tosui-ken*

The emperor was the supreme commander of the Army and Navy⁸⁴ as well as the head of the state and the chief priest of Shinto. The emperor always wore a military uniform when he appeared in public.

As described above, *tosui-ken* was situated outside the reach of the civilian government. But there was no explicit provision on the independence of *tosui-ken* in the Meiji Constitution. *Commentaries* explain the framers' intention that "paramount authority in military and naval is combined in the Most Exalted Personage as His sovereign power, and that those affairs are in subjection to the commands issued by the Emperor."⁸⁵ There was no mention of governmental advice on the prerogative to command the military forces. It was evident, however, that the Imperial Diet had nothing to do with this prerogative. To the contrary, the prerogative to determine organizations of the Army and Navy based upon Article 12 was clearly intended to be exercised with advice of the ministers of state.⁸⁶ Thus it could be inferred from the explanations *Commentaries* gave that the prerogative as the commander-in-chief was out of reach of even the government. In fact, the commanding power of the emperor was interpreted as independent of the government. Even liberals

⁸³ The Constitution of the Empire of Japan. art. 13. Nakae Chomin criticized the weak Diet that appeared in the Meiji Constitution. Among other things, Chomin believed, the Diet and the people should have participated in concluding treaties, declaring war, and making peace. See Kotoku Shusui, *Chomin sensei*, in *Tokuhon Kenpo no hyakunen*, 1: 189.

⁸⁴ See the Constitution of the Empire of Japan, art. 11.

⁸⁵ Ito, *Commentaries*, 28.

⁸⁶ Ito, *Commentaries*, 28.

such as Minobe Tatsukichi confirmed that its independence was the practice that was initiated before the Meiji Constitution was promulgated and had continued under it.⁸⁷ In sum, the independent commanding prerogative was regarded as a constitutional custom law from the early Meiji period.⁸⁸

The word *tosui* meant military strategies and tactics. Because special knowledge and skills were needed in the actual military operation,⁸⁹ it was thought that the emperor should be advised not by the ministers of state, who were mostly civilians, but directly by the Chief of the General Staff Office (Army) and the Chief of the Naval Staff Board (Navy).⁹⁰ Under the Meiji constitutional regime, the meaning of *tosui* had expanded so as to include preparations in peacetime for actual military operation such as “training of officers and soldiers, the organization of the armed forces, the appointment of officers, and even the determination of the size of the armed forces.”⁹¹ Such preparations were called *gunsei*, administrative matters regarding the military.⁹² Theoretically, *tosui* (*gunrei*, military order) and *gunsei* are different concepts because the organization of the armed forces itself can be separated from actual strategies and tactics. Unlike *gunrei*, the Meiji Constitution could

⁸⁷ See Minobe Tatsukichi, *Kenpo satsuyo* 5th ed. (Tokyo: Yuhikaku, 1932), 322; Minobe, *Kionshugi*, 95-96.

⁸⁸ The *Gunjin chokuyū* (the Rescript to Soldiers and Sailors of 1882) was one of the important documents on military matters. The Rescript clarified that the commanding power belonged to a prerogative of the emperor, that the Army and Navy were the military of the emperor, not the state, that the soldiers and sailors with one mind to the emperor tried hard to protect the state, that they should “neither be led astray by current opinions nor meddle in politics,” but with single heart fulfill their essential duties of loyalty, and that they should accept an order by a superior officer as one by the emperor. See Takashi Momose, *Jiten Showa zenki no nihon: Seido to jittai (Encyclopedia of Japan in the Prewar Showa Era: Institutions and Realities)* (Tokyo: Yoshikawa Kobunkan, 1990), 267. See also, Gluck, *Japan's Modern Myths*, 53-54.

⁸⁹ Minobe explains the reason of the prerogative independent of the government. “The main purpose of supreme command is to combat against present or hypothetical enemies. To accomplish this purpose, it is necessary that the military forces can act freely and rapidly and that strict secrecy of operations must be observed. Thus, no interference of outsiders must be allowed. When even the ministers of state can participate in matters of supreme command, it brings dangers that the military actions will become weak.” Minobe, *Kenpo satsuyo*, 322.

⁹⁰ Because ministers of war and the navy were members of the government, they were officials for political duties from a proper division of labor. However, they were deeply connected to the matters of military strategies and tactics. As a standard interpretation, both ministers held a privilege to report to the emperor, along with the Chiefs of the General Staff Office and of the Naval Staff Board. See Momose, *Jiten Showa zenki no nihon*, 257.

⁹¹ Miyasawa, *Kenpo (Constitutional Law)*, 32. For the translation of this part, see Tanaka, *The Japanese Legal System*, 633.

⁹² *Commentaries* exemplified as the power of determining the military organization “the organization of military divisions and fleets, and all matters relating to military districts and sub-districts, to the storing up and distribution of arms, to the education of military and of naval men, to inspections, to discipline, to modes of salutes, to styles of uniforms, to guards, to fortifications, to naval defences, to naval ports and to preparations for military and naval expeditions.” Ito, *Commentaries*, 28-29.

be appropriately interpreted in the way that *gunsei* should have been managed with the advice of the ministers of state under Article 12.⁹³ As matters that should be classified as *gunsei* increasingly shrank, in fact, the category of *gunrei* overwhelmed that of *gunsei*. Furthermore, even the *gunsei* matters that were not independent of the governmental control were executed with the advice of the ministers of war and of the navy, who should be respectively appointed from only generals or lieutenant generals, or admirals or vice-admirals on the active lists.⁹⁴ This customary principle was crucially important because the prime minister could not organize his cabinet without support from the army and navy, which alone controlled personnel in active service. If the military were powerful, then the cabinet had to make a significant concession to keep the government workable. As a consequence, the term *tosui* had increasingly come to be understood to cover almost all things related to the military forces. In fact, when political parties played a pivotal role in the democratic process, the ministers of war and of the navy should not be necessarily from high rank officers in active service, although virtually all the ministers were actually selected from active lists.⁹⁵ The collapse of the political party cabinet system vividly showed expansive influence upon the democratic process of the extra-constitutional principle that the ministers of war and of the navy should be high-ranking officers in active service. In such a situation, civilian control could not be expected to work well enough to keep inexperienced Japanese democracy from breaking down. The Meiji constitutional system lacked one

⁹³ Article 12 of the Constitution of the Empire of Japan read “The Emperor determines the organization and peace standing of the Army and Navy.” In Minobe’s interpretation, this prerogative on the organization of the armed forces should have been different from *tosui-ken* (art. 11). The actual operation of the armed forces presupposed their existence. The organization of the armed forces meant a creation of the military and only the state could decide to create the military forces. Therefore, such a state matter should have belonged to the governmental prerogative and should be carried out with the advice of the cabinet, not by the military staff. See Minobe, *Kihonshugi*, 97-99.

⁹⁴ The principle that ministers of war and of the navy should be a general or lieutenant general, or an admiral or vice-admiral in active service was explicitly established in 1900. However, there was no such provision in the Meiji Constitution. This practice was legally supported in the *fuhyo*, or attached list, of the Imperial Ordinance regarding the Organization of the Navy Department, No. 194, May 19, 1900, and in the Imperial Ordinance regarding the Organization of the War Department, No. 75, April 15, 1903. See Kenneth Colegrove, “The Japanese Constitution,” 31 *American Political Science Review* 1027, 1028 n. 4 (1937).

⁹⁵ Since 1900 the principle of active high-ranking officers had been effective except the period from 1913 to 1936, when political parties formed the government. This exceptional period was the most democratic under the Meiji Constitution. See Masuda Tomoko, *Tennosei to kokka* (The Emperor System and the State) (Tokyo: Aoki Shoten, 1999), 92.

of the most rudimentary elements of democracy.⁹⁶ Independence of *tosui-ken* was widely regarded as “an effective springboard for the rise of extreme militarism.”⁹⁷

4. Relationship between the Imperial Diet and the Government

As described above, the Meiji constitutional regime was created in the way that the emperor was supposed to play a central role as the head of state, the commander-in-chief, the chief priest of Shinto, and the head of the imperial family simultaneously. Politically speaking, it was a system of the direct governance of the emperor founded upon the imperial prerogatives, which were intended to be exerted with the advice of the ministers of state.⁹⁸

In contrast, the Imperial Diet enjoyed only relatively limited powers. The Diet was not an official legislative body that directly exercised its power over the people but an organ supporting the emperor who monopolized sovereign power.⁹⁹ The Diet held constitutional powers such as one to give its consent to law including to initiate projects of laws,¹⁰⁰ to approve emergency imperial ordinances,¹⁰¹ to give its consent to an annual budget,¹⁰² and to approve imperial ordinances of emergent financial measures.¹⁰³ The Diet’s power to participate in the legislative process was even narrowed because the Meiji Constitution allowed the emperor to issue imperial ordinances that were independent of a statutory basis.¹⁰⁴ Moreover, the parliamentary control over budget was also limited as described above. Even though the Diet did not approve the new budget before a fiscal year began, the government could execute the budget of the preceding year.¹⁰⁵ This constitutional provision

⁹⁶ See Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 241-251.

⁹⁷ Miyasawa, *Kenpo*, 33. For the translation, see Tanaka, *The Japanese Legal System*, 634.

⁹⁸ See the Constitution of the Empire of Japan, art. 55.

⁹⁹ See the Constitution of the Empire of Japan, art. 5. So long as a legal norm took on a law in the legal form, it was mandatory to obtain the consent from the Diet to make legislation constitutionally. Article 37 read “Every law requires the consent of the Imperial Diet.”

¹⁰⁰ See the Constitution of the Empire of Japan, art. 38.

¹⁰¹ See the Constitution of the Empire of Japan, art. 8 par. 2.

¹⁰² See the Constitution of the Empire of Japan, art. 64.

¹⁰³ See the Constitution of the Empire of Japan, art. 70 par. 2.

¹⁰⁴ See the Constitution of the Empire of Japan, art. 9.

¹⁰⁵ The Constitution of the Empire of Japan, art. 71.

made the parliamentary approval of the budget rather nominal.¹⁰⁶

The Diet was formally weak in relation to the government as well as to the emperor. The government was formed by appointment of the emperor.¹⁰⁷ On the one hand, the confidence of the Diet, particularly of the House of Representatives, was no condition of forming or maintaining the government. On the other, the House of Representatives was resolved by an imperial order that was issued by the emperor with the advice of ministers of state.¹⁰⁸ This asymmetry caused the Diet to lack the most powerful weapon available for the controlling the government.

Another problem of the weak Diet resided in its composition itself. The Imperial Diet consisted of the Houses of Representatives and of Peers as modeled on the British Parliament.¹⁰⁹ The members of the House of Peers were the members of the imperial family, the peerage, and those who were appointed by the emperor.¹¹⁰ This House had no democratic legitimacy. The framers argued, however, that bicameralism was necessary in order that deliberations might be “thorough and minute” and that “public opinion [might] be impartially represented.”¹¹¹ They to some degree recognized that the House of Peers served as a bulwark for the imperial house and a preserver of conservative elements. However, they claimed that the unitary head of state needed different types of organizations to govern the state well just as incorporation and cooperation of sets of different organs were necessary for the healthy activity of the mind of higher organic beings. Thus, it was necessary, they contended, that the ideas of the people should be transmitted to the sovereign

¹⁰⁶ In reality, however, the virtue of this clause diminished during the inflation periods. See Tanaka, *The Japanese Legal System*, 635 n. h).

¹⁰⁷ See the Constitution of the Empire of Japan, art. 10.

¹⁰⁸ See the Constitution of the Empire of Japan, arts. 7 and 55.

¹⁰⁹ The Constitution of the Empire of Japan, art. 33. See Minobe, “Kizokuin ron,” *Gendai kensei hyoron*, 143.

¹¹⁰ The Constitution of the Empire of Japan, art. 34. The *Kizokuin rei* (the Imperial Ordinance concerning the House of Peers), art. 1. The members of the House of Peers included the following as of 1925: All men of the imperial family became life members when they came of age. When princes and marquises turned 30 years of age, they automatically became members of the upper house. 18 count members were elected by mutual vote. 66 viscount and baron members were respectively elected by mutual vote. The emperor selected as the members 125 men of 30 years old or over who did meritorious services to the state or has learning and experience. 4 members were elected from academicians of the Imperial Academy by mutual vote. 66 members were selected by mutual vote from men of 30 years of age or over who paid a large amount in direct national taxes. See Minobe, *Kenpo satsuyo*, 362-367.

¹¹¹ Ito, *Commentaries*, 69.

through different media. Because the purpose of a representative system was “to draw profit from the results of public deliberations”,¹¹² the framers feared that unicameralism would reflect only partial ideas among the people and then prejudiced opinions would prevail over deliberated wisdom.

[W]hen all the political forces are united in a single House, and are left to the influence of excited passions and abandoned to one-sided movements, with no restraining and equalizing power over them, that House may in the intemperance of biased excitement, overstep the limits of propriety, and, as a consequence, bring about the despotism of the majority, which may in turn lead to anarchy. Evils would be far greater under such a state of things, than they were in the days when there was no representative system at all.¹¹³

Thus, the framers placed emphasis upon opinions that were expressed through other than public election. However, they failed to defend the constitution of the House of Peers. They only presented the shortcomings of a unicameral public elected chamber system. Rather, a real problem here is whether the framers’ assumption was proper. It is entirely true that despotism of the majority is one of the most serious problems in democratic society.¹¹⁴ Did the Meiji Constitution really create an institution that was democratic enough to express the will of a majority of the people? Despotism of the majority becomes a serious problem after the democratic political process functions significantly. After all, the Meiji constitutional regime could be essentially regarded as self-preservation of power as well as self-restraint on the part of the minority elite.

Unlike the House of Peers, to be sure, the lower house was founded upon popularly elected representatives.¹¹⁵ However, the nature of representation was so limited that the people could not be re-presented in the House of Representatives. In fact, representatives were elected in the election with extremely limited suffrage. Voters were only men who were 25 years of age or over and who paid 15 yen or over as land and income taxes. At the first general election of 1890, there were about

¹¹² Ito, *Commentaries*, 70.

¹¹³ Ito, *Commentaries*, 71.

¹¹⁴ See John Stuart Mill, *On Liberty* (1859) in Stefan Collini, ed., *On liberty; with The Subjection of Women and Chapters on Socialism* (Cambridge, Cambridge University Press, 1989); Alexis de Tocqueville, *Democracy in America* (1835, 1840), translated and edited by Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000).

¹¹⁵ The Constitution of the Empire of Japan, art. 35.

450,000 eligible voters, 1.24 percent of the then population.¹¹⁶ Even after universal suffrage for men of 25 years old or over was introduced in 1925, there were about 12,400,000 eligible voters, 21 percent of the population in 1928.¹¹⁷ The House of Representatives itself could claim only weak democratic legitimacy. Its foundation was not solid enough to cope with undemocratic political movement. The political situation of the time therefore showed much room for democratization before the problem of despotism of the majority was discussed.

Moreover, the Imperial Diet was the kind of bicameralism where both houses are equal in their powers with minor exceptions.¹¹⁸ It can be said, more precisely, that the House of Peers established superiority over the House of Representatives because while organization of the House of Peers was a matter of an imperial ordinance, the House of Representatives was composed according to the law.¹¹⁹ Thus, the House of Peers could participate in reorganizing the House of Representatives as a part of the law-making process. In contrast, the latter was excluded from reforming the former.¹²⁰ In this way, the lower house that was a limited democratic institution more suffered from the way of organizing parliament as a whole in democratic legitimacy.

As for the government, the Meiji Constitution introduced an advisory system on the part of respective ministers of state. The emperor might receive advice of his ministers of state in regard to state affairs.¹²¹ Following Western monarchies, the ministers of state were required to countersign all

¹¹⁶ See Soma Masao, *Nihon senkyo seidoshi*, 13-19. In 1925, the requirement of tax payment was abolished. Men of 25 years old or over became eligible to vote. Voters were 12,405,056, 21 percent of the population, when the sixteenth general election was held on February 20, 1928.

¹¹⁷ Eligible voters multiplied 3.5 times from 1924 to 1928. See Soma, *Nihon senkyo seidoshi*, 87.

¹¹⁸ The exceptions were as follows: a budget plan should first be presented to the House of Representatives. See the Constitution of the Empire of Japan, art. 65. The House of Peers had the power to advise the emperor about the rules that regulated the privileges of nobility. See the *Kizokuinrei* (the Imperial Ordinance concerning the House of Peers), art. 8. See also, Kenneth Colegrove, "Powers and Functions of the Japanese Diet," 27 *American Political Science Review* 885, 888 (1933).

¹¹⁹ Compare the Constitution of the Empire of Japan, arts. 34 and 35.

¹²⁰ There was a controversy whether the House of Peers could participate in revising the ordinance concerning the House of Peers. Minobe argued affirmatively. Minobe, "Kizokuin ron," *Gendai kensei hyoron*, 143-147. In fact, article 13 of the *Kizokuinrei* (the Imperial Ordinance concerning the House of Peers) provided that "When in the future any amendment or addition is to be made in the provisions of the present Imperial Ordinance, the matter shall be submitted to the vote of the House of Peers."

¹²¹ See the Constitution of the Empire of Japan, art. 55 par. 1.

laws, imperial ordinances, and imperial rescripts relating to state affairs.¹²² The ministers took responsibility only to the emperor. The responsibility of the ministers was political here, not criminal or civil.¹²³ The ministers of state respectively took responsibility to the emperor for their advice. The framers explained from the appointer-appointee relationship the reason why they adopted the individual responsibility principle. It was the emperor who held the prerogative to appoint and remove the ministers of state.¹²⁴ The Imperial Diet had nothing whatsoever to do with appointment and dismissal of governmental officials. Thus the ministers were naturally irresponsible for the Diet. The people were also irrelevant here. The emperor alone could decide on responsibility of the ministers “because the Sovereign possesses the rights of sovereignty of the State.”¹²⁵

Furthermore, even the prime minister had no power to appoint and dismiss the ministers of state. The framers argued that “[T]he Minister President and the other Ministers of State, being alike personally appointed by the Emperor, the proceedings of each one of them are, in every respect, controlled by the will of the Emperor, and the Minister President himself has no power of control over the posts occupied by other Ministers, while the latter ought not to be dependent upon the former.”¹²⁶

Surprisingly, the term ‘cabinet’ was not found in the Meiji Constitution.¹²⁷ Before its promulgation, however, a cabinet system was established, replacing the old executive branch on December 22, 1885. The newly established cabinet system realized a cabinet led by a powerful prime minister who pointed directions of the governmental policies to other ministers and commanded administrative departments and countersigned all law and imperial ordinances with the competent ministers.¹²⁸ When the Meiji Constitution was promulgated, some doubt was expressed whether such

¹²² See the Constitution of the Empire of Japan, art. 55 par. 2.

¹²³ See Ito, *Commentaries*, 102, 103.

¹²⁴ See the Constitution of the Empire of Japan, art. 10.

¹²⁵ Ito, *Commentaries*, 103.

¹²⁶ Ito, *Commentaries*, 104.

¹²⁷ See Kenneth Colegrove, “The Japanese Cabinet,” 30 *American Political Science Review* 903, 903-905 (1936).

¹²⁸ See the *Naikaku Shokuken*, arts. 1 and 5 in Inada, *Meiji kenpo seiritsushi*, 1: 746. For the legislative history of the cabinet system, see Inada, *Meiji kenpo seiritsushi*, 1: 746-758.

a powerful prime minister system might be in conflict with the constitution. At the promulgation of the Meiji Constitution, the existing legal rules that were repugnant to the constitution did not come into effect.¹²⁹ Then the framers in turn changed the cabinet system to conform to the constitution. Antagonism among the *hanbatsu* oligarchs led to disfavor the cabinet system based upon the powerful leadership of the prime minister. The *Naikaku kansei*, the Imperial Ordinance regarding the Organization of the Cabinet of 1889, provided that “[t]he minister president of state stands at the head of the ministers of state, reports affairs of state to the sovereign and, in compliance with imperial instructions, has general control over the various branches of administration.”¹³⁰ Unity of the cabinet under strong leadership loosened now, although important matters such as drafts of law and budget, and treaties with foreign countries were to be decided by a cabinet meeting.¹³¹ The prime minister did not have a constitutionally defined status in the first place. Thus the prime minister could not be institutionally influential enough to control his fellow ministers to have them realize a sense of oneness. As a constitutional principle, the ministers of state should be not collectively but respectively responsible to the emperor for their advice. The prime minister was only *primus inter pares*.

The profound reason why the framers refused the joint responsibility of the ministers was fear and disgust for party politics reflecting public opinion. “The evil” of a cabinet system based upon the principle of joint responsibility of the ministers was that “the power of party combination will ultimately over-rule the supreme power of the Sovereign.”¹³² Such a system was believed to be incompatible with the spirit of the Meiji Constitution.

Therefore, the weak collectiveness of the cabinet without the confidence of the Imperial

¹²⁹ See the Constitution of the Empire of Japan, art. 76.

¹³⁰ The *Naikaku kansei*, art. 2. See Colegrove, “The Japanese Cabinet,” 904.

¹³¹ See the *Naikaku kansei*, art. 5 read: “(1) drafts of law, financial estimates, and accounts; (2) treaties and diplomatic relations with foreign states; (3) administrative ordinances and regulations for the execution of laws; (4) disputes over the competence of departments; (5) petitions from the people, referred to the cabinet by the Throne or by the Diet; (6) expenditures apart from the budget; (7) appointment, promotion, and removal of all officials of *chokunin* rank (appointed by an imperial order) and of governors; (8) in addition, any matter concerning the administration of any department.” Colegrove, “The Japanese Cabinet,” 904-905.

¹³² Ito, *Commentaries*, 104.

Diet was prominently characteristic of the constitutional text. To be sure, both Houses of the Imperial Diet could make representations to the government¹³³ and might present addresses to the emperor.¹³⁴ Other than these methods, however, the Imperial Diet had officially nothing to do with the cabinet. In fact, the *Chozen shugi*, transcendental principle, was the framers' original intent. According to the principle, the government should hold itself aloof from political parties and factions and take an impartial course.¹³⁵ In brief, a parliamentary cabinet system was not an original choice under the Meiji constitutional regime.

Interestingly enough, however, the framers clearly made a considerable concession. They admitted that the cabinet might sometimes assume joint responsibility. The government as a whole took care of important matters both internal and external, and thus no single administrative department alone could properly discharge the duties on such matters. When such important matters were carried out, "all the Ministers of State shall take united counsel, and none of them is allowed to leave his share of the business a burden upon his colleagues."¹³⁶ This concession could be crucial for a cabinet system under the Meiji Constitution because the cabinet itself was entitled to decide what were important matters for the state. The principle of joint responsibility would probably become the widely applicable exception, though not the rule.

Another significant concession the framers made was on to whom the ministers were responsible for their administration of state affairs. As we saw, the framers argued that the ministers directly assumed political responsibility to the emperor. That was the fundamental principle of the Meiji Constitution. Here again, however, there was an important concession that "Ministers are directly responsible to the Emperor and *indirectly so to the people*."¹³⁷ The framers acknowledged that the Diet might pose questions to the ministers and "demand[ed] open answers from them before the

¹³³ The Constitution of the Empire of Japan, art. 40.

¹³⁴ Constitution of the Empire of Japan, art. 49.

¹³⁵ The first prime minister under the Meiji Constitution, Kuroda Kiyotaka made an address to express *chozen shugi* the very day after the proclamation of the Constitution. See this Chapter section 7.

¹³⁶ Ito, *Commentaries*, 105.

¹³⁷ Ito, *Commentaries*, 103 (emphasis added).

public”. They also pointed out the possibility that the Diet might “present addresses to the Sovereign setting forth its opinions.”¹³⁸ As a result, when the emperor exerted his prerogative to appoint the ministers, the framers further argued, “the susceptibilities of the public mind must also be taken into consideration.”¹³⁹ This concession the framers had to make vividly showed how great the influence of the *Jiyu Minken Undo* was.¹⁴⁰ If the ministers of state took responsibility for their policies even indirectly to the people, and this were widely supported, there was a good chance that a quasi-parliamentary government would operate as a constitutional practice. Here we can easily find a discrepancy between absolutism and constitutionalism in the Meiji constitutional regime.

Indeed, there might be enough room for a parliamentary government system in constitutional interpretation. From a liberal point of view, the Diet enjoyed the power to participate in state affairs as widely as the ministers of state were responsible for them and had duties to supervise the administrative departments. The Diet might observe the governmental policies on behalf of the people, discuss and criticize them, and then clarify responsibilities of the government for the people.¹⁴¹ Because the government initiated almost all bills and the Diet only formally passed them as the reality of Japan, Minobe argued, monitoring and criticizing of the government rather than participating in legislation should be considered a primary function of the Diet. As means of supervising the administrative department, either House of the Diet held powers to present addresses to the emperor,¹⁴² to make presentations to the government,¹⁴³ to receive petitions of subjects,¹⁴⁴ to review the limited state affairs, to address a question to the government,¹⁴⁵ and to receive reports from the government.¹⁴⁶ Among them, the power to make a resolution is worth special notice. Although there were no provisions concerning resolution in the Meiji Constitution or the Law of

¹³⁸ Ito, *Commentaries*, 102.

¹³⁹ Ito, *Commentaries*, 102-103.

¹⁴⁰ See this Chapter section 2.

¹⁴¹ See Minobe, *Kenpo satsuyo*, 354.

¹⁴² See the Constitution of the Empire of Japan, art. 49; the *Giin Ho* (Law of the Houses), arts. 51 and 52.

¹⁴³ See the Constitution of the Empire of Japan, art. 40; the *Giin Ho* (Law of the Houses), arts. 51 and 52.

¹⁴⁴ See the Constitution of the Empire of Japan, art. 50; the *Giin Ho* (Law of the Houses), arts. 62 through 71.

¹⁴⁵ See the *Giin Ho* (Law of the Houses), arts. 48 through 50.

¹⁴⁶ See the *Giin Ho* (Law of the Houses), art. 74.

Houses, it was thought that a house might adopt a resolution as a matter of nature because resolution only expressed an opinion of a house and had legally nothing to do with other institutions.¹⁴⁷ The power included votes of non-confidence in a cabinet or a particular minister of state, resolutions on an interpretation of the constitution, and votes on the illegality of governmental actions. Resolutions by a house were interpreted as having no legal effect. To be sure, the ministers of state had responsibility to the emperor who appointed them and they did not have necessarily seats of the Diet. Thus non-confidence resolutions did not entail mandatory resignation of ministers. In reality, however, the political influence of non-confidence vote¹⁴⁸ could be sufficiently great for the cabinet to take counter-actions such as reshuffle of the cabinet, resignation, and dissolution of the House of Representatives. If this kind of constitutional interpretation came to be considered convincingly valid in the course of political development of the Meiji Constitution, a parliamentary government would be realized based upon the principle that the cabinet must have support from the House of Representatives in a way that it was clearly against the original intention of the framers.¹⁴⁹

5. Pluralism in Advisory Institutions

When he exercised his prerogatives, the emperor was supposed to receive advice from various agents. Besides the prime minister, the ministers of state, or the cabinet, there were several advisory institutions in the Meiji constitutional system such as the Minister of the Imperial Household, the Lord Keeper of the Privy Seal, the *genro* (the group of senior statesmen), the Privy Council, and the General Staff Office and the Naval Staff Board in peacetime and the Imperial Headquarters in wartime. The prime minister and his cabinet could not monopolize the advisory position to the emperor even regarding state affairs. That was a distinctive feature of the Meiji constitutional regime. Pluralistic supporting institutions competed with one another for the

¹⁴⁷ See Minobe, *Kenpo satsuyo*, 413.

¹⁴⁸ The *fushinmin ketsugi* (resolution of non-confidence), the *monseki ketsugi* (resolution of censure), and the *dangai ketsugi* (resolution of impeachment) were used for means of control of the government.

¹⁴⁹ For a detailed examination of Minobe's constitutional theory, see this Chapter section 8.

emperor's will that was the only source of legitimacy in order to realize their own political agenda. Such a political situation caused a serious problem of irresponsibility in decision making and in fact the Meiji constitutional system led to a disastrous result in the end.

When the cabinet system was organized in 1885, the Ministry of the Imperial Household was established independently of the cabinet. Since then the imperial household has been conceptually separate from the state. The ministry represented one part of this dualism. The Minister of the Imperial Household, the chief of the ministry, supported the emperor only as to matters relating to imperial house affairs. Because he was not a minister of state, the minister was competent to give advice on no state affairs.

The Lord Keeper of the Privy Seal was a *shinin-kan* (official who was personally appointed by the emperor) and regarded as a liaison between the state and the imperial household. He had an official duty to always be in attendance on the emperor and support him. He himself had no power to present addresses to the emperor but as a close attendant expressed his opinions about not only the imperial household but also state affairs.

Both the Minister of the Imperial Household and the Lord Keeper of the Privy Seal were basically officials for the imperial household. However, they played an important role in the political process because the line between state affairs and imperial family matters was often vague and because they were so close to the emperor that they could screen those who were allowed to gain access to the emperor.¹⁵⁰

The *genro* (the group of senior statesmen) was an extra-constitutional institution. At the Meiji period, the *genro* were recognized as the senior statesmen from *Satsuma* and *Choshu* who had held central positions in the political and military world since the Meiji Restoration and gave the emperor advice on important issues of the state affairs. Particularly, one of the most important

¹⁵⁰ See Yasuda Hiroshi, *Tenno no seijishi (Political History of the Emperors)* (Tokyo: Aoki Shoten, 1998). In fact, it has been argued that the personnel change from liberals to "reformists" in officials related to the imperial household had a great influence on the political decisions that led to the Pacific War. See Yoshida Yutaka, *Showa Tenno no shusenshi (History of Ending the War of the Emperor Showa)* (Tokyo: Iwanami Shoten, 1992).

functions of the *genro* was to recommend the emperor an appropriate candidate for the next prime minister.¹⁵¹ In fact, the *genro* maintained this function, although its characteristics changed from a group of the influential statesmen with mediatory abilities to a group of leaders of the *hanbatsu* bureaucrats.¹⁵² As the *Kensei Yogo Undo* (Movement for Vindication of Constitutional Government) developed and demands for more democratic political styles became powerful, the *genro*'s influence diminished. At the Taisho period, the *genro* were understood as leaders who retired from the front line of the political world and gave the emperor advice on candidacy of the prime minister and on matters concerning the imperial household.¹⁵³ The *genro* thus had a close connection with important officials in the imperial household. As the Minister of the Imperial Household and Lord Keeper of Privy Seal, the *genro* also played a significant role in screening people who had access to the emperor.¹⁵⁴ When the last *genro*, Prince Saionji Kinmochi, died at the age of 90 on November 24, 1940, the *genro* as an institution also ceased to exist.

As discussed above,¹⁵⁵ matters related to the military operations were differently treated, even though they were regarded as what belonged to the state affairs. The cabinet could not give the emperor advice on *tosui* matters, which were interpreted as independent of the governmental control. Thus, the Chiefs of the General Staff Office and of the Naval Staff Board played a crucial part in political decision making as their qualifications even in peacetime. Because the ministers of war and of the navy were also understood as being privileged to present addresses to the emperor about *tosui* matters, the cabinet had not necessarily unified opinions on the military affairs and even so the cabinet could remain in power. The civilian government had no control over the armed forces.

As to state affairs, there was another important advisory institution, the Privy Council. It was a conspicuously authoritarian body in the governmental process. The Privy Council as the organ

¹⁵¹ See Momose, *Showa senzenki no nihon*, 12.

¹⁵² For the formation and transformation of the *genro*, see Ito Yukio, "Genro no keisei to hensen ni kansuru jyakkann no kosatu (Some Considerations on the Formation and Transformation of the *Genro*)," in Yasuda and Minagawa, eds., *Meiji kenpo taisei*, 247-267.

¹⁵³ See Momose, *Showa senzenki no nihon*, 13.

¹⁵⁴ See Yasuda, *Tenno no seijishi*, chap. 4.

¹⁵⁵ See this Chapter section 3(4).

for the *hanbatsu* oligarchs once supported the government against political parties. As a quasi-parliamentary government system developed based upon party politics, however, the Council became antagonistic to the government. The Council was regarded as a major obstacle to realizing the democratic governmental process. The Privy Council is understood as an example that pluralism in supporting the emperor led to irresponsible politics. Therefore, here we will pay some attention to the functions the Privy Council discharged.

The Privy Council was “an institution peculiar to Japan that was seldom if ever comparable in any constitutional state of the world.”¹⁵⁶ The Council was established as “the highest body of the Emperor’s constitutional advisers” in the same way as the cabinet was.¹⁵⁷ The framers of the Meiji Constitution intended the Council to “be impartial, with no leanings to this or that party,” as a consultative body.¹⁵⁸ Moreover, the Council was designed to serve as “palladium of the Constitution and of the law”¹⁵⁹ in the Meiji constitutional system without any kind of control of constitutionality by the court.

The Council had two major functions reflecting the constitutional dualism. One was regarding state affairs, and the other regarding the imperial household. The Privy Council performed duties on succession to the throne and regency.¹⁶⁰ From the European standard of monarchies, however, these duties should have constituted state affairs. As a constitutional organ, the Privy Council dealt with important state affairs such as: (1) Drafts of law and doubtful points relating to the provisions of the constitution and laws and ordinances supplementary thereto.¹⁶¹ (2) Proclamation of martial law under Article 14, and the imperial ordinances issued under authority of

¹⁵⁶ Minobe Tatsukichi, “*Sumitsuin ron* (On the Privy Council),” in *Gendai kensei hyoron* (*Commentaries on Modern Constitutional Government*) (Tokyo: Iwanami Shoten, 1930), 63.

¹⁵⁷ Ito, *Commentaries*, 108.

¹⁵⁸ Ito, *Commentaries*, 109.

¹⁵⁹ Ito, *Commentaries*, 109.

¹⁶⁰ See, e.g., Article IX of the *Koshitsu Tempun* (Imperial House Law) read “When the Imperial heirs is suffering from an incurable disease of mind or body, or when any other weighty cause exists, the order of succession may be changed in accordance with the foregoing provisions, with the advice of the Imperial Family Council and with that of the Privy Council.” See also, arts. IXX, XXV, IXXX. See also, the *Sumitsuin Kansei*, Imperial Ordinance No. 216 of 1890, issued on October 8, 1890, amended on April 28, 1888, art. 6 (1).

¹⁶¹ The *Sumitsuin Kansei*, art. 6(2).

Articles 8 and 70 of the constitution, as well as all other imperial ordinances having penal provisions.¹⁶² (3) International treaties and agreements.¹⁶³ (4) Matters relating to the amendment of the organization of the Privy Council, and to the rules for the conduct of its business.¹⁶⁴ (5) Matters specially submitted to its deliberation for advice, in addition to those above mentioned.¹⁶⁵ In 1938, the provision regarding jurisdictions of the Privy Council was amended to clarify and codify existing customs.¹⁶⁶ Almost all of these matters belonged to the emperor's prerogatives that were out of any formal control on the part of the Imperial Diet.¹⁶⁷ Thus the Council could and indeed did have a great influence on the political process in prewar Japan.

The Privy Council was composed of a president, a vice-president, and 24 councilors. The Councilors must be men of forty years old or over.¹⁶⁸ In practice, however, most new appointees were men who had approached or surpassed the retiring age. The average age of the Councilors was seventy-three in 1931.¹⁶⁹ In the Meiji period, people with highly distinguished careers were appointed Councilors and the presidents of the Council were the *genro* class, such as Ito Hirobumi, Kuroda Kiyotaka, and Yamagata Aritomo, who were all former prime ministers. It was not rare that politicians who were not appointed prime minister or important cabinet members were appointed

¹⁶² The *Sumitsuin Kansei*, art. 6(3).

¹⁶³ The *Sumitsuin Kansei*, art. 6(4).

¹⁶⁴ The *Sumitsuin Kansei*, art. 6(5).

¹⁶⁵ The *Sumitsuin Kansei*, art. 6(6).

¹⁶⁶ According to the new provision, the Privy Council was entitled to deliberate the following matters:

(1) Drafts of law and doubtful points relating to the provisions of the constitution (*Sumitsuin Kansei*, art. 6(2)).

(2) Laws and ordinances supplementary to the Constitution (art. 6(3)).

(3) Proclamation of martial law (art. 6(7)).

(4) Urgent imperial ordinances and urgent financial imperial ordinances (art. 6(5)).

(5) Conclusion of international treaties (art. 6(6)).

(6) Matters relating to the amendment of the organization of the Privy Council, and to the rules for the conduct of its business (art. 6(4)).

(7) Important imperial ordinances regarding education (art. 6(8)).

(8) Important imperial ordinances relating to administrative organization (art. 6(9)).

(9) Imperial ordinances relating to foundations of honors and pardons (art. 6(10)).

(10) Matters specially submitted to its deliberation for advice, in addition to those above mentioned (art. 6(11)).

¹⁶⁷ See the Constitution of the Empire of Japan, arts. 73, 14, 8, 70, and 13.

¹⁶⁸ See the *Sumitsuin Kansei*, art. 4.

¹⁶⁹ See Colegrove, "The Japanese Privy Council, 2," 25 *American Political Science Review*, 881, 897(1931).

Councilors. The office of Councilors once functioned as a waiting position and substitute for an appropriate higher office.¹⁷⁰ Later, the main sources of recruiting Councilors were bureaucrats, servicemen, judges, and scholars.

In practice, the Privy Council was powerful enough to be sometimes called a third house of the legislature. Unlike the Houses of Representatives and of Peers, however, the Privy Council was a passive institution. Only when the emperor consulted them did the Privy Councilors begin their duties to deliberate upon important matters of state.¹⁷¹ The consultation was assigned by means of imperial message. There were two forms of consultative matters that came before the Council. One was that of a draft the cabinet prepared. This form was taken when the cabinet proposed laws and ordinances, and submitted treaties for ratification. The other was in the form of a mere request of opinion of the Council. This form was used when interpretation of the constitution and laws was at issue.¹⁷² The Council collectively reported to the emperor about its opinion. Thus no Councilors were allowed to express dissenting opinions. It was entirely up to the emperor to adopt or refuse the Council's opinion.¹⁷³

The Privy Council as an advisory body for the emperor might be concurrent with the government that also gave advice to the emperor and took responsibility for it.¹⁷⁴ The prime minister and cabinet members attended a plenary session of the Council and were eligible to vote an item. The Councilors were superior to the cabinet members in number. When there was a disagreement between both sides, thus, the government inevitably failed to realize its will.¹⁷⁵ Because the emperor had discretionary decision-making power, by following the general rule of state affairs, the government gave advice to the emperor as to whether he would accept an opinion of the Privy Council or not. If the government reported to the emperor on adopting or refusing consultative

¹⁷⁰ See Momose, *Showa senzenki no nihon*, 46.

¹⁷¹ The Constitution of the Empire of Japan, art. 56.

¹⁷² See Colegrove, "The Japanese Privy Council, 1," 25 *American Political Science Review* 589, 598 (1931).

¹⁷³ Ito, *Commentaries*, 109.

¹⁷⁴ See the Constitution of the Empire of Japan, art. 55.

¹⁷⁵ See Colegrove, "The Japanese Privy Council, 1," 604.

matters in accordance with its will, it confused the situation, because the government itself participated in the decision-making process of the Council, thus, it contradicted itself when its advice was to reject the Council's opinion. As a result, when the government and the Council disagreed with each other, theoretically there were three options available to the government: first, it would report to emperor its own opinion; second, it would present to the emperor an address on dismissal of the Councilors; third, the government could decide to resign. As a matter of real politics, however, it was inappropriate from a viewpoint of constitutional government that the confused emperor who received conflicting pieces of advice was forced to decide directly. Thus, resignation of the cabinet was always the only actually available option.¹⁷⁶

In this way, when the government disagreed with the Council, the opinion of the latter prevailed over that of the former. The rule that cabinet members might vote in the Council did not contribute to fortifying the power of the government. Rather, it led to a real balance of powers that the government was subordinated to the Privy Council. The Council that was entirely irresponsible as a mere advisory institution played an unmatched important role in the political process. According to the Meiji Constitution, only the ministers of state were fully responsible for their advice to the emperor. However, the Privy Council that might restrict governmental activities without burdening any political accounts could prevent responsible politics from being realizing in prewar Japan.¹⁷⁷ Particularly after a political party cabinet system was established as a constitutional practice, the Council might be a reactionary player to distort a democratic, even if weak, will the government expressed through its policy. There was a serious defect in the institutional design.¹⁷⁸

The Privy Council was designed to be conservative from the outset. The reasons why this extra institution that seemed to be not necessary in modern constitutionalism should be established, according to Ito Hirobumi, were organization of a powerful mechanism for constitutional guarantee,

¹⁷⁶ See Minobe, "Sumitsuin ron," *Gendai kensei hyoron*, 114-118.

¹⁷⁷ See Momose, *Showa senzenki no nihon*, 47.

¹⁷⁸ For example, Minobe expected that further development of constitutional government would bring the Privy Council to abolition. See Minobe, "Sumitsuin ron," *Gendai kensei hyoron*, 128.

necessity of an adviser to the emperor at a conflict between the cabinet and both houses of the Imperial Diet, and avoidance of arbitrariness on the part of the cabinet or the Diet.¹⁷⁹ At the beginning of the Meiji constitutional regime, the Council and the government acted in harmony, because both ministers of state and Councilors had a common background of *hanbatsu* (clans) that was oligarchic and in antagonism against the democratic demands of the people. Cabinets were formed along the *chozen shugi*, transcendental principle. Thus the Privy Council could be as irresponsible to the social trend of the times as the cabinet.

When a political party cabinet system gradually established itself as a constitutional practice, however, the Council came to play a distinctive role in the political process. In fact, the Council expressed its distaste for a political party cabinet and foreign policy for international cooperation. The Councilors acknowledged themselves as guardians of the Meiji Constitution, but they were no longer an “impartial” consultative body. Appealing to veto power as the ultimate interpreter of the constitution, the Council became a body for checking the democratization of the governmental process.

In January 1924, Kiyoura Keigo, the president of the Privy Council, was appointed the prime minister and formed his cabinet based upon the House of Peers, not the House of Representatives. This cabinet thus followed the *chozen shugi*, transcendental principle, and was very unpopular among journalists because the Kiyoura cabinet represented the privileged class of society and seemed to be against new democratic development of politics people wanted after World War I. Three political parties, *Rikken Seiyukai*, *Kenseikai*, and *Kakushinkurabu*, jointly protested against the Kiyoura cabinet, defended constitutional government in general, and proposed the introduction of universal election, reorganization of the House of Peers, and administrative and budgetary reforms in particular. The coalition of these three parties was called *gokensanpa*. The general election of the House of Representatives held in May 1924 resulted in a victory for *gokensanpa*. They won 283 seats

¹⁷⁹ See Momose, *Showa senzenki no nihon*, 46.

of total 466 seats and *Kenseikai* became the leading party with 151 seats. Its president, Kato Takaaki, was appointed the prime minister and led the three-party-coalition cabinet. After that a relatively stable system of parliamentary cabinet government continued until May 1932, when a group of servicemen assassinated the Prime Minister Inukai Takeshi (the May 15 Incident).¹⁸⁰

As political party politics developed, the Privy Council clearly became a body for supervising the executive department. In fact, the Council overthrew the Wakatsuki cabinet, which was based upon the political party *Kenseikai* in the House of Representatives.¹⁸¹ In the spring of 1927, the Bank of Taiwan was at a standstill and on the brink of failure. To avoid finance crisis throughout the country, the Wakatsuki cabinet decided to offer salvation for the Bank of Taiwan by allowing the Treasury to guarantee that the Bank of Japan would provide financing of two hundred million yen for the Bank of Taiwan. The cabinet prepared an emergency imperial ordinance¹⁸² of that policy and submitted it to the Privy Council for consideration. A committee of investigation of the Privy Council immediately reviewed the request of the cabinet and reported a denial of the ordinance on the very next day. The general trend in the Privy Council was harshly critical of the Wakatsuki cabinet. Leading members of the Council were especially antagonistic to the cabinet of *Kenseikai* because its diplomatic policy toward China seemed to them too weak-kneed. At a plenary session, the Council and the cabinet were diametrically opposed to each other. The Council expressed its disfavor of the cabinet's diplomacy, which was irrelevant to deliberation on the policy to evade the financial crisis. The cabinet refused to amend or withdrawal the proposed ordinance. As a result, the proposed ordinance was denied 11 to 19. Prime Minister Wakatsuki then decided to resign rather than fight back by asking the emperor to remove the Councilors. He collected the resignations of his cabinet members to submit them to the emperor. The president of the opposition party *Rikkenn Siyukai*, Tanaka Giichi, was appointed the succeeding prime minister. The cabinet adopted a

¹⁸⁰ For the second *Kensei Yogo Undo*, see e.g., Ito Takashi, "Kiyoura naikaku to gokensanppa naikaku," in Inoue Mitsusada et al eds., *Nihon rekishi taikei vol. 16 Daiichiji sekaitaisen to seitonaikaku (The First World War and Political Party Cabinets)* (Tokyo: Yamakawa Shuppan, 1997), 247-256.

¹⁸¹ See Colegrove, "The Japanese Privy Council, 2," 885-888.

¹⁸² See the Constitution of the Empire of Japan, art. 8.

moratorium on a five hundred million yen scale. On April 22, two days after its formation, the Privy Council easily approved the proposed emergency imperial ordinance this time. Tanaka and his cabinet, meanwhile, criticized the weak-kneed diplomacy of the former foreign minister Shidehara Kijuro and thus took a hard line on China.

The most serious problem for the Privy Council was not that the Councilors were reactionary and antagonistic to party politics but that even when they behaved in good faith, the very existence of the Council distorted responsible politics and public reason. The Wakatsuki cabinet's resort to the emergency imperial ordinance was interpreted as unconstitutional because the cabinet had plenty of time to submit a proposal of rescue to the Imperial Diet during its session.¹⁸³ If so interpreted, the Council had an institutional duty to oppose the governmental proposal.¹⁸⁴ The Council in secret deliberated on important issues concerning the state affairs. All activities of the Council were officially closed to the public.¹⁸⁵ Whatever conclusion it might come to draw, therefore, the Council's opinion failed to make a contribution to the publicly deliberated decision making process in society. Rather, its secrecy furthered temptations of opposition parties, the military, and other outsiders of the government to work on the Council in order to exercise unfair influence on the political decision making process. The Privy Council obviously involved serious institutional shortcomings.

Against party cabinet government, the Privy Council functioned as not only a bulwark of the bureaucratic elite, but also a pathfinder of the ultra-nationalistic movement, whether it intended to or not.¹⁸⁶ The Privy Council was one of the most severely criticized institutions in the Meiji

¹⁸³ See Minobe, "Sumitsuin ron," *Gnedai kensei hyoron*, 118-122.

¹⁸⁴ Minobe argued that not the Privy Council but a constitutional court would well serve constitutional guarantee. See Minobe, "Sumitsuin-ron," *Gnedai kensei hyoron*, 88-92, 127.

¹⁸⁵ See Minobe, "Sumitsuin ron," *Gnedai kensei hyoron*, 122-125.

¹⁸⁶ In both the Kellogg Peace Pact Case and the London Naval Disarmaments Treaty Case, when the government submitted both treaties to the Privy Council for its consideration, the Councilors took a strongly censorious attitude toward the cabinet because they understood that the emperor's prerogatives---to conclude treaties and to command the navy---were infringed by the cabinet's actions. While the cabinet made a concession in the first case, it withstood the accusation of the Councilors. See Colegrove, "The Japanese Privy Council, 2," 888-896. Ito Takashi, "Tanaka naikaku to tohokaigi (the Tanaka cabinet and the Eastern

constitutional system.

6. Protection of the Rights of Subjects and the Judiciary

Although the Meiji Constitution had a sort of the Bill of Rights, the rights declared there were not those inherent in human beings. Rather, they were considered gifts to the subjects from a benevolent emperor.¹⁸⁷ The framers of the Meiji Constitution believed from the beginning of their plan that a modern constitution needed a declaration of some kind of rights but that they should not be so powerful as to trump national policy. As a result, the declaration of rights generally came with the *horitsu no ryuho*, reservation of law. For example, freedom of speech, one of the most important rights in liberal democracy, was guaranteed “within the limits of law”.¹⁸⁸ It is true that reservation of law has a positive side of its significance. The executive branch cannot infringe upon rights without any explicit foundation of statute. Executive arbitrariness is always a real threat to the rights of citizens. The Meiji Constitution might be understood as providing some safeguard against invasion of rights in this sense. On the other hand, however, reservation of law also has a negative meaning. Once law is established by following proper procedures, even the rights of citizens can be legitimately restricted in the name of democratic authority. We know that there is a good argument that the rights of citizens could be protected well in a majoritarian scheme.¹⁸⁹ However, that was not the case with the Meiji Constitution. As described above, the Imperial Diet enjoyed no legislative power in the real meaning of the word. It was a mere organ for giving consent to the emperor, who possessed the prerogative of legislation. In addition, the Diet was not so democratized as to be a

Conference),” and “Hamaguchi naikaku to rondon gunshuku kaigi (The Hamaguchi cabinet and the London Navy Disarmaments Conference),” in *Daiichiji sekai taisen to seito naikaku*, 294-295, and 324-327. Masuda, *Tennosei to kokka*, 147-179.

¹⁸⁷ The subjects *bunzai* controversy between Mori and Ito, see Inada, *Meiji kenpo seiritsushi*, 2: 627-631.

¹⁸⁸ The Constitution of the Empire of Japan, art. 29. Freedom of religion was an exception. The subjects enjoyed freedom of religious belief “within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects”. *Ibid.*, art. 28. Because the state and Shinto was unified in the Meiji constitutional scheme, freedom of religion was difficult to enjoy as such.

¹⁸⁹ See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998).

body for representation of the nation.

If the Diet could not be counted on, how about the judiciary to protect the rights of citizens? The judiciary decided civil and criminal cases in the name of the emperor.¹⁹⁰ The principle of trials conducted according to law, the framers contended, had to be solidly established. From the framers' perspective, however, "the Sovereign is the fountain of justice, and His judicial authority is nothing more than a form of the manifestation of the sovereign power."¹⁹¹ Although as a result of the prerogative-centered system, the emperor appointed judges and the court declared judgments in the name of the emperor, the courts were planned to discharge their functions in an unprejudiced way because the emperor did not "take it upon Himself to conduct trials, but cause[d] independent courts to do so, in accordance to law and regardless of the influence of the administrative."¹⁹²

The right to trial was guaranteed in the Meiji Constitution.¹⁹³ In fact, the court was prohibited from refusing to hear civil cases.¹⁹⁴ As in most European continental countries, however, the judiciary did not hear administrative cases but the administrative court did so as an administrative organ.¹⁹⁵ In the framers' view, there were two reasons why it was necessary to establish a court of administrative litigation different from judicial courts. First, the administrative department was also required to be independent as the judicature. The review of administrative measures by the judiciary could have made administrative authorities "in a state of subordination to judicial functionaries." The administrative department should have discretionary judgment on "benefits to society and happiness to the people" and freedom of action in securing them.¹⁹⁶ Secondly, specialty in administrative judgments had to be protected because judges were lacking in professional training in identifying administrative demands. From the framers' perspective, "the

¹⁹⁰ The Constitution of the Empire of Japan, art. 57.

¹⁹¹ Ito, *Commentaries*, 111-112.

¹⁹² Ito, *Commentaries*, 114.

¹⁹³ The Constitution of the Empire of Japan, art. 24: "No Japanese subject shall be deprived of his right of being tried by the judges determined by law."

¹⁹⁴ See Miyasawa, *Kenpo*, 37.

¹⁹⁵ The Constitution of the Empire of Japan, art. 61.

¹⁹⁶ Ito, *Commentaries*, 120.

question of administrative expediency is just what judicial authorities are ordinarily apt to be not conversant with.” The administrative departments served promotion of public interests and thus “it [would] become necessary under certain circumstances to sacrifice individuals for the sake of the public benefit.”¹⁹⁷ To maintain the public interest, in fact, administrative acts were regarded as legal unless the competent court of administrative litigation revoked them. The framers surely gave priority to the public goods over private interests when they annotated that Article 61 of the Meiji Constitution must be understood to mean that “no suit can be brought against those measures that have been carried out in conformity with law or with the functionary power of the office in question” and that “mere damage to one’s interest, though it can become the ground of a petition, begets no right of bringing an administrative litigation.”¹⁹⁸ The *Gyosei Saiban Ho* (Administrative Justice Act) declared that the administrative court heard only cases that were specifically enumerated in statutes or orders.¹⁹⁹ Thus, legal positivism made standing to sue the administrative agencies narrow.²⁰⁰

Judicial review was not expressed clearly in the Meiji Constitution, unlike the current constitution.²⁰¹ There was a consensus that the court might review the propriety of procedural aspects of statutes.²⁰² The question, however, remained whether the court could review the substance of statutes.²⁰³ On the one hand, conservatives such as Hozumi Yatsuka and Uesugi Shinkichi who advocated a prerogative-centered interpretation to enhance the sovereignty of the emperor favored judicial review because it worked as a useful check against the Imperial Diet that generally was more democratic than the bureaucratic government. Liberals, on the other, such as Minobe Tatsukichi and Sasaki Soichi denied this power of the court because it would betray their cause of democratization of the political process. Liberals championed the parliamentary cabinet system. The court itself

¹⁹⁷ Ito, *Commentaries*, 121.

¹⁹⁸ Ito, *Commentaries*, 122-123.

¹⁹⁹ See the *Gyosei Saiban Ho*(Administrative Justice Act), art. 15.

²⁰⁰ See Miyasawa, *Kenpo*, 37. See also, Tanaka, *The Japanese Legal System*, 53-54.

²⁰¹ See the Constitution of Japan, art. 81.

²⁰² See, e.g. Minobe, *Kenpo satsuyo*, 567.

²⁰³ For the two schools of constitutional interpretation, see this Chapter section 8.

disclaimed the judicial review of statutes several times, while it could review orders. That was the judicial precedent.²⁰⁴

In theory, the denial of judicial review reflected an idea that the ultimate interpreter of the constitution should not be the judiciary but the legislative branch. That was based upon an assumption that the people would agree, even if indirectly, to diminish their benefits from their ruler when the Meiji Constitution provided for the requirement of the consent of the Imperial Diet. In reality, however, there were several players such as the emperor, the *genro*,²⁰⁵ the House of Peers, and the Privy Council in the political process in the Meiji constitutional system and they were totally independent of democratic control. Thus the assumption was not necessarily wrong but only limitedly plausible.

More fundamentally, the system of guaranteeing rights expressed in the Meiji Constitution reflected ambivalent aspects of the regime once again. The exchange between Ito Hirobumi and Mori Arinori in the process of deliberation on the draft of the constitution in the Privy Council is a good example of the discrepancies between absolutism and constitutionalism the Meiji Constitution involved. Mori, the minister of education, proposed to revise the draft of chapter 2 “rights and duties of subjects” to “responsibilities of subjects.” Mori argued that the word of subject usually used to express a relation to the emperor. Unlike Western monarchies, Mori believed, the Japanese subjects could not claim their rights from the emperor but only took their responsibilities. Mori opposed the enumeration of rights in a very important code such as a constitution.²⁰⁶ Ito strongly criticized Mori’s view on a constitution. The spirit of establishing a constitution, in Ito’s opinion, resided in, first of all, limitation of sovereign power of monarch, and secondly, guarantee of rights to subjects. Without a bill of rights but only with enumeration of responsibilities, a constitution should not have been framed. Unless monarchical powers had been limited and rights of subjects had been protected,

²⁰⁴ Taishin in hanketsu, July 11, 1912, *keiroku* 19: 790; October 23, 1913, *keiroku* 20: 1924. Minobe, *Koho hanrei taikai*, 1, 47. See also, Miyasawa, *Kenpo*, 36.

²⁰⁵ See Ito Yukio, “Genro no keisei to hensen ni kansuru jyakkann no kousatsu,” Yasuda & Minagawa, eds., *Meiji kenpo taisei*, 247-267.

²⁰⁶ See Inada, *Meiji kenpo seiritsushi*, 2: 629.

that system must have been regarded as tyrannical.²⁰⁷ Here Ito presented his understanding of a constitution as an instrument for limiting powers and that conformed to the modern idea of constitutionalism. As a matter of fact, Ito's opinion was accepted at the meeting of the Privy Council.

However, there was a twist in this exchange. Mori himself as a man of enlightenment believed that the rights of subjects were natural rights. Whether a constitution was established or not, therefore, subjects by nature enjoyed rights such as freedoms of speech and religion and property right. To Mori, despotism meant a political system in which monarchical powers were promoted for nothing, while the natural rights of subjects were so lawlessly treated as to be ignored. In Western countries, the distinction between the state and monarch had been clarified and thus subjects could claim some rights even from the monarch. In Japan, by marked contrast, there had been no such distinction. To Mori, therefore, the phrase that subjects had rights and duties to the emperor made no sense whatsoever.²⁰⁸ We can understand that Mori attempted to distinguish the area of state organization a constitution covers from privately autonomous areas regulated by natural law. From Mori's perspective, the forthcoming constitution had to be a fundamental law for its proper area and it should not encroach upon the autonomously regulated domain.²⁰⁹

In sharp contrast, Ito maintained his positivist idea of constituting a political order. Natural law thought was irrelevant in Japan because such foreign thought served the creation of a government and it was obviously against the Japanese tradition. In Ito's view, it was the forthcoming constitution that established rights of subjects. The constitution would never confirm that people had already enjoyed rights as an accomplished fact, but for the first time declare that it would grant subjects civil rights and civil liberties.²¹⁰

Therefore, we cannot welcome at face value the conception of constitutionalism Ito argued

²⁰⁷ Inada, *Meiji kenpo seiritsushi*, 2: 629.

²⁰⁸ Inada, *Meiji kenpo seiritsushi*, 2: 630.

²⁰⁹ See Maruyama Masao, *Nihon no shiso (Japanese Thought)* (Tokyo: Iwanami Shoten, 1961), 41.

²¹⁰ See Inada, *Meiji kenpo seiritsushi*, 2: 630-631.

for. It is true that Ito's version includes some idea of limited government and that even such an idea was highly valuable for liberal democracy in Japan, retrospectively because it could not be publicly developed at the final stage of the Meiji constitutional regime. However, if we followed such constitutionalism, a constitution would in the end become a mere piece of written paper, which expresses self-restraint of sovereign power at his convenience. Precious rights would be at the mercy of the emperor's will. To that extent, Mori's argument is worth listening to. When they are confronted with outrageous political power that is apt to expansively invade every aspect of human life, individuals can confine themselves to the autonomous private sphere with rights guaranteed. The Meiji constitutional system failed to provide people with a fortress.

A serious problem Mori had never raised is, however, how to draw a line between the spheres ruled by natural law and those governed by artificial constitutional law. Ultimately, the private sphere can be identified only by the process in which the people who are more or less the object of rule participate. In fact, however, the very next day of promulgating the Meiji Constitution, the Prime Minister Kuroda Kiyotaka publicly stated that the subjects should not meddle in constitutional affairs.²¹¹ Popular commitment to participation in creating a new political order was, after all, totally foreign to the *kintei kenpo shugi* (the principle that the emperor grants to the subjects a constitution as his charity).²¹² Ito, the father of the constitution, accordingly stressed in the public address that people should keep the fact in mind that this constitution was what the emperor granted to his subjects with his deep affection and favor.²¹³

7. The Meiji Constitution in Operation

The Meiji Constitution attempted to create a new regime where the traditional source of authority would be connected to a modern notion of political legitimacy. Its purpose was, on the one hand, to maintain a sort of absolutism and, on the other, to introduce a Western conception of

²¹¹ See Inada, *Meiji kenpo seiritsushi*, 2: 922-923.

²¹² See Maruyama, *Nihon no shiso*, 40-41; Matsumoto, *Meiji shisoshi*, 44.

²¹³ See Inada, *Meiji kenpo seiritsushi*, 2: 923.

constituting politics according to law. The sovereign was placed in “a line of Emperors unbroken for ages eternal” and the emperor himself was regarded as “sacred and inviolable.”²¹⁴ This central element of the Constitution was clearly based upon a traditional image of authority. Even though the emperor “combin[ed] in Himself the rights of sovereignty”²¹⁵ and thus separation of powers was not thorough, there were considerable chances to authorize political power democratically because once some sort of constitutional political system starts, political decisions need public or at least not completely private explanations to justify them.

In fact, Ito Hirobumi, a key politician who led the constitutional drafting process, assumed an ambivalent attitude toward constitutional writing in Japan. Although there were no European countries in the late nineteenth century that had not practiced constitutional politics, in Ito’s view, the Japanese situation was considerably different because such a constitutional writing was totally novel. Before framing a constitution, the axis of Japan as a nation had to be explored and determined. Unlike Western countries, there was no real influence of religion on the Japanese people. What should be the axis of the Japanese nation was, in Ito’s opinion, only the imperial family and a constitutional drafting should follow this axis.²¹⁶

Ito considered the emperor system in Japan equivalent to Christianity in the West. The emperor should be the moral foundation of a Japanese constitutional regime. In the framers’ view, new governmental principles should tie directly to this morality. Constituting a governmental system by the monarchical principle meant preservation of the imperial morality that the framers assumed prevalent and consistent in Japanese history. The Meiji Constitution was thus not only a document of governmental principles but also a declaration of the fundamental rule of morality.

Such an image of the emperor of course reflected the reconstruction the framers attempted in order to authorize their power. The emperor system had varied in its reality from age to age in Japanese history. There were periods in which the emperor was almost forgotten. A main purpose of

²¹⁴ The Constitution of the Empire of Japan, arts. 1 and 3.

²¹⁵ The Constitution of the Empire of Japan, art. 4.

²¹⁶ See Inada, *Meiji kenpo seiritsushi*, 2: 567-568.

framing the Meiji Constitution therefore fortified the status of the emperor by appealing to the founding myth and the alleged uniqueness of the unbroken tradition thereafter.

However, Ito himself realized that introducing some sort of constitutionalism to Japan could lead to limiting political power, even sovereign power. As partially described above, important controversies occurred in the framing process at the Privy Council. Some councilors expressed their dissatisfaction because the proposed constitutional articles seemed to them to be against the supremacy of the emperor. The consent of the Imperial Diet to the legislative power the emperor exercised and the guarantee of rights of the subjects were targets of such criticisms.²¹⁷ By rejecting the criticisms, Ito reiterated that once a constitutional system was created, even the power of the emperor should be subject to the limits set by the constitution. In Ito's view, writing a constitution meant to make a commitment to an idea of the limited government to some extent.

In this way, the Meiji constitutional regime involved serious contradictory elements from the very beginning. A Western concept of constitution was founded upon traditional authority. The Meiji Constitution was a compromise between the absolute status of the emperor as preexisting sovereign and an idea traditionally cherished in constitutionalism that because power is apt to be abused, a healthy governmental scheme needs articulated limitations on power holders.

Because there were the contradictory elements built into the text of the Meiji Constitution, its operation could vary according to which element an interpreter placed emphasis upon.²¹⁸ If some regarded the traditional aspect of the constitution as crucially important, then sovereignty of the emperor came to the central point of its interpretation. If others made much of the elements of

²¹⁷ The "consent" controversy occurred because some councilors believed that the word of consent meant agreement from the higher to the lower. If the Imperial Diet had given consent to the legislative power the emperor enjoyed, in their understanding, the Diet would have been higher than the emperor. Ito rejected the objections because creation of constitutional government generally required the Diet to give the consent to legislation and budget, even if the opponents disliked the word of consent. See Inada, *Meiji kenpo seiritsushi*, 2: 589-602. For the controversy over "responsibilities of the subjects," see this chapter section 6.

²¹⁸ Colegrove has pointed out a wide range of possible constitutional interpretations. "[T]he language and spirit of this remarkable document is sufficiently broad to admit of the tremendous progress towards autocracy on one side, or towards democracy and parliamentary government on the other side, without adding or subtracting a single clause." Kenneth Colegrove, "Powers and Functions of the Japanese Diet," *27 American Political Science Review* 885, 889 (1933).

constitutionalism in the constitution, then separation of powers, parliamentary cabinet government, independence of the judiciary, and so on became a matter of utmost concern on the interpretive agenda.

In fact, the Meiji Constitution went through many twists and turns before the regime collapsed. The framers' original intent on the government was, as discussed above, that the government must stand aloof to avoid the influence of political parties. The framers thus refused the English model and followed the Prussian one. Immediately after the establishment of the Meiji Constitution, the intent was realized as a bureaucratic cabinet system that was independent of political pressure of the Imperial Diet generally more democratic than the government. This was called the *chozen naikaku* (transcendental cabinet).²¹⁹ However, the constitution neither prohibited ministers of state from being members of the Diet nor banned them from negotiating with it. The constitution might be interpreted as tolerating parliamentary cabinet government.²²⁰ According to this interpretation, a party cabinet government would be perfectly constitutional. Whether a transcendental bureaucratic cabinet or a parliamentary cabinet government, it would all depend upon the circumstances of actual political practices at particular times.²²¹

Indeed, Okuma Shigenobu, who was Minister of Foreign Affairs when the Meiji Constitution was put in effect and the chairman of the *Rikken Kaishinto* (Constitutional Progressive Party), delivered an address declaring that the success of a constitutional system depended upon not what its text stipulated but how it was made to work, that a party cabinet government was not necessarily provided for in the constitution, and that as in the United Kingdom, a party cabinet government was expected to be formed after full development of political parties here in Japan.²²² We can say that the Meiji Constitution to some extent expected a parliamentary government system to develop gradually. The constitution itself granted the Imperial Diet the power to give consent to

²¹⁹ For the addresses of the Prime Minister Kuroda Kiyotaka and Ito Hirobumi, the president of the Privy Council on the Meiji Constitution, see Inada, *Meiji kenpo seiritsushi*, 2: 922-925.

²²⁰ See Minobe, *Kenpo satsuyo*, 124.

²²¹ See Minobe, *Kenpo satsuyo*, 124.

²²² For Okuma's address, see Inada, *Meiji kenpo seiritsushi*, 2: 925-926.

bills and budgets the government proposed, no matter how weak the Diet might be otherwise. The transcendental government soon came inevitably under the influence of the Diet with the power to consent because, whether one liked it or not, the governmental process in constitutionalism contained institutional interactions by its very nature.

Okuma's expectation turned out to be right as early as 1898 when Okuma himself first organized a cabinet government. At that time, however, the foundation of the party cabinet system was not so solid as to last long enough to carry out important policies. The first and second *Kensei Yogo Undo* (the Movement for Vindication of Constitutional Government),²²³ the campaign for cabinet formation based upon a majority will of the House of Representatives, finally led to a relatively stable party cabinet government system. Majority party leaders organized cabinets with the support of the lower House between 1924 and 1932. Election by universal suffrage among men of 25 years or older was also realized in 1925. Changes in the government with the confidence of a majority party became a principle of political practice. The principle was called the *kensei no jodo* (normal course of constitutional government).²²⁴ This period experienced the most democratic political process in the Meiji constitutional regime.²²⁵

²²³ For the first and second movement for vindication of constitutional government, see Suetake Yoshiya, "Daiichiji goken undo," in *Daiichiji sekai taisen to seito naikaku*, 4-16; Ito Takashi, "Kiyoura naikaku to gokensanppa naikaku," *ibid.*, 247-269.

²²⁴ However, it is noteworthy that the *genro* played a crucial role in maintaining "the normal course of constitutional government." The *genro* were senior statesmen who, as an extra constitutional institution, supported directly the emperor with regard to domestic policies, foreign affairs, and military matters. They recommended to the emperor an incoming prime minister. Saionji Kinmochi who was appointed *genro* in 1912 was the only *genro* during the golden era of party politics. Although he recommended to the emperor a leader of opposition parties as the candidate for the next prime minister, Saionji did not deeply appreciate parliamentarism but did choose party politics to stabilize the political situation. So long as the *genro* supported the emperor's exercise of prerogatives, the *genro* quite naturally preferred the idea of cabinet for the emperor to parliamentarism. See Yasuda Hiroshi, *Tenno no seijishi*, 192-195. See generally Kojita Yasunao, *Kensei no jodo: Tenno no kuni no minshushugi (The Normal Course of Constitutional Government: Democracy in the Emperor's Country)* (Tokyo: Aoki Shoten, 1995).

²²⁵ The period partly overlaps with the period of the *Taisho demokurashi* (Democracy). For the Taisho Democracy, see Matsuo Takayoshi, *Taisho demokurashi* (Tokyo: Iwanami Shoten, 1974, 2001); Kinbara Samon, ed., *Taisho demokurashi* (Tokyo: Yoshikawa Kobunkan, 1994); Mitani Taichiro, *Taisho demokurashi ron (Essays on Taisho Democracy)*, new ed. (Tokyo: Tokyo Daigaku Shuppankai, 1995). An important issue I cannot take up here is the relationship between inner constitutionalism and outer imperialism during the "Taisho demokurashi." See e.g., Eguchi Keiichi, "1910 nen kara 30 nendai no nihon (Japan from 1910 to the 1930s)" in *Nihon teikokushugishi kenkyu* (Tokyo: Aoki Shoten, 1998), 20-89.

After the Manchurian Incident of 1931, however, the tendency toward a democratic governmental process twisted once again.²²⁶ The Great Depression hit Japan severely. The financial and agrarian crises were so serious that a feeling of blockade was wide spread all over the country. Japan started to wage the Fifteen Years' War against China. A fascistic moment approached. A group of young radical naval officers and army cadets assassinated Prime Minister Inukai Takeshi in the May 15 Incident of 1932. Inukai was one of the most influential leaders of the *Kensei Yogo Undo* (the Movement for Vindication of Constitutional Government). This coup d'état was a failure as an attempt to restructure the state but it had an enormous impact on the political process. Party cabinet came to an end. By using the independence of *tosui-ken*, leaders of the military forces seized real power over the government. Violence rather than speech became a decisive medium of politics. Another form of terrorism against important officials of the government materialized in the February 26 Incident of 1936. The China Incident of 1937 brought total war against China, which led to the Pacific War against the Allies in 1941. The *Kokka Sodojin Ho* (All Nation Mobilization Act) was enacted in 1938 and political parties were dissolved. Japan rushed into a total war regime. The general election of 1942 is remembered as the *yokusan senkyo* (assistance election). The *Yokusan seiji kai* (Political Association for Assistance of Imperial Rule) was the only faction in the House of Representatives.²²⁷ In this situation, the Imperial Diet became a mere body to say yes to the measures the government proposed. The gradual development of constitutional democracy ceased there. The fanatical military clique was rampant until Japan was defeated in August 1945.²²⁸ The period from 1932 to 1945 is called *kurai tanima* (the Dark Valley).

²²⁶ For the process of the breakdown of the Taisho Democracy, see Sakai Tetsuya, *Taisho demokurashi taisei no hokai (The Collapse of the Taisho Democracy Regime)* (Tokyo: Tokyo Daigaku Shuppankai, 1992).

²²⁷ Voting rate was 81.1 percent in the 1942 election. 81.8 percent of candidates (381 of 466) recommended by the Council were elected. Despite severe interference by the police, 13.9 percent of non recommended candidates were elected. They gained 35 percent of votes, which were understood as critical of the Tojo Hideki Cabinet.

²²⁸ See Inoue Mitsusada, Ngahara Keiji, Kodama Kota, and Okubo Toshikane, eds., *Kakushin to senso no jidai (The Era of Reform and Wars)* (Tokyo: Yamakawa Shuppansha, 1997).

8. Two Schools of Constitutional Interpretation: The Organ Theory Controversy

If the Meiji Constitution was a compromise between two conflicting ideas---absolutism based upon reclaimed traditional authority and constitutionalism introduced from the West, then its interpretation could develop along either of them. Generally, there were two conflicting schools of constitutional interpretation. One was more theocratic and authoritarian. The other was more liberal and democratic.²²⁹

The first school of constitutional interpretation was in concert with the framers' original intent. This school well reflected the *kintei kenpo shugi*. It emphasized the emperor's divine right to govern. More precisely, it sanctified divine descent to govern Japan on the ground of the founding myth. It thus paid close attention to the phrase in *joyu*, the preamble of the Meiji Constitution: "The right of sovereignty of the State, We have inherited from Our Ancestors, and We shall bequeath them to our descendants."²³⁰ This divine school was apt to interpret the Meiji Constitution to make prerogative politics as expansive as possible.

Hozumi Yatsuka (1860-1912), professor of constitutional law at the Tokyo Imperial University, was the most influential spokesman of this divine school.²³¹ Before the promulgation of the Meiji Constitution, Hozumi had already presented a constitutional theory that was favorable for the *hanbatsu* government. The emperor alone enjoyed power to create a constitution because he held sovereign power in Japan. Thus, the subjects were not entitled to participate in the process of establishing a constitution. Moreover, a constitution could not restrain the emperor from changing it because he as sovereign created the constitution and thus he could even abolish it without any

²²⁹ For a general view of conflicts in constitutional interpretation, see Kenneth Colegrove, "The Japanese Emperor, I & II," *26 American Political Science Review* 642-659; 828-845 (1932).

²³⁰ The Constitution of the Empire of Japan, preamble.

²³¹ For Hozumi's theory, see Inaga Saburo, *Nihon kindai kenpo shiso-shi kenkyu (Studies on History of Japanese Modern Constitutional Thought)*(Tokyo: Iwanami Shoten, 1967), 157-176; Nagao Ryuichi, "Hozumi Yatsuka," in *Nihon kenpo shiso-shi (A History of Japanese Constitutional Thought)*(Tokyo: Kodansha, 1996), 36-59; Nagao Ryuichi, "Yatsuka no zui kara meijishi nozoku," in Nagao, ed., *Hozumi Yatsuka shu* (Tokyo: Shinzansha, 2001), 260-416; Iwama Akimichi, "Senzen niokeru kenpo kaishaku no hoho (Methods of Constitutional Interpretation in Prewar Japan)," in *Kenpo haki no gainen* (Tokyo: Shogakusha, 2002), 431-357.

reservation.²³² At the beginning of the Meiji constitutional regime, in fact, Hozumi's interpretation was regarded as authoritative because he theorized the framers' intent that the constitution was an instrument for the efficient, systematic, and stable operation of state power.

The primary purposes of Hozumi's constitutional theory²³³ were both to deny a thesis of state sovereignty that eventually came to mean that the emperor's power was restricted by parliament with representation of the people and to refuse the idea of "I am the state" that was a symbol of absolute monarchy overthrown by civil revolution.²³⁴ To accomplish his aims, Hozumi tried to combine and unite the state and the imperial throne by appealing to the notion of *kokutai* of the unbroken line of the emperors for ages eternal.²³⁵ The first feature of Hozumi's constitutional interpretation was the imperial throne sovereignty thesis. The reason why the throne, not the emperor himself, was regarded as the sovereignty holder was that the throne well matched eternity and powerfulness of the state, while the life of a real person was too short and its power was too weak to cope with them.²³⁶ The second feature of Hozumi's theory was the idea of "the emperor is the state." Sovereignty that resided in the imperial throne was expressed in the person of the emperor.²³⁷ This idea meant that, on the one hand, the supreme and enormous natural will of the emperor as a real person fulfilled the will of the state (legal will) and that, on the other, sovereignty that was supreme, independent, inseparable, and unlimited in its nature²³⁸ made a pair of absolute obedience to such sovereignty and thus this relationship made political order of society maintained. By combining the emperor and the *kokutai*, and the state and the *kokutai*, Hozumi created the thesis that "the emperor is the state" from the concept of *kunshu kokutai* and the state order as a

²³² See Hozumi Yatsuka, "Kenpo seitei-ken no shozai o ronzu (Who Has the Power to Create a Constitution?)," in Nagao Ryuichi, ed., *Hozumi Yatsuka shu (Essays of Hozumi Yatsuka)* (Tokyo: Shinzansha, 2001), 13-16.

²³³ See Masuda, *Tenmosei to kokka*, 31-33. The description in this paragraph depends upon Masuda's analysis.

²³⁴ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 74.

²³⁵ See the Constitution of the Empire of Japan, art. 1. See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 72-76.

²³⁶ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 65.

²³⁷ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 84.

²³⁸ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 49-51.

relationship of absolute obedience to sovereignty. This thesis could avoid both state sovereignty in the monarchy and absolute obedience to the monarch as the idea that “I am the state” inspired.²³⁹ Thus the emperor’s prerogative politics developed along this reasoning. Let us consider Hozumi’s constitutional theory in more detail.

In his theory, Hozumi distinguished between *kokutai* (form of state) and *seitai* (form of government). The former meant a distinction of state according to residence of sovereignty: *kunshu kokutai* (monarchical form of state) and *minshu kokutai* (democratic form of state).²⁴⁰ The latter was a distinction of ways that sovereignty exercised: *sensei seitai* (despotic form of government) and *rikken seitai* (constitutional form of government).²⁴¹ With the Meiji Constitution, Hozumi argued, Japan became a state of the *kunshu kokutai* (monarchical form of state) and *rikken seitai* (constitutional form of government).

However, a main point of his theory lay not in a purely academic classification of forms of state and government, but an ideological claim that *kokutai* had been decided by the history of a state as an undisputable fact and a national conviction²⁴² and that a constitution could not change *kokutai* but only *seitai*.²⁴³ In Hozumi’s understanding, the sovereignty of the Japanese state resided in the unbroken line of the throne for ages eternal and this formed the everlasting *kokutai* of the state.²⁴⁴ The *kokutai* was understood as not artificially constitutive but historically and consciously determinative as the people. Hozumi thus founded the idea of *kokutai* with a special constitutional meaning.

Hozumi’s ideological attempt was also to reject parliamentary government based upon party politics, which was once again in harmony with the framers’ view. If the Diet had been composed of only representatives of the nation and its majority controlled the government, he

²³⁹ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 72-76.

²⁴⁰ See Hozumi, “Kenpo no seishin (The Spirit of the Constitution),” in Nagao, *Hozumi Yatsuka shu*, 20.

²⁴¹ See Hozumi, “Kenpo no seishin,” in Nagao, *Hozumi Yatsuka shu*, 26.

²⁴² See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 68.

²⁴³ For constitutional meanings of *kokutai* and *seitai*, see Nagao Ryuichi, “‘Kokutai’ to ‘kensei’ (‘National Polity’ and ‘Constitutional Government’),” in *Nihon kenpo shisoshi*, 10-34.

²⁴⁴ See Hozumi, “Kenpo no seishin,” in Nagao, *Hozumi Yatsuka shu*, 18.

believed, the fundamental structure of the Japanese state would have been revolutionarily changed as if an old state fell and a new state arose.²⁴⁵ In a parliamentary governmental system, the representatives of the people would monopolize both legislative and administrative powers. Adoption of such a system would transform the political characteristics of Japan from the *kunshu kokutai* and *rikken seitai* to the *minshu kokutai* (democratic form of state) and *sensei seitai* (despotic form of government). Hozumi refused the party cabinet government as absolutely unacceptable because it would betray the eternality of the *kokutai*.

His idea of the *rikken seitai* needs further explanation. Particularly, the reason why a parliamentary government system was regarded as a despotic form of government was complicated in terms of a common understanding of constitutionalism. Surprisingly, Hozumi admitted that the essence of constitutionalism consisted in the separation of powers. Legislative, administrative, or judicial powers should be distinguished so that the constitution could demarcate the boundaries of competent fields among the legislature, government, and courts. In this respect, constitutional government was different from despotism in which a single organ of the state arbitrarily exerted confused legislative, administrative, and judicial powers.²⁴⁶ Parliamentarism was thus understood as a kind of despotism because parliament usurped administrative power the constitution properly granted to the government.²⁴⁷ Hozumi's antagonism toward parliamentary government also reflected his distinctive conception of constitutionalism. It was contrary to a common understanding of constitutionalism, which tells us that we should watch the administrative power carefully because abusive exercise of power usually occurs in this field of state power. To Hozumi, oppression of majority seemed the most serious problem for a stable political order. In misunderstood sympathy with the warning John Stuart Mill gave in his *On Liberty*, Hozumi contended that a representative system easily led to disastrous tyranny of majority.²⁴⁸ Legislative despotism was, thus, believed to be

²⁴⁵ See Hozumi, "Kenpo no seishin," in Nagao, *Hozumi Yatsuka shu*, 39.

²⁴⁶ See Yatsuka, "Kenpo no seishin," in Nagao, *Hozumi Yatsuka shu*, 26-27.

²⁴⁷ See Yatsuka, "Kenpo no seishin," in Nagao, *Hozumi Yatsuka shu*, 26-30.

²⁴⁸ See Hozumi Yatsuka, "Kokkai giin ha ryokyoku no setsuritsu o yosu (Bicameralism Is Required in the

more dangerous than governmental despotism. Constitutionalism properly interpreted in Hozumi's view prevented the Diet from invading the sphere granted to the government.

The deep suspicion of the Diet Hozumi expressed derived from his fear and hatred of disorder the masses might cause. What he most feared was the *minshu kokutai* and *sensei seitai* exemplified irrational despotism by the masses as the result of the French Revolution.²⁴⁹ To Hozumi, it had proved that the most ferocious despotism was realized by the people, not by the monarch.²⁵⁰ Hozumi bore constant enmity against popular participation in the political process because the masses tended to want the government to solve social problems such as food, housing, and jobs, and eventually could not reasonably discipline themselves so that a powerful outsider had to maintain social order to avoid uncontrollable despotism.²⁵¹ Thus his constitutional theory was mainly for advocating an absolute emperor system that seemed to him suitable not only for the Japanese tradition but also for an ongoing transformation to mass society.

Hozumi's theoretical reasoning reached the same conclusion. When separation of powers was the essence of constitutionalism, conflicts among three organs were expected to occur frequently. Thus there necessarily had to be something for stabilizing the whole constitutional system. In Hozumi's opinion, only sovereign power could unify and harmonize three different branches. Sovereign power had to be so intensified as to discharge well the function of unification and harmonization. Constitutionalism, Hozumi argued, required the solid status of a sovereign monarch and expansion of his political power. Without any favor of one organ, the head of state with sovereignty stood aloof from the three powers. Prerogative politics must not be interfered with by any subordinate organs.²⁵² To Hozumi, ironically enough, constitutional government needed a powerful emperor-centered system.

In Hozumi's view, therefore, sovereignty must be original, absolute, and unlimited.

Imperial Diet),” in Nagao, *Hozumi Yatsuka shu*, 2-12.

²⁴⁹ See Nagao Ryuichi, “Hozumi Yatsuka,” in *Nihon kenpo shisoshi*, 47.

²⁵⁰ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 67.

²⁵¹ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 70.

²⁵² See Hozumi, “Kenpo no seishin,” in Nagao, *Hozumi Yatsuka shu*, 27-28, 30-33.

Sovereignty was only under self-limitation, which sovereign will could always change.²⁵³ Sovereignty understood thus belonged to the imperial throne. Since the earliest times, the will of the emperor had been supreme and absolute and nothing had been able to restrict it. Therefore, even after it established a constitution, sovereign power was not necessarily subject to it. Because he established the constitution, the emperor was free to change and abolish it without any reservations.²⁵⁴ Sovereign power was well beyond all kinds of law. To Hozumi, constitutionalism did not mean limitation of political power. In contrast, the rights of the subjects were not real rights. Constitutional provisions regarding rights meant that statutes checked what the administrative staff might do. These provisions were the orders to administrators that established norms of action for them. They were not regarded as constitutional declarations on what subjects could do without governmental intervention. Interests that the subjects had, if any, were mere reflections of these orders.²⁵⁵

Thus, absolute obedience to sovereign power was one of the most important aspects of Hozumi's constitutional theory. For example, he contended that equality could be meaningful only under enormous sovereignty. That was because he believed that men were unequal in a state of nature. There were the powerful, the weak, the wise, the foolish, the rich, and the poor in society by nature and thus there would be inevitable despotism by physical strength, intellectual power, and financial power.²⁵⁶ When he advocated absolute obedience to unlimited sovereignty, Hozumi also relied upon a family view of the state. The state was regarded as extended family. While father as the head of family held absolute power over his family members, he took care of them to maintain household welfare. Family members in turn respected and obeyed the father. The head of state enjoyed absolute sovereign power over subjects to maintain social welfare, just as a father did for his family. Patriarchy and paternalism were the foundation of Hozumi's constitutional theory. Indeed,

²⁵³ See Hozumi, *Kenpo satsuyo*, in Nagao, *Hozumi Yatsuka shu*, 84.

²⁵⁴ See Hozumi, *Kenpo satsuyo*, in Nagao, *Hozumi Yatsuka shu*, 84-85.

²⁵⁵ See Hozumi, in Ienaga, *Nihon kindai kenpo shisoshi kenkyu*, 160-161.

²⁵⁶ See Hozumi, "Kenpo no seishin," In Nagao, *Hozumi Yatsuka shu*, 20-21.

he greatly emphasized anachronistic ancestor worship.²⁵⁷

In Hozumi's constitutional theory, as a result, the powers of the Imperial Diet and ministers of state were interpreted in such a way as to make them as limited as possible but those of the Privy Councilors and House of Peers as expansive as possible. At an early stage of the Meiji constitutional regime, Hozumi's constitutional interpretation well served the intentions of the *hanbatsu* government. However, he emphasized the emperor's prerogative too much to deny delegation of legislative powers to administrative orders because strict constitutional interpretation made such delegation against the principle of separation of powers, which would lead to despotism.²⁵⁸ All governmental officials knew that state activities in the twentieth century could not be executed without delegation of legislative power to the administrative departments. As constitutional government developed, Hozumi's interpretation lost its original influence. His theory gradually became obsolete.

In its place, another school of constitutional interpretation became more and more influential. It was well known as the *tenno kikan setsu* (the emperor organ theory). Minobe Tatsukichi (1873-1948), professor at the Tokyo Imperial University, was the most eminent scholar of this school.²⁵⁹

Criticizing Hozumi's constitutional interpretation, Minobe argued for parliamentarism under monarchy. First, he dismissed the idea of *kokutai* as a legal analytical tool. To Minobe, the

²⁵⁷ See Hozumi, *Kenpo teiyo*, in Nagao, *Hozumi Yatsuka shu*, 66-68. Hozumi fiercely criticized a draft of family law based upon the French model because the individualistic approach to domestic matters expressed in the draft was absolutely unacceptable from his patriarchal view of family and state. See Hozumi Yatsuka, "Minpo idete chuko horobu (Family Law Is Made, Then Loyalty and Filial Piety Are Perishing)," in Nagao, *Hozumi Yatsuka shu*, 110-114.

²⁵⁸ See Hozumi Yatsuka, "'Ho no ini' no setsu o nanzu (Criticizing a Theory of 'Delegation of Law')," in Nagao, *Hozumi Yatsuka shu*, 162-164.

²⁵⁹ For Minobe's theory, Ienaga Saburo, *Minobe Tatsukichi no shisoshiteki kenkyu* (*A Study of Minobe Tatsukichi Based upon a History of Thought*) (Tokyo: Iwanami Shoten, 1964, 1998); Frank O. Miller, *Minobe Tatsukichi: Interpreter of Constitutionalism in Japan* (Berkeley: University of California Press, 1965); Okudaira Yasuhiro, "Minobe Tatsukichi," in Hasegawa Masayasu, ed., *Kenpo gakusetsushi* (*A History of Constitutional Theories*) (Tokyo: Sanseido, 1978), 197-210; Nagao, "Minobe Tatsukichi no ho tetsugaku (Jurisprudence of Minobe Tatsukichi) in *Nihon kenpo shisoshi*, 142-194; Iwama, "Senzeni niokeru kenpo kaishaku no hoho," in *Kenpo haki no gainen*, 369-392; Ozaki Motoaki, "Shihai ideorogi toshiteno rikkennshugi shiso no shiikoza to sono kiketsu," in Yasuda & Minagawa, eds., *Meiji kenpo taisei*, 392-422.

kokutai meant the most important historical and ethical characteristics of the Japanese state.²⁶⁰ The *kokutai* could not be understood independently of the unbroken line of emperors for ages eternal and was in fact incomparable in the world.²⁶¹ In Minobe's opinion, such a historical and ethical nature could not be translated into mere legal terms such as monarch and democracy. Minobe rather insisted that the regime of a state, or the foundation of the legal structure of a state should be referred to as the *seitai*.²⁶²

Further, Minobe opposed an interpretation that sovereignty was absolute and unlimited power. Unlike the *kokutai*, *shuken*, sovereignty, is a notion purely introduced from the West and has several meanings.²⁶³ Minobe suggested that the term should be used precisely to avoid unnecessary confusions because *shuken* had multiple meanings and sometimes meant *tochiken*, the state's right to govern it. For Minobe, *shuken* was not necessarily the same as *tochiken*. *Shuken* was often interpreted as single and inseparable, supreme and independent, and absolute and unlimited,²⁶⁴ but *tochiken* should not be understood in the same way. While *tochiken* meant the power to fulfill the purposes of the state by ruling a certain territory and people,²⁶⁵ in federalism, for example, it might be separable²⁶⁶ and not necessarily supreme and independent.²⁶⁷ According to Minobe, it was the personality or will of the state that was supreme and independent.²⁶⁸ *Tochiken* had nothing directly to do with it.

However, what repelled most him was the contention that sovereignty was absolute and unlimited. Even though the will of the state was not absolute or unlimited because it was limited both by natural power such as custom law and rule of reason developed in society and by

²⁶⁰ See Minobe, *Kihonshugi*, 3, 12-13.

²⁶¹ See Minobe, *Kihonshugi*, 14.

²⁶² See Minobe, *Kihonshugi*, 16. For his conception of the *seitai*, see Minobe, *Kenpo satsuyo*, 49-70.

²⁶³ See Minobe, *Kihonshugi*, 18. Minobe enumerated four meanings of *shuken*, sovereignty: 1) being supreme and independent, 2) the power of the will of the state, 3) *tochiken*, the right to govern, and 4) the will of the supreme organ of the state. See Minobe, *Kenpo satsuyo*, 41-44.

²⁶⁴ Minobe quoted Hozumi as a representative of this interpretation.

²⁶⁵ See Minobe, *Kihonshugi*, 21.

²⁶⁶ See Minobe, *Kihonshugi*, 22-25.

²⁶⁷ See Minobe, *Kihonshugi*, 28.

²⁶⁸ See Minobe, *Kihonshugi*, 29.

autonomous limits such as statutes and treaties,²⁶⁹ *tochiken*, the right to govern was all the more limited because it was a right of the state and a right had its effect by sanction of law and thus the right was guaranteed within the limits law recognized.²⁷⁰ Minobe mentioned territorial, interpersonal, formal, and substantive limits upon the right to govern.

Minobe also rejected the argument that in monarchy, sovereignty belonged to both the state and monarch. In the usage of monarchical or popular sovereignty, sovereignty meant the power to constitute the supreme will of the state.²⁷¹ The monarch or the people had this power not as their own right but as representatives of the state.²⁷² The power of the monarch to govern was not necessarily as expansive as the right of the state to govern. In constitutional monarchy, the power to govern had to follow constitutional rules and thus the power did not cover all aspects of the right of the state to govern.²⁷³ Therefore, Hozumi's thesis that "the emperor is the state" was based upon the confusion of multiple meanings of sovereignty. In the term of monarchical sovereignty, sovereignty meant the supreme power to govern, and the exercise of the right of the state to govern derived its supreme source from the monarch. As a consequence, the power of the monarch was dependent only on the constitution and constitutionally proper to him with its exercise in his name.²⁷⁴

Minobe then presented his own interpretation of Japanese monarchism. The emperor held the power to govern as his proper power because he had enjoyed it since the founding of the Japanese state as a historical fact. "A line of Emperors unbroken for ages eternal"²⁷⁵ showed a historical fact on the one hand and expressed that it was to be an everlasting principle for the future on the other.²⁷⁶ But Minobe argued that sovereignty, the right to govern, belonged to the state as a legal personality. In his opinion, historical evidence showed that the emperor himself had held the

²⁶⁹ See Minobe, *Kihonshugi*, 30-32.

²⁷⁰ See Minobe, *Kihonshugi*, 32-34.

²⁷¹ See Minobe, *Kihonshugi*, 35.

²⁷² See Minobe, *Kihonshugi*, 36.

²⁷³ See Minobe, *Kihonshugi*, 36-37.

²⁷⁴ See Minobe, *Kihonshugi*, 41-42. For his precise conception of *tochiken*, the right to govern, see also Minobe, *Kenpo satsuyo*, 30-41.

²⁷⁵ The Constitution of the Empire of Japan, art. 1.

²⁷⁶ See Minobe, *Kihonshugi*, 43.

power to govern not for his private interest but for the state as the whole.²⁷⁷ Monarchism in Japan meant that the powers to govern all derived from the emperor. The emperor was regarded as one supreme organ in the state as a corporation. The constitutional provision that “The Emperor is the head of the Empire, combining in Himself the rights of sovereignty”²⁷⁸ well showed that the emperor could be described as the brains of the state on the analogy of human body.²⁷⁹ It did not mean that sovereign power privately rested with the emperor himself. It rather meant that their original source derived from the emperor, while the powers to govern were dividedly held by several organs of the state.²⁸⁰

Article 4 of the Meiji Constitution also declared that the power to govern was exercised “according to the provisions of the present Constitution.”²⁸¹ The emperor’s power to govern was clearly under the Constitution and thus it should not be absolute. Surely the Meiji Constitution was the *kintei kenpo*, the constitution bestowed as a favor to his subjects by the merciful emperor. However, once the constitution was established, it became the supreme law of the nation and even the emperor’s prerogatives to govern were under it not only for the present but also for the future.²⁸² Even the creator of the Constitution could not abolish it at will. To Minobe, constitutionalism was meant to be an autonomous limitation on the political power of the state.

Minobe’s constitutional theory therefore rejected the idea of constitutional power, which usually is regarded as powerful enough to revolutionize an established political order.²⁸³ He was significantly alert to the dangers unlimited political power might cause. His main concern thus lay in rationally theorizing a once established constitutional order, definitely not in dynamically creating a

²⁷⁷ See Minobe, *Kihonshugi*, 43-44.

²⁷⁸ The Constitution of the Empire of Japan, art. 4.

²⁷⁹ See Minobe, *Kihonshugi*, 46.

²⁸⁰ See Minobe, *Kihonshugi*, 45-46.

²⁸¹ The Constitution of the Empire of Japan, art. 4.

²⁸² See Minobe, *Kihonshugi*, 49. See also, Minobe, *Kenpo satsuyo*, 73.

²⁸³ For the idea of a distinction between constitutional power and constitutionally established powers, see Carl Schmitt, *Verfassungslehre* (1929), chap. 8. Minobe feared that the recognition of constitutional power led to exercise of political power unlimited by a constitution. Minobe, *Kihonshugi*, 59-60; Minobe, *Kenpo satsuyo*, 74. Thus he also refused a distinction between the power to amend a constitution and constitutionally established powers. See *ibid.*, 75-77.

new political order.²⁸⁴

Minobe believed that constitutionalism was founded upon ideas of democracy and liberalism. To him, democracy as popular sovereignty was completely unacceptable because it was sharply against the *kokutai* of the Japanese state.²⁸⁵ However, democracy as a principle that the governmental policies reflected the will of the people as greatly as possible could coexist with monarchism. In Minobe's opinion, such a view on democracy had already been adopted to some extent in the Meiji Constitution. The emperor governed the state with the support of the people and the Imperial Diet in place of the people supported the emperor.²⁸⁶ Its decisions were regarded as the expression of the popular will. The governmental process thus should be realized dependently on them. This was what Minobe called the emperor's government with the support of the people, and his version of democratic politics.²⁸⁷ Minobe continued to point out that democracy needed responsible politics. Taking responsibility meant submission to the criticisms of others. Unlike despotism, constitutional politics required that the governmental process should reflect the popular will. When a governmental policy was against what the people wanted to realize, they should have some means of criticizing it. The system of assuming responsibilities by the ministers of state²⁸⁸ was established for this purpose. The Meiji Constitution, in Minobe's interpretation, declared a principle of responsible politics that the ministers of state were responsible for all the political activities of the government. The principle meant that the Imperial Diet might hold the ministers of state responsible for their policies and that, more fundamentally, the people could constitutionally exercise freedom of speech in criticizing the policies of the government.²⁸⁹ As to another supporting idea of constitutionalism, Minobe argued that liberalism claimed respect for personal dignity and made each

²⁸⁴ See Chapter 2 section 6.

²⁸⁵ See Minobe, *Kihonshugi*, 103.

²⁸⁶ Minobe believed that because the people had no power of will as the people, they could become subject in a legal system only with a parliament. See Minobe, *Kenpo satsuyo*, 349.

²⁸⁷ See Minobe, *Kihonshugi*, 104.

²⁸⁸ See the Constitution of the Empire of Japan, art. 55.

²⁸⁹ See Minobe, *Kihonshugi*, 105.

individual live as a free person, which the Meiji Constitution only reinforced.²⁹⁰ In Minobe's view, the Meiji constitutional system confirmed what had been realized since the Meiji Restoration after the abolition of feudalistic institutions. Moreover, the Meiji Constitution had first introduced the idea of government by law.²⁹¹ Unlike bureaucratic despotism, administrative and judicial powers had to be executed according to law.²⁹² By the constitutional form of government, in sum, Minobe meant parliamentarism, politics for the people, responsible politics, separation of powers, and legalism.²⁹³

In this way, Minobe argued for limited political power. On the one hand, he maintained that the prerogatives of the emperor were constitutionally limited powers of an organ of the state²⁹⁴ and that the Meiji Constitution enumerated all the prerogatives the emperor held.²⁹⁵ For a salient example, Minobe argued that the exercise of the prerogative to organize the Army and Navy²⁹⁶ was required to have the support of a minister of state, or the government, while the prerogative to command the Army and Navy²⁹⁷ was interpreted as independent of the government based upon traditional custom.²⁹⁸ In sharp contrast, Minobe interpreted the constitutional declaration of rights of subjects as mere enumeration of examples. In his view, there were important rights the Meiji Constitution did not mention such as freedom to choose and change one's occupation, freedom of marriage, freedom of business, freedom of contract, freedom of education, academic freedom, and so on.²⁹⁹ The declaration of rights and freedoms should be understood as the general establishment of legalism, or the governmental process on a legal basis.³⁰⁰

Therefore, Minobe paid close attention to the elements of democratic politics that the Meiji

²⁹⁰ See Minobe, *Kihonshugi*, 105-106.

²⁹¹ Minobe quoted a sentence from Preamble of the Meiji Constitution. "We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law."

²⁹² See Minobe, *Kihonshugi*, 106-107.

²⁹³ See Minobe, *Kihonshugi*, 107; Minobe, *Kenpo satsuyo*, 59-67.

²⁹⁴ See Minobe, *Kihonshugi*, 36.

²⁹⁵ See Minobe, *Kenpo satsuyo*, 221-223.

²⁹⁶ The Constitution of the Empire of Japan, art. 12.

²⁹⁷ The Constitution of the Empire of Japan, art. 11.

²⁹⁸ See Minobe, *Kihonshugi*, 93-100; Minobe, *Kenpo satsuyo*, 231-232, 321-330.

²⁹⁹ See Minobe, *Kenposatsuyo*, 177-178.

³⁰⁰ See Minobe, *Kenposatsuyo*, 179-180.

Constitution involved to some extent. He gave priority to the democratic control of political power in his constitutional interpretation. Among other things, the Imperial Diet was interpreted as the representative organ of the people to enhance democratic checks on the governmental process by an otherwise institutionally weak body, even though the House of Peers had no legitimacy whatsoever through popular will.³⁰¹ Minobe widely recognized a supervisory function of the Diet.³⁰² In his interpretation, the House of Representatives might adopt even a resolution of non-confidence in the government, although the Meiji Constitution did not clearly provide that the House enjoyed that power.³⁰³ In response to such a resolution, the cabinet might dissolve the House of Representatives. Here the cabinet was interpreted as collectively responsible for its policies not only to the emperor but also to the House of Representatives.³⁰⁴ Such an institutional interaction is no other than a parliamentary system. This was a greatly rational interpretation though in opposition to the original intent of the framers.³⁰⁵ Minobe offered the most convincing theory for rationalizing politics within the Meiji constitutional regime. As of 1932, Minobe could triumphantly declare that “the custom of parliamentary government system was almost established at least under the recent political circumstances in Japan.”³⁰⁶ It is fair to say that Minobe’s constitutional interpretation made the most distinguished contribution to developing parliamentary politics in prewar Japan.

A debate over Minobe’s organ theory broke out in the magazine *Taiyo (the Sun)* in 1912.³⁰⁷ Uesugi Shinkichi (1878-1929), a leading disciple of and the successor at the Tokyo Imperial University to Hozumi Yatsuka, attacked Minobe’s organ theory as an infraction of the concept of the *kokutai*.³⁰⁸ Uesugi contended that sovereignty resided in the emperor, not in the state and that if

³⁰¹ See Minobe, *Kihonshugi*, 118, 131; Minobe, *Kenpo satsuyo*, 351-352.

³⁰² See Minobe, *Kihonshugi*, 121-123; Minobe, *Kenpo satsuyo*, 352-354.

³⁰³ See Minobe, *Kenpo satsuyo*, 394, 413-414.

³⁰⁴ See Minobe, *Kenpo satsuyo*, 291-311. See also, Minobe, *Kihonshugi*, 147.

³⁰⁵ See this Chapter section 4.

³⁰⁶ Minobe, *Kenpo satsuyo*, 301.

³⁰⁷ For this controversy, see Miyasawa Toshiyoshi, *Tenno kikan setsu jiken: Shiyo ha kataru (The Incident of the Emperor Organ Theory: Historical Materials Talk)* (Tokyo: Yuhikaku, 1970), 1: 4-68.

³⁰⁸ For Uesugi’s personality and constitutional theory, see Nagao Ryuichi, “Uesugi Shinkichi den,” in *Nihon kenpo shiso shi*, 60-141; Ida, *Uesugi Shinkichi*; Iwama, “Senzen niokeru kenpo kaishaku no hoho,” 358-369.

the emperor had been an organ of the state as a corporation, he would have been a servant who worked for the people. To Uesugi, such a theory seemed democratic enough to transform the Japanese fundamental characteristics from monarchy to democracy.³⁰⁹ Minobe refuted Uesugi's accusation. He maintained that Uesugi misunderstood his constitutional theory in three ways: first, his state corporation theory was regarded as a claim that the state was the people; second, if the monarch was an organ of the state, the monarch worked for a distinctive entity, the state; third, if a person worked for a different person, he was a servant and if the monarch was an organ, he was a servant of the people. Because of these three misunderstandings that could easily be avoided, Uesugi's denouncement of Minobe as a destroyer of the founding regime had no convincing power.³¹⁰ Although Uesugi again denied Minobe's organ theory from the emperor sovereignty theory,³¹¹ third party participants except Hozumi favored Minobe and expressed their deep doubts on Uesugi's unscholarly arguments.³¹² Appealing to the concept of the *kokutai* indeed made calm academic discussion very difficult, if not impossible, because the *kokutai* was usually deeply connected to moral conviction, not rationalization by nature.

At that time the debate happened against the background of what is called the Taisho Democracy. That was when political party politics gradually developed toward a parliamentary government system within the limits of the Meiji Constitution. Minobe himself actually led the times. It was thus quite natural that Minobe was predominant in the mostly academic debate.

Although the debate between Uesugi and Minobe assumed the form of a dispute in constitutional interpretation, as Matsumoto Sannosuke has pointed out,³¹³ it was also a head-on collision of two schools of thought: statist particularism that had supported the policy of the *fukoku kyohai* (enriching the wealth and military strength of the country) since the Meiji Restoration and universalism or constitutionalism that was more open to the world and had emerged since the end of

³⁰⁹ See Miyasawa, *Tenno kikan setsu jiken*, 1: 13-21.

³¹⁰ See Miyasawa, *Tenno kikan setsu jiken*, 1: 21-28.

³¹¹ See Miyasawa, *Tenno kikan setsu jiken*, 1: 28-33.

³¹² See Miyasawa, *Tenno kikan setsu jiken*, 1: 33-47.

³¹³ Matsumoto, *Meiji shisoshi*, 239-240.

the Sino-Japanese War. The fact that the debate ended in favor of Minobe vividly showed that the rational and universalistic trend was then more influential than statist particularism in Japanese society.

Twenty years later, however, the atmosphere that was once surely advantageous for Minobe's constitutional theory had already disappeared when a second controversy over the same topic occurred. Political party politics yielded to violence, militarism, and conformism after the May 15 Incident of 1932. In February 1935, Baron Kikuchi Takeo delivered a speech at a plenary session of the House of Peers that he denounced Minobe's organ theory as overwhelmingly Western and thus anti-*kokutai* of traditional Japan and that he required the government to undertake stricter controls over such anti-*kokutai* theories and to ban especially Minobe's books.³¹⁴ The government first did not observe the problem so seriously. Prime Minister Okada Keisuke responded that although he did not feel the term organ entirely appropriate and he did not support the organ theory, he believed that we left appropriateness of the theory to scholars' judgments rather than to a political decision.³¹⁵ It is noteworthy that no one paid careful heed to free speech and academic freedom.³¹⁶ The fact implies that the Meiji constitutional regime granted no, or at least little, real protection to the inner spiritual activities of individuals.

Minobe, then professor emeritus and a member appointed by imperial order of the House of Peers, made a counter-speech, a personal defense. He determinedly repeated that his state corporation theory that situated the emperor as supreme organ of the state was not against the *kokutai* but indeed best fitted to the structure of the Meiji Constitution and Japanese tradition.³¹⁷ However, Minobe's counter-speech brought more ferocious accusations. The denouncement of Minobe's organ theory this time became a more clearly shaped political movement that aimed not only to suppress a liberal and democratic interpretation of the Constitution and promote more

³¹⁴ See Miyasawa, *Tenno kikan setsu jiken*, 1: 73-87.

³¹⁵ See Miyasawa, *Tenno kikan setsu jiken*, 1: 86.

³¹⁶ See Miyasawa, *Tenno kikan setsu jiken*, 1: 87.

³¹⁷ See Miyasawa, *Tenno kikan setsu jiken*, 1: 88-100.

authoritarian and intolerant *kokutai* ideology, but also to remove Prime Minister Okada and liberal attendants on the emperor. The right wing and militarists intensively held demonstrations against the rebellious organ theory and for clarifying the concept of *kokutai*. The Houses of Peers and of Representatives unanimously pass a proposition and resolution on clarification of the true meaning of *kokutai*, respectively.³¹⁸ Because both the army and navy were severely opposed to the organ theory, the cabinet, which had active high officers as the ministers of war and of navy, worried over how to treat this accusation. The cabinet made more and more concessions to the movement in order to avoid resignation due to disharmony and to hold the damage to a minimum. Okada twice declared the government position on clarification of *kokutai*.³¹⁹ The government banned Minobe's three books on the Meiji Constitution and ordered him to rewrite parts of two other books on review of political affairs.³²⁰ Although the government suspended prosecution of Minobe for lese majesty and crimes against the Law of Publication, he was forced to resign from the House of Peers and retired from public life.³²¹ Other important organ theorists, Ichiki Kitokuro, the president of the Privy Council and a former mentor of Minobe, and Kanamori Tokujiro, chief of the Cabinet Legislation Bureau resigned from their offices in 1936. Another lethal form of terrorism befell the Okada cabinet in February (the February 26 Incident). The Ministry of Education published a textbook *Kokutai no hongi* (*The True Meaning of Kokutai*) in May 1937. It clearly denied the emperor organ theory, emphasized the founding myth, ideology of a line of emperors unbroken for ages eternal, and the emperor's sovereignty, and moreover maintained that the emperor was a living god.³²² The organ theory incident finally killed even a weak version of constitutionalism in Japan. Political constitution thereafter depended upon fear and violence. In fact, it was the government, not the people themselves that had ultimate decision-making power over which human spiritual activity was

³¹⁸ See Miyasawa, *Tenno kikan setsu jiken*, 1: 141-146, 171-175.

³¹⁹ See Miyasawa, *Tenno kikan setsu jiken*, 1: 284-296; 2: 351-383. See also, Masuda, *Tennosei to kokka*, 259-296.

³²⁰ See Miyasawa, *Tenno kikan setsu jiken*, 1: 218-219.

³²¹ See Miyasawa, *Tenno kikan setsu jiken*, 1: 307-321.

³²² See Miyasawa, *Tenno kikan setsu jiken*, 2: 445-449.

legitimate or not.³²³

What was most ironical in the organ theory incident is that even the House of Representatives unanimously adopted a resolution on accusing Minobe's constitutional theory and requiring the government to clarify the true meaning of *kokutai*. Minobe as a constitutional scholar rendered the most distinguished service to the development of Japanese political party politics. His organ theory was without doubt the most salient theoretical foundation upon which the parliamentary government was to some degree realized under the Meiji constitutional regime that was not necessarily advantageous for a political party from the originalist point of view. However, some members of the *Seiyukai*, the leading political party, were in the vanguard of the movement for the denouncement of the organ theory. The *Seiyukai* attempted to utilize this movement as a good opportunity to overthrow the Okada cabinet. Because they had over 300 seats in the House of Representatives, in fact, the *Seiyukai* themselves believed that they deserved to make a single party cabinet. That was why they were frustrated. Minobe was commonly regarded as close to the *Minseito*, another large political party. But the Inukai cabinet itself, based upon the *Seiyukai*, recommended to the emperor Minobe as a member appointed by imperial order of the House of Peers. Retrospectively, Minobe was the most suitable person the last party cabinet recommended because of distinguished services to the state.³²⁴ Moreover, the *Minseito* also agreed with the *Seiyukai* on rejecting anti-*kokutai* constitutional theories. Because if they had not supported the resolution, they would have been identified as rebellious as Minobe was considered; such conformism due to fear of exclusion well showed that the *kokutai* ideology devoured all.

However, the circumstances surrounding the political party had dramatically changed when the organ theory incident occurred. Since Prime Minister Inukai was assassinated in the May 15 Incident, the party cabinet system had ended and the influence of political party had significantly declined. When he reported to the emperor a candidate for the next prime minister, the *genro* Saionji

³²³ See Miyasawa, *Tenno kikan setsu jiken*, 2: 564-565.

³²⁴ See Mitani, "Tenno kikan setsu jiken," 246.

no longer followed the *kensei no jodo* (normal course of constitutional government).³²⁵ The parliamentary principle had already been disregarded because the political party had lost public confidence in stabilizing the political situation. The fact of the unanimous resolution on the denouncement of the organ theory was clear evidence that the custom of parliamentary government was not established firmly enough to cope with difficulties. Once a political party stood outside the government, it was tempted to make the most of available options some of which obviously had even anti-party tendencies. In the organ theory incident, indeed, the beneficiaries themselves were self-contradictorily willing to destroy their own theoretical foundation.

What, then, is the meaning of the organ theory incident? This is deeply related to evaluation of the Meiji Constitution itself, its development, and two schools of its interpretation. One influential explanation comes from dualism of interpretation.³²⁶ According to this explanation, two constitutional interpretations were in use in different applicable fields. The top governmental officials seemed to utilize a double standard on constitutional interpretation. The organ theory championed by Minobe was widely accepted by highly educated people. Hozumi's theory was for common citizens. In order to govern the people efficiently, on the one hand, it was convenient for the government to emphasize absolute obedience to the emperor's power that was the essence of Hozumi's constitutional interpretation. They realized, on the other, that Hozumi's theory did not work well in the area of high politics. Hozumi sought the weakest possible Imperial Diet and denied party politics and parliamentary government. Hozumi's interpretation was, however, irresponsible to the reality, in which, in so far as the Diet held the power to consent to legislation and the budget, it exercised non-negligible influence over the government. His prerogative politics centered vision became out of date with the development of Japanese political culture. Hozumi's rejection of the delegation of legislative power to administrative departments was in fact unrealistic in the age of the administrative state. Thus Hozumi's interpretation prevailed only in the areas of school education,

³²⁵ See Yasuda, *Tenno no seiji shi*, 194. See also this Chapter section 7.

³²⁶ See Kuno Osamu & Tsurumi Shunsuke, *Gendai nihon no shiso* (Tokyo: Iwanami Shoten, 1956), 128-134.

military education, and police education, where submissive obedience was usually most required.³²⁷

In this explanation, the organ theory incident is understood in the way that the organ theory as an elitist interpretation was repudiated by a more common theory of divine right. The military and the ministry of education in charge of elementary education who believed in a constitutional theory strictly consistent with the *kokutai* ideology successfully attempted to dismiss the elitist agreement on dualism of constitutional interpretations and unified the official interpretation in their favor.

This skillful explanation has gained wide support. However, it goes rather too far in that the organ theory had never gripped common people's mind.³²⁸ In fact, Minobe first developed his theory systematically in *Kenpo kowa*, which was published based upon a series of lectures to teachers at junior high schools. More importantly, Minobe was accused after he had expressed his organ theory for about thirty years as a professor at the most influential university.

Therefore, there is another explanation that the incident was a legal and bloodless coup d'état. The incident is understood as a part of the movement that aimed to overthrow democratic and liberal elements of the Meiji Constitution and to create a regime with unlimited state power.³²⁹ In other words, the incident is regarded as a successful attempt to amend the Constitution outside the amending process.³³⁰ This second explanation is based upon an assumption that the organ theory was the most appropriate interpretation of the Meiji Constitution. In this explanation, moreover, Minobe built his constitutional theory upon a traditional sense of community by which a crystal-clear dichotomy between law and morality was not necessarily accepted.³³¹ It was because there was believed to be no essential difference between society autonomously regulated by morality and the

³²⁷ See Ienaga, *Nihon kindai kenp sisoshi kenkyu*, 174, 207 n. 37, and 217-312.

³²⁸ See Kuno & Tsurumi, *Gendai nihon no shiso*, 133-134.

³²⁹ See Bito Masahide, "Nihonshijyo ni okeru kindai tennosei (Modern Emperor System in History of Japan)" in *Edo jidai toha nanika* (Tokyo: Iwanami Shoten, 1992), 198-251.

³³⁰ See Mitani, "Tenno kikansetsu jiken," 225-261

³³¹ See Bito, "Nihonshijyo ni okeru kindai tennosei," 230-234.

state as an institution artificially regulated by law.³³²

However, Minobe's constitutional interpretation expressed only one side of the Meiji constitutional regime, in so far as the Meiji Constitution relied upon the idea of a line of emperors unbroken for ages eternal and the premise that the Constitution merely confirmed the governmental principle that had already been established. Because the Meiji Constitution was a product of compromise between the emperor absolutism and constitutional government, an orthodox theory necessarily lay in somewhere between despotism and constitutionalism.³³³ It is true that Minobe's organ theory was the most rational constitutional interpretation. But the Constitution itself included from the very beginning what was beyond rationalization. Minobe himself expressed his regret for a fact that there were disagreements between his view and many others in basic theory and interpretation of constitutional clauses.³³⁴ When rationalization went too far, there could naturally be reactionary movements. The emperor organ theory incident should be understood as a reflection of the compromise the Meiji constitutional regime involved.

9. Conclusion: Difficulties in the Meiji Constitution to Overcome

As has been discussed so far, the Meiji Constitution was established with the aim of preserving the *hanbatsu* leadership with a mixture of the traditional authority of the emperor and a Western concept of constitutional government from the outset. The Meiji constitutional regime thus had its inside conflicting elements of absolutism and constitutionalism. With gradual political development, Japan to some extent managed to operate a liberal democratic political system during some of the prewar period. Particularly, from 1924 to 1932, six political party cabinets were

³³² Minobe emphasized that authority, fact, and reason were all sources of law. By reason, he meant consciousness on what law ought to be as what social justice and social interests required. Minobe, *Kenpo satsuyo*, preface 4-5. As the result of this methodological position, he mentioned an important source of constitutional law reason of law that was understood as the whole body of human sense of social justice, consciousness of justice, nature of things, spirits underlying laws, and necessary conditions of social life, and so on. See *ibid.*, 117-119.

³³³ See Masuda, *Tennosei to kokka*, 259-296.

³³⁴ Minobe, *Kenpo satsuyo*, preface 3.

consecutively organized and this can thus be called the most democratized period of the Meiji constitutional regime. In the 1930s, however, the fanatic militaristic clique destroyed some liberal democratic elements that once seemed promising and finally overthrew the constitutional governmental system that to some extent worked well, even though the Constitution involved various limits. Therefore a question arises as to why the Meiji constitutional regime failed if it was resilient enough to tolerate the liberal democratic governmental process once in its history by “betraying the framers’ original expectation”.³³⁵

Mitani Taichiro has pointed out five conditions under which the political party cabinet system could function well in the Meiji constitutional regime: 1) supremacy of the House of Representatives over the House of Peers, 2) pervasion of the constitutional theory that justified the supremacy, 3) political neutralization of the Privy Council, 4) partisanship of the bureaucrats, and 5) international detente under the Washington regime and a corresponding decline in the political influence of the military.³³⁶ It is important to note that these conditions are all factual, not institutionalized. Thus when the political circumstances changed, the party cabinet was immediately faced with difficulties in maintaining its own system. In fact, the reverse conditions brought the party cabinet to an end: 1) dilution of political importance of the majority in the House of Representatives, or malfunction of the political party as the subject of unifying the regime, 2) denouncement of Minobe’s constitutional theory in the emperor organ theory incident, 3) active interventions in political affairs by the Privy Council, 4) spread of an anti-party attitude among the bureaucrats, and 5) challenges by the military to the Washington regime to maintain interests in China.³³⁷

Therefore we can say that the Meiji constitutional regime lacked the institutional guarantees of the democratic political process. Among other things, democratic control was not strong enough to restrain a minority from realizing a tyrannical rule. Even participants in the

³³⁵ Minobe, *Kenpo satsuyo*, 124.

³³⁶ See Mitani Taichiro, “Seito naikaku ki no joken (The Conditions during the Period of Political Party Cabinet),” in Yasuda & Minagawa, eds., *Meiji kenpo taisei*, 268-278.

³³⁷ See Mitani, “Seito naikaku ki no joken,” 278.

governmental process were not completely clear about who assumed political responsibility. The cabinet, which was considered the most ordinary advisory institution for the emperor, could not monopolize powers to support him. For example, the emperor as the supreme commander in chief was always situated outside the will of the cabinet.³³⁸ Even liberals as Minobe interpreted that the prerogative to command the army and navy was independent of the government and that its exercise was subject to only the support of the top military officials.³³⁹ The House of Peers, the Privy Council, and the *genro* were also influential participants in the governmental process. Thus, institutions independent of the democratic will played an important role in the decision-making process. More fundamentally, the Meiji Constitution adopted the principle that the emperor directly governed.³⁴⁰ This principle was not necessarily consistent with the rule of advice and support of the ministers of state or others that was appropriate for constitutional monarchy because while the former was based upon the emperor's own positive will on governmental affairs, the latter relied upon his negative will by which he always gave consent.³⁴¹ The institutional arrangements the Meiji constitutional regime had meant that there was no clear ultimate rule on who assumed political responsibility for decisions the state always had to make to maintain political order for collectiveness. Multiple participants might be all irresponsible for what they did.

Secondly, we can point out that customs of the democratic political process were not solid enough either to overcome serious institutional defects involved in the Meiji constitutional system. Some of the actual political circumstances were constructive, not pre-determined and thus participants could maintain, consolidate, and develop them. Unfortunately, however, participants in democratic politics in prewar Japan had only a weak commitment to the parliamentary government

³³⁸ The Constitution of the Empire of Japan, art. 11.

³³⁹ See Minobe, *Kihonshugi*, 94-97; Minobe, *Kenpo satsuyo*, 321-323, 330-333.

³⁴⁰ The Constitution of the Empire of Japan, art. 4.

³⁴¹ In fact, the Emperor Showa sometimes expressed his own will on important governmental affairs. One of the most famous cases was that he reproved Prime Minister Tanaka Giichi when Tanaka reported the measures of soldiers who were involved in the incident of the killing of Zhang Zuolin with a bomb because they were different from what he promised before. Tanaka lost the emperor's confidence and thus resigned. See Yasuda, *Tenno no seijishi*, 204-209; Masuda, *Tennosei to kokka*, 139-145.

system itself. For example, the emergency imperial ordinance³⁴² was once a convenient tool for bureaucratic despotism because, with resort to the measure, it was possible for the government to short-circuit efforts to gain consent to legislation from the Imperial Diet. This convenient detour was also in common usage even under the political party cabinet, regardless of party difference.³⁴³ The case of an amendment to the *Chian Iji Ho* (Peace Preservation Law) was a good example of lack of respect for the democratic political process.³⁴⁴ In 1929, after the bill to amend the Peace Preservation Law was shelved in the fifty-fifth Imperial Diet, the *Seiyukai* Tanaka Giichi cabinet decided to enact it as an emergency imperial ordinance. Although the opposition party, *Minseito*, and some Privy Councilors doubted the constitutionality of such an enactment,³⁴⁵ the amendment was promulgated as an emergency imperial ordinance because there was a wide demand for undertaking stricter control of communists and anarchists and for imposing severer punishments on them. In the next fifty-sixth Imperial Diet, both Houses passed a resolution to approve the emergency imperial ordinance and thus the ordinance maintained its effect as a law.³⁴⁶ Because the Peace Preservation Law aimed directly at limiting freedom of speech and freedom of conscience, the amendment should have been thoroughly deliberated in the Diet. The framers themselves expressed the fear that if the government utilized this power “as a pretext for avoiding the public deliberations”, the Constitution “would be far from serving as a bulwark for the protection of the people.”³⁴⁷ The government’s frequent appeals to emergency ordinance suggested that, on the one hand, the power to give the consent the Diet was granted was not negligible but that, on the other, even party members did not care much about politics based upon public deliberation which is certainly centered

³⁴² The Constitution of the Empire of Japan, art. 8.

³⁴³ See Masuda, *Tennosei to kokka*, 41-48.

³⁴⁴ For the process and content of the amendment, see Okudaira, *Chian Iji Ho shoshi*, 97-105. See also, Kenneth Colegrove, “Powers and Functions of the Japanese Diet, I,” *27 American Political Science Review* 885, 894 (1933).

³⁴⁵ For example, Minobe severely criticized the way in which the Tanaka cabinet managed to enact the amendment with resort to an emergency imperial ordinance because of lack of emergency. See Minobe, “Chian Iji Ho no kaiseimondai,” “Kinkyu chokurei nitaisuru sumitsuin no taido,” “Chian Iji Ho kaisei no kinkyu chokurei,” *Gendai kensei hyoron*, 256-260, 261-266, 267-286.

³⁴⁶ The Constitution of the Empire of Japan, art. 8 par. 2.

³⁴⁷ Ito, *Commentaries*, 16.

in a parliamentary government system.

In this relation, the opposition did not work well. Because the ruling party almost always won a general election in prewar Japan, an opposition party desperately sought something to break the deadlock. To criticize and force the government to resign, therefore, an opposition party was inclined to be possessed by a temptation to count on independent organs such as the Privy Council, the House of Peers, and the military to compensate for its own weakness.³⁴⁸

In the first place, however, even in the period of the political party cabinet, only three prime ministers, Hara Takashi, Hamaguchi Osachi, and Inukai Takeshi had seats in the House of Representatives, and all of them were assassinated.³⁴⁹ This evidence well symbolizes the limits of political party politics under the Meiji constitutional regime.

More fundamentally, the Meiji constitutional system was ultimately contradictory to the idea of persuasion through mutual interaction by speech, upon which democratic politics must rely. The Meiji Constitution was a kind of compromise between traditional Japanese authority and constitutionalism of a Western origin. But its central logic was the *kokutai* ideology of a line of emperors unbroken for ages eternal. At the establishment of the Meiji Constitution, the Emperor Meiji swore to the imperial founder and other imperial ancestors that he should “maintain and secure from decline the ancient form of government”,³⁵⁰ because he inherited his right to sovereignty of the state from his ancestors in “a lineal succession unbroken for ages eternal”.³⁵¹ As a matter of constitutional logic, the emperor himself was restricted by the intents and practices of the founder and his ancestors. In fact, this logic was declared in the *Tsugebumi* (Imperial Oath Sworn at the Sanctuary of the Imperial Palace). The Meiji Constitution was considered a mere expression in the form of fundamental law of “the instructions bequeathed by” the imperial founder and by other

³⁴⁸ See Ito Takashi, “Tanaka naikaku to toho kaigi,” in *Daiichiji taisen to seito naikaku (The First World War and the Political Party Cabinet)*, 295.

³⁴⁹ See Eguchi Keiichi, “1910 nen kara 30 nendai no nihon (Japan from 1910 to the 1930s)” in *Nihon teikokushugishi kenkyu* (Tokyo: Aoki Shoten, 1998), 73.

³⁵⁰ *Tsugebumi* (Imperial Oath Sworn at the Sanctuary of the Imperial Palace) in Ito, *Commentaries on the Constitution of the Empire of Japan*, 167.

³⁵¹ *Joyu* (Preamble).

ancestors.³⁵² In this way, the provisions of the Constitution on the emperor were not creative but only declaratory.

Therefore, the emperor did not necessarily stand inside the constitutional regime. If the emperor was independent of the Constitution in essence, the power to govern the people was ultimately out of constitutional control. Constitutionalism tended to fail here. We can understand that when he advocated the emperor organ theory, Minobe attempted to put the emperor into the constitutional limits by excluding the concept of the *kokutai* from his constitutional theory. As discussed above, his manner of interpreting the Meiji Constitution was absolutely exquisite and he succeeded to a considerable degree. But he became a victim of the ultra-nationalistic movement of 1935, when his theory was suppressed.

The failure of the organ theory also clarifies the structure of the Meiji constitutional regime that the state, more precisely the *kokutai*, monopolized internal values such as truth, morality, and beauty.³⁵³ The Constitution and *Kyoiku Chokugo* (the Imperial Rescript on Education)³⁵⁴ were understood as the official documents of such a declaration. Because it was founded upon the unification of spiritual authority and political power, the prewar Japanese state held in herself the standard of judgment on governmental activities. Thus the state never confronted serious challenges to its legitimacy. In such a situation, the standard of values came down to relative distance from the emperor, the embodiment of ultimate value in both the state and society. Moreover, even the emperor himself could not be completely free because his status and power were inherited from his ancestors in a lineal succession unbroken for ages eternal.

Therefore, if liberal democracy functions in an ultimate situation at all, Japan must be liberated from the *kokutai* ideology. The emperor should derive legitimacy from only a constitution. Modern constitutionalism is an effort to give the state a constructive political order. The tradition

³⁵² *Tsugebumi* (Imperial Oath Sworn at the Sanctuary of the Imperial Palace).

³⁵³ See Maruyama Masao, "Theory and Psychology of Ultra-Nationalism," in *Thought and Behaviour in Modern Japanese Politics*, 1-24.

³⁵⁴ For the text of the Imperial Rescript on Education, see Gluck, *Japan's Modern Myth*, 121.

itself is filtered by deliberated opinion, whether one likes it or not. How can the emperor be concretely taken into a constitution? That will be a pressing problem in the new era. But one thing for sure is that success of constitutional democracy there depends upon a change in a view of a constitution. The framers of the Meiji Constitution understood the constitution as an elitist instrument for ruling the people. They welcomed rational and efficient rule by law. Such basic characteristics generally determined the course of the Meiji Constitution. In this respect, Minobe's organ theory was not an exception. Rather, a new constitution should create a common basis upon which public dialogue between common citizens and the government elites could be performed well. Only with such a basis, will democracy be able to take root in Japanese society. After all, in a complex, diversified, and pluralistic society as ours, the constitution has to be a channel for arranging various private interests among the people to the public good.

Because the theorists both of the external imposition and of the internal continuity tend to oversimplify Japanese constitutional history, they do not pay much attention to constitutional experiences in the Meiji regime. Whether one likes it or not, the limits of the Meiji Constitution as we have discussed inevitably set a starting point of struggling to reconstruct political order in the postwar era. By obtaining the benefit of this analysis, the third way theorizes the more complicated experience about the defeat in the war and the creation of the new constitution. How then can we conceptualize the postwar constitutional experience?

Chapter 2

Failure of the Japanese Government to Revolutionize the Constitution

1. Introduction
2. A New Era
3. The Initial Process of Constitutional Reform
4. The Reluctant Japanese Government: Traces of the Matsumoto Committee
5. The Japanese Government's Failure: The Lack of Passion and Ideals
6. An Old Liberal in a New Era: Minobe Tatsukichi and Fading Glory
7. Conclusion

1. Introduction

The Meiji constitutional system, which once realized democratic practice of politics to a considerable extent, collapsed because it suffered severely from the attack of the ultra-nationalist movement. To common citizens, defeat in World War II was liberation from totalitarian rule for the last decades. It also invited the Japanese people to face the serious task of the reconstruction of the postwar political order. Interestingly enough, there were no disputes over the goal of reconstruction. Liberal democratization of Japan had to be pursued. Whether one liked it or not, the Potsdam Declaration set a basic scheme for postwar Japan.

If liberal democratization of politics was required, a question arose as to the nature of the Meiji Constitution. Did not it serve liberal democratization? If so, what was wrong with it? Serious reconsideration of the fundamental law obviously seemed to be needed. In the trend of the world, defeated nations especially cannot keep their old governing system intact.¹

However, the Japanese government did not seem to take the defeat seriously. The governing elites optimistically hoped that the *kokutai* would be retained even after the state surrendered. They were so confident in the existing constitutional system that a small modification would be good enough to meet the requirement of establishing “in accordance with the freely expressed will of the

¹ See Hannah Arendt, *On Revolution* (New York: Penguin Books, 1963), 15.

Japanese people a peacefully inclined and responsible government.”² They opportunistically understood that the “ultimate form of government” could “be established by the freely expressed will of the Japanese people.”³ The Potsdam Declaration also required the Japanese government to “remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people.”⁴ For the governing elites, the magic words were “the revival and strengthening”. They possibly meant that because what already existed disappeared for some reason, the government should restore it. However, the same article carried another sentence: “Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights, shall be established.”⁵ This requirement was extremely difficult to achieve on the premise of the Meiji Constitution because the Meiji constitutional regime was not consistent with the idea of fundamental human rights.

As the last chapter has clarified,⁶ the Meiji regime was founded upon the *kokutai* ideology that the *tenno* in one line unbroken for ages eternal held and exercised sovereign power over the Japanese state. In this ideological world, the *tenno* monopolized the standard of values. Thus people could not enjoy inner freedom. According to this ideology, further, even the *tenno* had no freedom to govern the state because the constitutional power to rule on the part of the *tenno* was a product not of the *tenno*'s will but of the will of the imperial founder and ancestors. Under this governmental system, the liberal democratization of politics should soon be deadlocked because of its intrinsic limits. To develop liberal democracy fully, it was inevitable to take the *tenno* into a constitutional framework. To do so, it was necessary to break off with the *kokutai* ideology of one line unbroken for ages eternal. However, the governing elites could not see the problems the Meiji Constitution had had because they were so privileged that they might identify themselves with the regime. Thus, they could not present a conception of a new political order for postwar Japan.

² The Potsdam Declaration, art. 12, *Foreign Relations of the United States (FRUS)*, 2 (1960): 1474-1476 in RM024

³ Reply by Secretary of State to Japanese Qualified Acceptance, August 11, 1945, *Political Reorientation of Japan*, Appendix II, 415 in RM026.

⁴ The Potsdam Declaration, art. 10, *FRUS*, 2 (1960): 1474-1476 in RM024.

⁵ The Potsdam Declaration, art. 10, *FRUS*, 2 (1960): 1474-1476 in RM024.

⁶ See Chapter 1 especially section 9.

This chapter will explore the failure of the Japanese government to frame a fundamental law appropriate for a new era. On the one hand, the external imposition theory criticizes GHQ's imposition of the postwar constitution upon the Japanese people. However, the Japanese government accepted the Potsdam Declaration and thus was under an international obligation to execute the liberal democratization of politics. Although the government had opportunities to create a postwar constitutional order by itself, the governmental and intellectual elites were so obsessed with the retention of the *kokutai* that they could not adapt themselves to the new situation of the international pledge. The third way should internalize the failure of the Japanese government. On the other hand, the internal continuity theory emphasizes that the symbolic *tenno* institution matches the authentic tradition of Japan. However, it tends to ignore the significance of the defeat. The required liberal democratization of politics could not be achieved by simply returning to the pre-modern conditions. Thus the third way has to examine carefully the meaning of the defeat and the governmental failure to take a chance of constitutional reform.

In this chapter, first, we will review how a new era started. The political meanings of the requirements the Potsdam Declaration had set forth are our central concern. Next, we will examine the initial process of constitutional revision immediately after the war. The starting point of constitutional reform in postwar Japan was the suggestion of General Douglas MacArthur, Supreme Commander for Allied Powers, to Prince Konoe Fumimaro, deputy prime minister of the Higashikuni cabinet. Konoe and the Office of the Privy Seal tried to assume governmental responsibility for constitutional revision. Their action incurred the repulsion of the government. Escalation of both domestic and international criticisms against Konoe caused MacArthur and GHQ to modify their direction for seeking a partner of reform. This group's work had the distinctive feature that they kept contact with high American officials to know what the American side wanted. It also showed the elitist limits of retaining the *kokutai* ideology.

Further, this rivalry between the office of the privy seal and the cabinet led to the establishment of the *Kenpo Mondai Chosaiinkai* (the Committee for the Investigation of Constitutional Problems). Matsumoto Joji, minister of state, was the chairman and the committee had outstanding constitutional scholars and legal bureaucrats. However, the name of this committee well reflected the conservative attitude of the government toward constitutional reform. Their reluctance and isolationism resulted in a narrow-viewed approach to constitutional revision. On February 1, 1946, the *Mainichi Shinbun* abruptly reported the alleged drafted of the Matsumoto Committee. This shocked many Japanese people and the GHQ staff because the reported draft seemed to them too conservative to carry out the liberal democratization of politics in postwar Japan. This scoop was a critical turning point in the process of making the postwar constitution. After that the Government Section of the GHQ took the leadership. We will carefully examine the failure of the Matsumoto Committee. If imposition of the constitution occurred, that was the Japanese government's fault, not anyone else's. We will explore why the government failed.

The final section of this chapter will consider what Minobe Tatsukichi thought about reconstruction of the political order after the defeat. Minobe, who advocated a theory that even the *tenno* was one organ of the state, was a liberal champion under the Meiji constitutional regime. His excellent constitutional interpretation helped a quasi-parliamentary government system to develop in prewar Japan. Such an interpretation was against the original intent but widely accepted before the *tenno* organ theory incident in 1935. Minobe was a victim of the fanatic ultra-nationalist movement. People were thus eager to know what this liberal giant would say about constitutional revision after the war. Surprisingly, Minobe was quite hesitant to amend the Meiji Constitution immediately. He believed that it was flexible enough to execute tasks for the liberal democratization of politics. When he argued for cautious treatment of the matter, he definitely represented the governing elites. However, constitutionalization of his *tenno* organ theory, which was basically the plan of the Matsumoto Committee, did not solve the serious problem inherent in the Meiji Constitution. True

liberal democratization could not be realized until a fundamental law rejected the logic of the *kokutai* ideology that the *tenno* in one line for ages eternal should govern Japan by following the will of the imperial founder and ancestors. Unfortunately, Minobe failed to present an innovative conception of politics for the new era. The section will explore the reason for his failure in his constitutional thinking.

2. A New Era

World War II finally ended when Japan accepted the Potsdam Declaration without any reservation on August 14, 1945.⁷ Japan had been defeated not only militarily but also ideologically. Japan, governed by the military clique of fanatic ultra-nationalists, could not draw a grand design for the postwar world. Japan failed to propose a fundamental idea that could be universally expanded beyond the politics of imperialism. The Japanese behavior was nothing but military invasion with an economic bloc. It was difficult for the particularistic *kokutai* ideology to have universal appeal to others in the world. This is in sharp contrast to the fact that at a very early stage in the war, the U. S. President, Franklin Roosevelt, presented the “Four Freedoms,” which eventually became the cornerstones of the Charter of the United Nation.⁸

With the surrender, anyway, Japan had recovered peace for the first time in fifteen years. The next difficult question was how political order had to be restored. The conditions of rebuilding the nation were established in the Potsdam Declaration.⁹ Its main provisions relevant to postwar reconstruction claimed the following:

⁷ Although some Japanese have tried to argue for conditional surrender, they have been unsuccessful. For the nature of the Japanese surrender and its difference from that of Germany, see Sato Tatsuo, *Nihonkoku Kenpo Seiritsushi* (Tokyo: Yuhikau, 1962), 1: 105-133 (hereinafter as Sato, *Seiritsushi*).

⁸ It is worth noting that the U. S. did not completely dispel an imperialistic attitude when the U.S. agreed that the USSR had invaded the former Japanese territory in northern China and occupied the Chishima (Kuril) Islands.

⁹ Proclamation Defining Terms for the Japanese Surrender, Signed at Potsdam and Issued by the President of the United States (Truman) and the Prime Minister of the United Kingdom (Attlee) and Concurred in by the President of the National Government of China (Chiang), July 26, 1945.

Article 10: The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

Article 12: The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.¹⁰

Article 12 seemed to require Japan to create a new government based upon the principle of popular sovereignty. On August 10, 1945, before accepting the Declaration, the Japanese government expressed their expectation of its favorable interpretation. The maintenance of the *kokutai*, where the *tenno* in one line unbroken for ages eternal exercised sovereign power, was the most important problem for the government elites to deal with. In the inquiry, the Japanese government stated that it was ready to accept the Potsdam Declaration “with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler.”¹¹ The Allied Powers did not reply directly to the Japanese inquiry, but issued the following statement that further explained their position (the so-called Byrnes’ reply).¹²

“From the moment of surrender the authority of the Emperor and the Japanese government to rule the state shall be subject to the Supreme Commander of the Allied Powers who will take such steps as he deems proper to effectuate the surrender terms.”

“The ultimate form of government of Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people.”

Then the Japanese government officially accepted the Declaration on August 14. In the Imperial Rescript on the same day, the *tenno* told his subjects that he accepted the Potsdam Declaration in “Having been able to safeguard and maintain the structure of the Imperial State”.¹³ The *tenno*

¹⁰ Potsdam Declaration, *FRUS*, 2(1960): 1474-1476 in RM024.

¹¹ Japan’s Qualified Acceptance, Legation de Suisse Washington, D.C., August 10, 1945 in RM025.

¹² U. S. accepts Japan’s surrender (8/11/45) Secretary Byrnes in RM026.

¹³ Japan surrenders (8/14/45) Emperor Hirohito: Imperial Rescript in RM027. The *tenno* contended that he declared war “out of Our sincere desire to ensure Japan’s self preservation and the stabilization of East Asia, it being far from Our thought either to infringe upon the sovereignty of other nations or to embark upon territorial aggrandizement.” And then he told subjects that “it is according to the dictate of time and fate that We have resolved to pave the way for a grand peace for all the generations to come by enduring the

concluded his statement with the *kokutai* ideology again: “*kokutai no seika no hatsuyo*”; “Cultivate the ways of rectitude; foster nobility of spirit; and work with resolution so as ye may enhance the innate glory of the Imperial State and keep pace with the progress of the world.”¹⁴

The Japanese government elites, thus, believed that they could maintain the *kokutai*, the governmental system in which the *tenno* as sovereign in a line unbroken for ages eternal holds the prerogative to govern Japan.¹⁵ Objectively, however, there was a serious problem as to whether their belief had a reasonable basis. A few Japanese elites suspected that Article 12 of the Potsdam Declaration and the Byrnes’ reply would be inconsistent with the idea of the *kokutai*.¹⁶ Because of such an apprehension that acceptance of the Declaration would deny the *tenno*’s prerogatives as sovereign, which could lead to a revolt of fanatic militants, indeed, the government intentionally translated Byrnes’ reply into ambiguous Japanese.¹⁷ The phrase “the form of government” could mean the whole structure of a governmental system and then if it had been “established by the freely expressed will of the Japanese people”, it would have been clearly contrary to the traditional concept of the *kokutai*, sovereignty of the *tenno* in a line unbroken for ages eternal. However, the governmental official translation uses the Japanese phrase “*seifu no keitai*”, which may be interpreted as the form of the executive department. Following this interpretation, the top governmental officials hoped that formation of liberal and democratic cabinets, which once actually occupied the mainstream during the prewar period, would meet the conditions the Potsdam Declaration and Byrnes’ reply set forth for the democratization of postwar Japan.

unendurable and suffering what is insufferable.” The Japanese people directly listened to what the *tenno* told them in the rescript on the radio at high noon the next day.

¹⁴ Japan surrenders (8/14/45) Emperor Hirohito: Imperial Rescript in RM027.

¹⁵ For the Japanese acceptance of the Potsdam Declaration, see Sato, *Seiritsushi*, 1: 8-31. For the American side, see Dale M. Hellegers, *We the Japanese People: World War II and the Origins of the Japanese Constitution* (Stanford: Stanford University Press, 2002), vol. 1; Sato, *Seiritsushi*, 1: 32-56.

¹⁶ Toyoda and Shimomura Notes in Sato, *Seiritsushi*, 1: 23.

¹⁷ The first sentence above in Byrnes’s reply was translated as followed: “...tenno...no kenpen ha... rengogun saikou shireikan no seigen no motoni okareru monotosu< shall be subject to>.” The second sentence above was translated as followed: “Saishuteki no nihonkoku seifu no keitai ha<the ultimate form of government of Japan> ... nihonkoku kokumin no jiyu ni hyomei suru ishi niyori ketteiseraru bekimonotosuru.” For the official Japanese translation, see Tsutsui et al, eds., *Nihon kenposhi*, 344-345.

In this way, understandings of these articles of the Potsdam Declaration and Byrnes' reply could become a critical source of controversy. By relying upon an interpretation in their favor, however, the Japanese government contended maintenance of the *kokutai* for the time being. The governmental elites thus believed that no serious structural change in the constitutional system would be necessary for discharging duties Japan accepted by international agreement. The atmosphere among them was well represented in the statement of Prime Minister Prince Higashikuni, who was a member of the *tenno* family and the first postwar prime minister. He contended that policy for the reconstruction of Japan must be based upon the maintenance of the *kokutai*, which was the Japanese people's firm conviction beyond reason or feeling.¹⁸

In sum, the end of the war should have brought a new era to Japan. For the common Japanese people, there had to be liberation from the established *kokutai* ideology, which had long invaded even internal freedom and monopolized the standard of value judgments.¹⁹ In reality, however, a new idea appropriate for restructuring the nation did not easily gain momentum. In the first place, most common citizens had no place to live and were barely able to eke out a living. When the Japanese government accepted the Potsdam Declaration, the most important issue for the elites was not the life and safety of the people, but rather the maintenance of the *kokutai* and the safety of the *Tenno Showa* and his family. They attempted, in vain, to gain from the Allied Powers a promise that the status of the *tenno* would be untouched.²⁰ However, they still believed that the *tenno* would be sovereign in a postwar governmental system as he had been in the prewar time. The governing elites attempted to leave the old system as unchanged as possible.

3. The Initial Process of Constitutional Reform

¹⁸ Prime Minister Prince Higashikuni at the press interview conference in *Mainichi Shinbun* on August 30, 1945, reprinted in Hidaka, ed., *Sengo shiso no shuppatsu*, 53.

¹⁹ See Chapter 1 section 8.

²⁰ The U.S. policy toward occupation of Japan was also ambiguous at the early stage of the postwar period. See Ray A. Moore & Donald L. Robinson, *Partners for Democracy: Crafting the New Japanese State under MacArthur* (Oxford & New York: Oxford University Press, 2002), 30-33.

On October 4 1945, General MacArthur suggested to Prince Konoe Fumimoro revising the Meiji Constitution to a more liberal one. Konoe was the minister of state without portfolio and the deputy prime minister in the Prince Higashikuni cabinet, which was headed by a member of the imperial family to cope with the expected resistance of the military. The maintenance of the *kokutai* was the primary responsibility of this cabinet. Apart from the suggestion of constitutional reform, MacArthur issued the directive regarding civil liberties on the same day.²¹ “In order to remove restrictions in political, civil and religious liberties and discrimination on grounds of race, nationality, creed or political opinion,” it required in the directive that the Japanese government remove all provisions of statutes, decrees, ordinances, and regulations that were utilized to suppress the liberties of the people in pre- and mid-war Japan. It listed “freedom of thought, of religion, of assembly and of speech, *including the unrestricted discussion of the Emperor, the Imperial Institution and the Imperial Japanese Government*” and discrimination “by reason of race, nationality, creed or political opinion.” What interests me is the fact that it again enumerated the removal of restrictions on “the collection and dissemination of information” along with freedom of speech. Guarantee of freedom of expression was a serious concern in groping for a new political order. In addition, the directive also precisely ordered the Japanese government to release immediately political and thought prisoners, abolish government offices related to control of thought, speech, religion, or assembly such as all secret police organs, the Special Higher Police, and the Protection and Surveillance Commission, dismiss police officials, and abolish physical punishment on and mistreatment of suspects and prisoners on the part of police officials.²²

When he received the directive, Prince Higashikuni concluded that his cabinet would be unable to carry out MacArthur’s orders because they seemed to him and his colleagues so liberal that the most important purpose of his cabinet, maintenance of the *kokutai*, would become

²¹ Restrictions on liberty removed (SCAPIN 93) (10/4/45) SCAP to Japanese government, I a in RM039 (emphasis added).

²² Restrictions on liberty removed (SCAPIN 93) (10/4/45) SCAP to Japanese government, I c, d, e f and g in RM039.

extremely difficult to achieve. Thus, the Higashikuni cabinet resigned the very next day. This cabinet had been essentially transitional in the aftermath of the defeat of war. The cabinet had lasted for less than two months (from August 17 to October 5, 1945).

The fate of the Higashikuni cabinet well shows how inconsistent the *kokutai* ideology was with freedom of thought, speech, and religion. Although he expressed his will to strengthen protection of freedom of speech,²³ that protection would not be thorough enough to tolerate speeches that were incongruous with the concept of the *kokutai*. Rather, we should pay close attention to the fact that freedom was given to the Japanese people by MacArthur. The Japanese government failed to offer a basis for creating a new constitutional regime. Freedom of speech is one of the most important rights for the proper functioning of the democratic political process.²⁴ When it was required to “remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people”,²⁵ it is quite natural to think that suppressive statutes and measures such as the *Chian Iji Ho* (Peace Preservation Act) should be abolished first. However, we should remember the fact that universal manhood suffrage was enacted in linkage with the *Chian Iji Ho* in 1925. Constitutional democracy, which was surely once promising, was operated only within the limits of the *kokutai* ideology in prewar Japan. After the defeat in the war, the Japanese people obtained freedom from the outside. That was rationed-out freedom.²⁶ Therefore, what Nakae Chomin pointed out about the Meiji Constitution basically conforms to the postwar situation.²⁷ To accomplish internalized democratic politics, hard and even painful efforts should be made to replace the *onshiteki*

²³ Prime Minister Prince Higashikuni at the press interview conference in *Mainichi Shinbun* on August 30, 1945, reprinted in Hidaka, ed., *Sengo shiso no shuppatsu*, 56-57.

²⁴ See, e.g., Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980); Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996).

²⁵ The Potsdam Declaration, art. 10.

²⁶ See, e.g., Kawakami Tetsutaro, “Hiakyū sareta ‘jiyū’ (Rationed-out ‘Freedom’),” in Hidaka, ed., *Sengo shiso no shuppatsu*, 76-79. For criticism of Kawakami’s conservative view, see Nakano Shigeharu, “Fuyu ni hairu (Go into the winter),” *ibid.*, 79-88. See also, Dower, *Embracing Defeat*, 70.

²⁷ See Kotoku Shusui, “Chomin sensei,” in Inada, *Meiji kenpo seiritsushi*, 2: 925-926. Nakae Chomin, *Sansuijin keirin mondo*.

minken, or civil rights and civil liberties as a gift from above with the *kaifukuteki minken*, or those as a gain from below.

Even after the Prince Higashikuni cabinet resigned en masse, Prince Konoe continued to work for constitutional revision. Konoe understood that MacArthur had made the suggestion to him as a person, not as a member of the cabinet.²⁸ As late as October 8, just one day before Shidehara Kijuro was appointed the next prime minister, Konoe contacted George Atcheson, Jr., the acting political adviser in Japan, to gain some advice and suggestions about constitutional reform. Because he had asked the Secretary of State for the directive on the constitutional revision but had not received his response yet,²⁹ Atcheson offered several personal and unofficial comments about the problems of the Meiji Constitution. They included 1) the lack of a responsible government system; 2) the emasculation of the Bill of Rights by the restriction “within the limits of the law”; 3) the undemocratic House of Peers; 4) no provision for judicial protection of people’s rights as against government for impeachment of officials; 5) no provision for civilian control over the army and navy; 6) the undemocratic Privy Council; and 7) the lack of initiative taken by the people’s representatives to adopt amendments to the constitution that would be opposed to a government reflecting the “freely expressed will of the people,” and the emperor’s legislative prerogatives without the Diet’s participation, which would be the same.³⁰ It is crucially important to note that, in this context, the status of the *tenno* was presupposed as it was and thus popular sovereignty rather than the sovereignty of the *tenno* did not emerge as a fundamental issue.³¹

Konoe gained a position attached to the office of the lord privy seal (*naidaijin*) to devote himself to constitutional revision.³² He told Kido Koichi, the Lord Keeper of the Privy Seal that

²⁸ See Hideo Tanaka, “A History of the Constitution of Japan of 1946,” in Hideo Tanaka, ed., *The Japanese Legal System* (Tokyo: Japan, Tokyo University Press, 1976), 655 n. 1.

²⁹ The Acting Political Adviser in Japan (Atcheson) to the Secretary of State, October 4, 1945, *FRUS*, 6(1945) 736 in RM060.

³⁰ The Acting Political Adviser in Japan (Atcheson) to the Secretary of State, October 10, 1945, *FRUS*, 6(1945) 739 in RM065.

³¹ See Koseki, *Tanjiyo*, 22; Moore & Robinson, *Partners for Democracy*, 66.

³² For the Konoe problem, see Theodore McNelly, “The Konoe Effort: International and Bureaucratic

there was a fear that GHQ would present a draft of constitutional revision if the Japanese side loitered on the work.³³ He thus asked Sasaki Soichi for scholarly advice. Sasaki, a former professor at the Kyoto Imperial University and an authority on constitutional law, was considered as influential a liberal as Minobe Tatsukichi. On October 11, the *tenno* appointed Konoe a special assistant for the office of the lord privy seal. Sasaki received the same appointment two days later.

Meanwhile, Prime Minister Shidehara met MacArthur and accepted a general suggestion on constitutional reform and the directive of five specific reforms on the same day. The five reforms were 1) the emancipation of women through their enfranchisement; 2) the encouragement of the unionization of labor to give workers safeguard against exploitation and abuse and to raise their living standard to a higher level; 3) the “opening of the schools to more liberal education”; 4) the “abolition of systems which through secret inquisition and abuse have held the people in constant fear” by substituting “a system of justice designed to afford the people protection against despotic, arbitrary and unjust methods”; 5) the democratization of economic institutions “to the end that monopolistic industrial controls be revised through the development of methods which tend to insure a wide distribution of income and ownership of the means of production and trade”.³⁴ Interestingly, constitutional reform was not mentioned in the directive. Because MacArthur had already maintained that constitutional revision would be necessary, he should have once again ordered it of the new prime minister. However, that did not happen because Takagi Yasaka, who was the professor of American politics at the Tokyo Imperial University and Konoe’s assistant, asked a GHQ insider not to treat constitutional reform as equivalent to five reforms so that the Japanese government, particularly Konoe, spontaneously engaged in constitutional reform for the sake of appearance.³⁵ On October 13, newspapers reported that the *tenno* had appointed Konoe as a special assistant for the office of the privy seal and that Konoe would consider the constitutional revision.

Politics,” *The Origins of Japan’s Democratic Constitution*, 32-53; Hellegers, *We the Japanese People*, chap. 11 “Dust and Ashes’: The Konoe Affair,” 2: 438-460.

³³ See Sato, *Seiritsushi*, 1: 186.

³⁴ Five fundamental reforms (10/11/45) SCAP to Japanese government in RM041.

³⁵ See Koseki, *Tanjo*, 24-25.

Because MacArthur's order except five reforms was not directly mentioned in that report, the Japanese people might well have misunderstood that the Japanese government took the initiative in reforming the Meiji Constitution. At this moment, indeed, GHQ was very cooperative with the Japanese side on constitutional reform.³⁶

If MacArthur had suggested the necessity for constitutional revision to Konoe as a member of the Higashikuni cabinet, the legitimacy of Konoe's efforts would have become dubious. In fact, MacArthur made a general suggestion about constitutional revision to Shidehara, who succeeded Higashikuni: "In the achievement of the Potsdam Declaration, the traditional social order under which the Japanese people for centuries have been subjugated will be corrected. This will unquestionably involve a liberalization of the Constitution."³⁷ On October 13, the Shidehara cabinet rushed to establish the *Kenpo Mondai Chosa Inkai* (the Committee for the Investigation of Constitutional Problems) presided over by Matsumoto Joji, the minister of state without portfolio. The rivalry between Konoe and Shidehara made the issue of constitutional reform public. On the same day, the major newspapers *Asahi*, *Mainichi*, and *Yomiuri Hochi* discussed this subject in their editorials, which were generally critical of the Shidehara cabinet's passive attitude toward constitutional reform.³⁸ What is noteworthy is that *Yomiuri Hochi* cast doubt on Konoe's qualification as a main promoter of constitutional revision because he was the leader of the reformist movement that dissolved political parties under the *Taisei Yokusan Kai* (Imperial Rule Assistance Association).³⁹ In *Yomiuri Hochi's* opinion, the liberalization of a constitution necessarily accompanied expansion of parliamentary politics and thus an anti-parliamentarian such as Konoe

³⁶ See Koseki, *Tanjiyo*, 25; Moore & Robinson, *Partners for Democracy*, 66.

³⁷ Five fundamental reforms (10/11/45) SCAP to Japanese government in RM041.

³⁸ "Kintei kenpo no minshuka (Democratization of the imperially established Constitution)," *Asahi Shinbun*, editorial, October 13, 1945 in Kizokuin jimukyoku chosabu, ed., *Kenpo kaisei ni kansuru shoron shuroku* (A Collection of Essays on Constitutional Amendment) (Tokyo, 1946), 1-2 (hereinafter as *Shoron Shuroku*); "Kenpo kaisei no kinkyusei (Urgency of Amending the Constitution)," *Mainichi Shinbun*, editorial, October 13, 1945, *ibid.*, 2-3; "Kenpo no jiyushugika (Liberalization of the Constitution)," *Yomiuri Hochi Shinbun*, editorial, October 13, 1945, *ibid.*, 3-5.

³⁹ For Konoe's political activities, see Yoshida Yutaka, "Konoe Fumimaro," Yoshida Yutaka, et al., *Haisen Zengo: Showa Tenno to gonin no shidosha (Around the Wartime Defeated: The Emperor Showa and Five Leaders)* (Tokyo: Aoki Shoten, 1995), 11-44.

was believed to be inappropriate for taking care of constitutional reform.⁴⁰

The rivalry between Konoe and Shidehara itself was accompanied by a serious constitutional problem: which institution was eligible to consider amendments to the Meiji Constitution, the office of the lord privy seal or the cabinet? The Meiji Constitution preserved the power to project a constitutional amendment for only the *tenno*.⁴¹ A project for amending the Constitution should “be submitted to the Imperial Diet by the Imperial Order.”⁴² Theoretically, the conclusion depended upon the interpretive stance, whether a prerogative-centered one or constitutionalist one. Because the Meiji Constitution, as the “*fuma no taiten* (immutable fundamental law),”⁴³ was believed to be eternal, interpretation of the article regarding its amendment had been out of reach of public discussion. In fact, it had never been changed since its promulgation in 1889. An amendment was truly unprecedented.

Matsumoto criticized the operations of the office of the lord privy seal. Because constitutional amendment was one of the most important affairs of state, the exercise of this prerogative by the *tenno* must be with the advice of the cabinet. The cabinet should assume responsibility for amending the constitution to the *tenno*. The work Konoe was performing was believed to a preparation for the *tenno*'s judgment when a proposal of the government would be presented to him.⁴⁴ Miyasawa Toshiyoshi, a professor of constitutional law at the Tokyo Imperial University, joined Matsumoto in criticizing the procedure that Konoe was following. State affairs were supposed to be executed with the advice of the ministers of state, and the government naturally gave the *tenno* advice on constitutional amendment and was responsible for it. A project to amend the constitution would be submitted to the Imperial Diet and it was the government that presented a draft and gave an explanation of it in deliberation. The office of the lord privy seal, however, had no

⁴⁰ “Kenpo no jiyushugika (Liberalization of the Constitution),” *Yomiuri Hochi Shinbun*, editorial, October 13, 1945 in *Shoron Shuro*, 4.

⁴¹ See Minobe, *Nihon kenpo no kihonshugi*, 60-64.

⁴² The Constitution of the Empire of Japan, art. 73, sec. 1.

⁴³ The Imperial Rescript on the Promulgation of the Constitution, par. 1.

⁴⁴ See “Ho no kaishaku o gensei ni (Strict Interpretation of Law),” *Mainichi Shinbun*, article, October 16, 1945, in *Shoron Shuroku*, 11.

relationship to the Diet. The behavior Konoe took was that the small group prepared constitutional amendment behind a secret door, which had nothing to do with the government and the Diet. In Miyasawa's conclusion, such behavior was definitely unconstitutional.⁴⁵

Sasaki openly opposed the criticisms. As long as a project to amend the Meiji Constitution must be based upon an imperial order, no governmental institution could begin to consider an amendment without the order. The government needed an imperial order to start their consideration as well as the office of the lord privy seal. There were two kinds of advice the *tenno* was given. The government gave him advice on actual actions in state affairs. In contrast, the office of the lord privy seal gave him advice only for his good consideration upon constitutional reform. In Sasaki's opinion, thus, the *tenno* was supposed to have two different pieces of advice in quality from both the government and the office. Although it was the government that gave the *tenno* advice for an official project of amendment, the office of the lord privy seal might support the *tenno*'s personal decision to issue an imperial order. So interpreted, duties and responsibilities of the government and the imperial household should be constitutionally separated.⁴⁶

In theory, the principle of responsible government requires the cabinet to take responsibility for all kinds of state affairs. Given democratization of the constitution on the agenda, public opinion was generally supportive of the argument that the government should assume responsibility for constitutional amendment.⁴⁷ But this constitutional dispute ended in a wholly different manner. As the criticism on the work of the office of the lord privy seal intensified, Konoe utilized the authority

⁴⁵ See Miyasawa Toshiyoshi, "Kenpo no seishin ni hansuru naidajinnfu no shingi (The deliberation in the Office of the Lord Privy Seal is against the Spirit of the Constitution)," *Mainichi Shinbun*, October 16, 1945 in *Shoron Shuroku*, 9-10.

⁴⁶ See Sasaki Soichi, *Mainichi Shinbun*, Osaka, October 21, 1945 in Sato, *Seiritsushi*, 1: 192-194.

⁴⁷ An editorial of *Asahi Shinbun* said that because Kido and Konoe were responsible for the collapse of the Meiji constitutional regime, they were not appropriate for taking charge of constitutional reform in a new era. This editorial also criticized the reluctant Shidehara cabinet for being neglectful of reforms. Appointment of Matsumoto as minister of state was regarded as a poor excuse. "Kyutai izen tari (A Way of Government Remains Unchanged)," *Asahi Shinbun*, editorial, October 18, 1945 in *Shoron Shuroku*, 18-19. An editorial of *Tokyo Shinbun* was also critical of governmental support and advice the emperor gained. "Hohitsu no mondai (Problems of Advice)," *Tokyo Shinbun*, editorial, October 17, 1945 in *Shoron Shuroku*, 17-18. However, Kanamori Tokujiro, former chief of legislation bureau, argued that the work the office of the lord privy seal engaged in should be welcomed for the sake of study. "Kenpo kaisei sokkou ron (An Argument for Immediate Reform of the Constitution)," *Tokyo Shinbun*, article, October 25, 1945 in *Shoron Shuroku*, 45-46.

of MacArthur. For example, he frankly told an Associated Press reporter Russell Brines that the project had started with MacArthur's suggestion in the October 4 meeting.⁴⁸ On November 1, 1945, however, GHQ abruptly announced that MacArthur had suggested the constitutional reform to Konoe as "the deputy primer representing the prime minister", not as an individual.⁴⁹ GHQ officially broke off relations with Konoe and his assistants. The GHQ's denial of Konoe's effort to amend the Meiji Constitution may have originated with escalating criticisms of Konoe both in Japan and abroad.⁵⁰ MacArthur had to protect himself from serious criticisms derived from his mistake in choosing a wrong man as a collaborator.⁵¹ Even after Shidehara became the prime minister and had been told of the necessity for constitutional revision, Konoe's group continued to contact Acheson and GHQ members. Therefore, GHQ did not make an effort to correct Konoe's misunderstanding.⁵² Konoe was eventually under suspicion as a war criminal before the Tokyo Tribunal. He finally committed suicide on December 16, 1945.

Even after the "betrayal" of MacArthur, Konoe's group continued its work. On November 22 and 24, Konoe and Sasaki respectively presented their reports of the constitutional amendments to the *tenno*.⁵³ On the same day when Sasaki delivered a lecture to the *tenno*, the office of the lord privy seal was abolished. Konoe's outline of the constitutional revision appeared in newspapers after

⁴⁸ "Tenno taii no jyoko no sonyu mo arieru (Possible Addition of a Clause of Abdication)," *Yomiuri Hochi Shinbun*, article, October 23, 1945 in *Shoron Shuroku*, 45.

⁴⁹ "Kenpo kaisei ni okeru Konoe ko no yakuwari o hitei (GHQ denies Prince Konoe's Role in Constitutional Reform)," *Asahi Shinbun*, article, November 3, 1945 in *Shoron Shuroku*, 54-55. See also, MacArthur repudiates Konoe (11/3/45) Kenpô Chôsokai in RM075.

⁵⁰ See *New York Herald Tribune*, editorial, October 31, 1945 in RM74. Byrnes, Secretary of State, sent quotation of the editorial to Acheson.

⁵¹ See Theodore McNelly, "'Induced Revolution': The Policy and Process of Constitutional Reform in Occupied Japan," Ward & Sakamoto, *Democratizing Japan*, 78.

⁵² Acheson wrote to President Truman saying that there was a serious misinterpretation when Konoe met MacArthur. Acheson alleged that the sentence "'administrative machinery' of the government should be reformed." was translated as "the constitution should be revised." Political developments; Konoe's role (11/5/45) Acheson to President Truman in RM077. Because Acheson continued to give advice to Konoe's group, what he wrote there was not wholly true. This incident caused disharmony between MacArthur and GHQ and Acheson and the Department of State.

⁵³ Sasaki took a purely scholarly stance and hated to make a political compromise. He could not reach an agreement with Konoe about a desirable new constitution under those circumstances. Thus Sasaki separately made his own draft.

his death.⁵⁴ While it maintained the principle that the *tenno* shall be the superintendent and exerciser of sovereignty, the *tenno*'s exercise of sovereignty "shall be dependent on the support of the people." We find democratization of the governmental process in several important respects. For example, 1) the prime minister, who shall be constitutionally institutionalized, shall preside over the cabinet and shall be responsible not only to the *tenno* but also to the Diet. 2) While the House of Peers and the Privy Council shall be abolished, the House of Representatives shall be strengthened. 3) All prerogatives the *tenno* holds shall be exercised with support of the Diet. 4) The prerogative to command and organize the army and navy shall belong to state affairs and thus the cabinet shall be responsible for it. 5) It shall be made clear that the freedoms of the people take precedence over the law. 6) As for constitutional amendment, a procedure based upon popular referendum is being considered. This outline well reflected suggestions of Atcheson and other Americans.⁵⁵ On the other hand, Sasaki's detailed draft was never published.⁵⁶ It can be said that Sasaki's draft carried over the basic structure of the Meiji Constitution when it kept the first four articles intact, although there were some noteworthy proposals such as the right to enjoy the necessities of life as determined by law, freedom with limits of law when required by the public welfare, establishment of a constitutional court and of self-governing organizations, and referendum on constitutional amendment. Although the *tenno* gave the government those drafts as reference, the Matsumoto Committee paid no formal attention to them.⁵⁷ The works of the office of the lord privy seal had generally little concrete influence in the later process of constitutional reform. Rather, they played the role of triggering debates on constitutional reform.⁵⁸ This role cannot be underestimated, when the government and intellectual elites commonly hesitated to support fundamental reform.

⁵⁴ See "Konoe ko no kenpo kaisei soan (Prince Konoe's Draft of Constitutional Revision)," *Asahi Shinbun*, article, December 21, 1945 in *Shoron Shuroku*, 90-92. For the English translation, see Konoe's proposed revisions (12/45) Konoe to Emperor Hirohito in RM088.

⁵⁵ See Koseki, *Tanjo*, 38; Moore & Robinson, *Partners for Democracy*, 72.

⁵⁶ For Sasaki's draft, see Sato, *Seirtsushi*, 1: 222-229. For the English translation, see Outline of revisions (11/23/45) Sasaki Sôichi to Emperor Hirohito in RM083.

⁵⁷ Sato Tatsuo, a member of the Matsumoto Committee, testified to the fact. See Sato, *Seirtsushi*, 1: 233.

⁵⁸ See Sato, *Seirtsushi*, 1: 234.

This Konoe affair was situated as an important crossroads in the process of constitution-writing in postwar Japan.⁵⁹ After this event, the Matsumoto Committee became the only Japanese governmental institution that was in charge of examining the problems of the Meiji Constitution. On the part of the United States, MacArthur began to exclude Acheson, who belonged to the State Department, from the constitutional reform issue.⁶⁰ The Matsumoto Committee could have learned lessons from the work of Konoe's group on the constitutional revision, which deserves a special note in two respects.

First, Konoe had a close relationship with people who were well informed about the United States. Among them was Takagi Yasaka, the professor of American politics at the Tokyo Imperial University,⁶¹ who, through an old personal acquaintance, played an important role in obtaining from GHQ their vision of constitutional reform.⁶² As discussed above, indeed, Konoe's outline of constitutional amendment was a reflection of the American suggestions. During the period when the German influence on scholarship was overwhelming in Japan, only an extremely small number of scholars were interested in the American legal and political system and actually studied law and politics in the United States. Therefore, Konoe's advisory group was highly unusual. It appears that there was no counterpart on the Matsumoto Committee, which, in marked contrast, closed its doors to the public, came into no contact with American people, and created its own isolated cosmos.⁶³ In any event, Konoe's advisory group knew that the Potsdam Declaration required the Japanese government to carry out rather radical political reform.

⁵⁹ See Koseki, *Tanjyo*, 43.

⁶⁰ McNelly has pointed out five outcomes of the power struggle in Tokyo from October through December 1945. "(1) on the international level, the American predominance in the Allied Occupation was preserved and enhanced, (2) on the American level, the Department of War rather than the Department of State was shown to have pre-eminence in the enforcement of the Occupation, (3) on the SCAP Headquarters level, the Government Section rather than the Office of the Political Adviser would oversee constitutional reform and internal politics in Japan, (4) on the Japan level, the cabinet and the Matsumoto committee (parliamentary forces) rather than the Lord Privy Seal and the Konoe group (feudal forces) would be entrusted with the reform of the constitution, and (5) the Konoe initiative apparently hastened the process of constitutional reform in Japan." McNelly, "The Konoe Effort," *The Origins of Japan's Democratic Constitution*, 53.

⁶¹ Takagi studied at Harvard University.

⁶² Others were Matsumoto Shigeharu, who studied at Yale University, and Ushiba Tomohiko.

⁶³ See Tanaka, *Oboegaki* 7-8; Koseki, *Tanjyo*, 40.

Secondly, even though the Konoe group attempted to prepare a new Japanese constitution in relation to international politics, their effort shows the limits of the established Japanese intellectual leaders. Their outcomes were oriented by the status-quo.⁶⁴ It is true that their proposal included more democratized political institutions, which means the political process was more responsible to the people, than the Meiji Constitution. Because such a degree of democratization was regarded as “a sort of common sense”,⁶⁵ however, the group was not confronted with the fundamental problem: how to take in a constitutional framework the *tenno*, who was situated outside the constitution under the Meiji regime. The *kokutai* ideology was so influential that the internationalized group was also captivated by the old way of thinking. After all, the elites around the power center were far removed from common Japanese citizens. They devoted themselves only to maintaining the *kokutai* they had cherished.

4. The Reluctant Japanese Government: Traces of the Matsumoto Committee

With their narrow interpretation of the Potsdam Declaration and GHQ’s occupational policy, most Japanese intellectuals believed that a fundamental change of the Meiji Constitution was unnecessary for rebuilding of the nation after the wartime defeat. The government established a committee for constitutional issues but the name, *Kenpo Mondai Chosa Iinkai* (the Committee for the Investigation of Constitutional Problems) well expressed the general atmosphere at that moment. A term such as amendment, revision, or reform was intentionally avoided and a more neutral term,

⁶⁴ Konoe admitted that “in the light of this defeated war, the amendment of the Meiji Constitution, rather than its proper interpretation and practice, is necessary to contribute to build a basis for the future of the nation.” Yet his proposal includes neither a democratized *tenno* system nor liberalized judicial protection of fundamental rights of the people. Kenpo chosakai jimukyoku, ed., *Teikoku kenpo kaisei shoan oyobi kankeibunsho No. 6 (Drafts of Amendment of the Imperial Constitution and their Relative Documents)* (kenshi, sodai 26 go) (July, 1958), 3.

As discussed above, Sasaki’s detailed draft may be worth noting for its proposal of a constitutional court system, even if that was not conceived as a court for protection of rights of the people. Besides that, his proposal is not greatly different from the Meiji Constitution. Indeed, Sasaki’s draft is based upon the perpetual idea that “Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.” See the Constitution of the Empire of Japan, art 1. As Minobe, Sasaki who had been regarded as an eminent liberal in the previous regime, failed to come up with an innovative idea that would be appropriate in the new era.

⁶⁵ Sato, *Seiritsushi*, 1: 233.

investigation or research was used to compromise between the sincere belief of the government members and the actual pressure the political rivalry caused.⁶⁶

Prime Minister Shidehara Kijyuro, who was foreign minister in five prewar cabinets and famous for his stance of international cooperation, had as most Japanese leaders a firm assumption that the Meiji Constitution was elastic enough to execute on a statute level the obligations the Potsdam Declaration had set forth. In rivalry with Konoe's work at the office of the lord privy seal, however, the Shidehara cabinet decided to start investigation on constitutional problems and assigned Matsumoto Joji to be the competent minister on October 13, 1945. As Konoe group developed work on a full scale, the cabinet established the *Kenpo Mondai Chosa Iinkai* (so-called the Matsumoto Committee) on October 25.⁶⁷ Interestingly enough, there was no legal basis for the committee, such as *chokurei* (an imperial order), *seirei* (a cabinet order), or *kakugi kettei* (an official decision in a cabinet meeting). It was based only upon *kakugi ryokai* (an unofficial agreement in a cabinet meeting).⁶⁸

The committee was composed of truly distinguished constitutional scholars and legal bureaucrats.⁶⁹ Advisers Minobe Tatsukichi, Shimizu Toru, and Nomura Junji and members

⁶⁶ See "Kenpo Mondai Chosa Iinkai secchi no shushi (the Aim of the Committee for the Investigation of Constitutional Problems Matsumoto Explained)," in Irie Toshio, *Kenpo seiritsu no keii to kenpo jono shomondai* (Tokyo: Daiichi hoki, 1975), 108 (hereinafter Irie, *Keii*).

⁶⁷ See "Kenpo Mondai Chosa Iinkai o secchi (The Government Established the Committee for the Investigation of Constitutional Problems)," *Asahi Shinbun*, article, October 26, 1945 in *Shoron Shuroku*, 48-49.

⁶⁸ See Sato, *Seiritsushi* 1: 252; Koseki, *Tanjyo*, 80.

Kakugi kettei is a kind of decision made by the cabinet and based upon the powers vested in the cabinet. It is usually used for more important matters than *kakugi ryokai*, which is a form of decision-making related to the powers vested in each minister.

⁶⁹ The main members of this Committee were:

Chairman: Matsumoto Joji (minister of state without portfolio; an appointed member of the House of Peers; former professor of commercial law at the Tokyo Imperial University)

Advisers: Shimizu Toru (academician of the Japan Academy; vice president of the Privy Council)

Minobe Tatsukichi (academician of the Japan Academy; an appointed member of the House of Peers; professor of constitutional law emeritus at the Tokyo Imperial University)

Nomura Junji (professor of public law emeritus at the Tokyo Imperial University)

Members: Miyasawa Toshiyoshi (professor of constitutional law at the Tokyo Imperial University)

Kiyomiya Shiro (professor of constitutional law at the Tohoku Imperial University)

Kawamura Matasuke (professor of constitutional law at the Kyusyu Imperial University)

Ishiguro Takeshige (secretary general of the Privy Council)

Narahashi Wataru (chief of the cabinet legislation bureau)

Miyasawa Toshiyoshi, Kiyomiya Shiro, and Kawamura Matasuke were all regarded constitutional scholars of the highest quality. Narahashi, Irie, and Sato were top three of the governmental legal bureaucrats. However, the name of this committee described its characteristics and well showed its limits from the beginning. Matsumoto Joji, the chairman, announced that the main purpose of the committee was to conduct scholarly research on the Meiji Constitution. Even if the committee found problems in the Meiji Constitution, therefore, it did not intend to take the initiative in proposing a plan to revise the constitution.⁷⁰ Thus, the committee's first obligation was to investigate constitutional issues, if any, in the aftermath of defeat in the war. It was not to make a draft of a revision of the constitution, let alone a new constitution. After all, the Shidehara cabinet believed that making a new constitution was irrelevant not only for the committee but also for Japan itself.

The Matsumoto Committee had two different kinds of meetings. One was a general meeting in which both advisers and members participated; the other was a research meeting in which only members participated. In the former, the issues to be examined and the general orientation toward them were decided; detailed work was carried out in the latter. The Matsumoto Committee held seven general and fifteen research meetings from October 27, 1945 to February 2, 1946.⁷¹ As discussions went on, the committee transformed its character from a research body to a draft preparation organ. Matsumoto as chairman actually led discussions in the committee. Finally, the committee framed two plans and they along with one preliminary plan were submitted to cabinet meetings from January 30 to February 4.⁷²

Kenpo kaisei yoko (Plan A) proposed minimum amendment to the Meiji Constitution. Here we look at only the main points. 1) Articles 1 and 4 shall be kept completely intact. Article 3 "The

Irie Toshio (chief of the first department of the cabinet legislation bureau)

Sato Tatsuo (chief of the second department of the cabinet legislation bureau)

⁷⁰ See "Kenpo Mondai Chosa Iinkai o secchi (The Government Established the Committee for the Investigation of Constitutional Problems)," *Asahi Shinbun*, article, October 26, 1945 in *Shoron Shuroku*, 48-49; *Mainichi Shinbun*, October 26, 1945 in Sato, *Seirtsushi*, 1: 253; "Kenpo Mondai Chosa Iinkai secchi no shushi (the Aim of the Committee for the Investigation of Constitutional Problems Matsumoto Explained)," in Irie, *Keii*.

⁷¹ For the detailed activities of the Matsumoto Committee, see Sato, *Seiritushi*, 1: 252-374; 2: 485-588.

⁷² For the four cabinet meetings, see Irie, *Keii*, 68-86; Sato, *Seirtsushi*, 2: 629-642.

Emperor is sacred and inviolable” shall change to “The *tenno* is exalted and inviolable.” 2) Emergency imperial ordinances shall be issued by the *tenno* in consultation with the newly established Diet Standing Committee, according to the provisions of the Imperial Diet Law. 3) Army and Navy shall be changed to armed forces. Organization and peace standing of armed forces shall be determined by law. 4) A new provision shall be enacted that Japanese subjects shall not have their rights and liberties impaired without recourse to law. 5) The House of Peers shall be replaced with the House of Councilors. The House of Representatives shall be superior to the House of Councilors in the legislative process. 6) A cabinet system shall be determined by law. Ministers of state shall give their advice to the *tenno* and be responsible for all state affairs including commanding armed forces to the Imperial Diet. When the House of Representatives passes a resolution of non-confidence in ministers of state, unless the House is dissolved, ministers of state shall be dismissed. 7) Administrative cases shall be determined by the judiciary. 8) Members of two Houses may project an amendment with approval of one third of respective members.⁷³

Kenpo kaisei an (Plan B) included a little wider reform than Plan A. Old terminology changed to something more appropriate in the new era: the Constitution of the Empire of Japan to the Constitution of Japan, subjects to the people, and the Imperial Diet to the Diet. 1) As to the *tenno*, four drafts were presented in relation to Article 1 of the Meiji Constitution and three to Article 3.⁷⁴

A) The *tenno* of a line unbroken for ages eternal combines in himself the rights of sovereignty, which he exercises according to the provisions of this Constitution.

B) The sovereignty rights of Japan are combined in the *tenno* of a line unbroken for ages eternal, who exercises them in accordance with the provisions of this Constitution.

C) Japan shall be a monarchy headed by the *tenno* of a line unbroken for ages eternal. The *tenno* combines in himself the rights of sovereignty, and he exercises them according to the provisions of this Constitution.

D) Japan shall be reigned over by the *tenno* of a line unbroken for ages eternal.

A) The *tenno* is responsible to no one in exercising the rights of sovereignty. The person of the *tenno* is inviolable.

B) The *tenno* is the head of the state, and is inviolable.

C) The person of the *tenno* is inviolable.

⁷³ For *Kenpo kaisei yoko* (plan A), see Sato, *Seiritsushi*, 2: 551-554.

⁷⁴ Translation is by Ray A. Moore. See Koseki, *The Birth of Japan's Postwar Constitution*, translated by Ray A. Moore (Boulder: Westview, 1998), 59.

They were not substantially different from one another. “A line unbroken for ages eternal” was once again a central concept of constitutional writing. 2) The *tenno*, in consequence of an urgent necessity to maintain public safety or to avert public calamities, may issue, when the Diet is not sitting, emergency imperial ordinances in consultation with the Diet Standing Committee. 3) Army and Navy shall be abolished and thus there shall no prerogatives to command armed forces and determine their organizations. 4) Reservation of law was still good for this plan. For example, the freedoms of the people shall be guaranteed within the limits of public interests provided by law. The Japanese people shall not have their rights and liberties impaired without recourse to law. 5) The Diet was also bicameral: the Houses of Representatives and of Councillors. The former shall be superior to the latter in certain cases of legislation. 6) According to law, the cabinet shall consist of ministers of state, who shall give their advices to the *tenno* and be responsible for it. When the House of Representatives passes a resolution of non-confidence in ministers of state, unless the House is dissolved, ministers of state shall be dismissed. 7) Administrative cases shall be determined by the judiciary. 8) Members of two Houses may project an amendment with approval of one third of respective members.⁷⁵

Although both of them would surely democratize the political process to some degree, they basically conserved the structure of the Meiji Constitution. Some members of the Matsumoto Committee felt frustrated because Plan A was too conservative to change the constitutional regime in the new era and thus they prepared the more liberal Plan B.⁷⁶ Generally speaking, therefore, Plan A was more conservative than Plan B.⁷⁷ But it can be said that their difference was a matter of degree, not of quality.⁷⁸ Both of them were based upon the principle that the *tenno* was still planned to not only enjoy sovereign power but also directly exercise it. It is true that when they introduced the parliamentary government system, they attempted to correct the serious defect of the plurality of

⁷⁵ For *Kenpo kaisei an* (Plan B), see Sato, *Seiritsushi*, 2: 567-576.

⁷⁶ Irie testified the feeling of many members toward Plan A. See Irie, *Keii*, 59-60.

⁷⁷ For comparison between Plans A and B, see Sato, *Seiritsushi*, 2: 609-614.

⁷⁸ See Sato, *Seiritsushi*, 2: 609.

advisory institutions in the Meiji constitutional regime. Democratic control would increase when the cabinet assumed responsibility in a unified manner. Insofar as the principle of direct governance of the *tenno* was maintained, however, subject of action and those who assume its responsibility should be naturally separated and there would be always ample room for manipulating power and for having a good excuse for the failure of democratic control. Furthermore, these two plans did not touch the *kokutai* ideology at all. As long as a revised constitutional regime was founded upon the concept of “a line unbroken for ages eternal,” the *tenno* would not yet be situated inside the constitutional frame. In such a system, we have little hope of realizing authentic constitutionalism whose central meaning lies in the principle that governmental power should be limited to protect individual liberties.

As mentioned above, the most outstanding constitutional scholars of the time were called together in the Matsumoto Committee.⁷⁹ Nonetheless, they could not come up with a new way of thinking in the new era. They had been profoundly infatuated with the *kokutai* ideology, which was, however, becoming obsolete. Their failure deserves further exploration.

We can point out the narrow-mindedness, self-centeredness, and elitism of the members, particularly Matsumoto. The committee’s relationship to the outside world really mattered. Unlike Konoe’s group, the Matsumoto Committee did not officially contact GHQ at all until their draft was completed.⁸⁰ Matsumoto believed that constitutional revision would be carried out spontaneously and independently. He often cited in his favor the terms of the Potsdam Declaration of “the freely expressed will of the Japanese people”.⁸¹ But he interpreted it from his narrow perspective.⁸²

⁷⁹ Sasaki Soichi, an academican of the Japan Academy, appointed member of the House of Peers, and professor of constitutional law emeritus at the Kyoto Imperial University, was not a member of this committee. He had already committed himself to helping Konoe Fumimaro make a draft for revising the Meiji Constitution. He rejected Matsumoto’s offer to join the committee. See Sato, *Seiritsushi*, 1: 260-262.

⁸⁰ For no direct relationship between the Matsumoto Committee and GHQ, see Sato, *Seiritsushi*, 2: 615-619.

⁸¹ For example, Matsumoto later recollected the atmosphere when the committee was established. He said that the Potsdam Declaration and the related documents clearly guaranteed that the Japanese people could decide about the Japanese *kokutai* whatever they wanted. “Interview with Matsumoto Joji,” in Sato, *Seiritsushi*, 252.

⁸² Along with Matsumoto’s short-sightedness and arrogance, MacArthur’s new non-contact policy also influenced relationship between the committee and GHQ. Moore and Robison have pointed out that

This committee was, in fact, profoundly isolated not only from international politics, in which the Cold War was becoming a crucially important element,⁸³ but also from domestic voices of reform. The committee met behind closed doors. Matsumoto only once explained the aim and perspective of the committee in the Imperial Diet as four general principles, when a representative criticized the bureaucratic secretiveness of the government attitude toward constitutional reform.⁸⁴ Because the final drafts of constitutional revision the committee framed faithfully followed the four principles, we wonder whether deliberation in the committee improved the quality of discussion. Other drafts private groups and political parties proposed were also available for reference. Matsumoto and his members would not listen to what other people, particularly those who were on the periphery of the established regime, wanted to say about the new era. Their perception alone was everything.

But there were several opportunities for self-correction, all of which Matsumoto and his members missed. On October 27, 1945, the committee held its first general meeting, which determined its general direction. At the very beginning, Chairman Matsumoto made the purpose of this committee clear. He asserted that they did not have to discuss the necessity of amending the Meiji Constitution but would do careful research on problems, if any, the Meiji Constitution faced.⁸⁵ Yet Nomura Junji, an adviser, opposed Matsumoto's conservative position. Nomura presented his understanding that the acceptance of the Potsdam Declaration had required the Japanese

“MacArthur’s policy of no contact on the high-priority issue of constitutional reform must also share the blame for this failure in late 1945 and early 1946.” Moore & Robison, *Partners for Democracy*, 78.

⁸³ There were many countries that claimed more severe punishment on the *tenno* than the United States. In including such countries, the Far Eastern Committee would soon start to discharge its official functions.

⁸⁴ On December 8, 1945, Matsumoto in the House of Representatives presented the outline of the general perspective of his committee’s work. “1) No change shall be made in the basic principle that the Emperor shall exercise the right of sovereignty. 2) Expand the number of issues which require decisions by the Diet, and as a result, restrict to some extent those which in the past have been called matters of Imperial sovereignty. 3) Expand the ministers of state’s responsibility to all matters of State, and reduce the scope for those others than ministers of state to interfere in State affairs. And, at the same time, make the ministers of state responsible to the Diet. 4) Strengthen guarantees of the people’s rights and freedoms. That is, the people shall not be restricted by laws and regulations that are not made by the Diet. And, on the other hand, measures shall be adopted to prevent violations of their rights and freedoms.” See “Kenpo kaisei ni yongensoku (Four Principles of Constitutional Revision),” *Yomiuri Hochi Shinbun*, article, December 9, 1945 in *Shoron Shuroku*, 84. See also, Sato, *Seiritsushi*, 1: 422-426. For translation, see Koseki, *Birth*, translated by Moore, 56.

⁸⁵ See Irie, *Keij*, 24-28; Sato, *Seiritsushi*, 1: 262.

government to carry out a thorough democratization of politics. He raised three points. First, abolition of the army and navy would remove the power to command and organize armed forces. Second, there were questions about how to organize the government based upon the freely expressed will of the people. They were, for example, whether a minister of state must be a member of the Diet and how the House of Peers should be reformed. Finally, a question had to be asked about what Japan would do to strengthen democratic tendencies as expressed in the Potsdam Declaration. In this context, Articles 1 through 4 of the Meiji Constitution⁸⁶ had to be thoroughly examined because Nomura understood that the articles might be inconsistent with intensifying democracy in Japan.⁸⁷ He did not believe that the committee could consider self-satisfied constitutional revision without disregarding the Potsdam Declaration. Under these urgent circumstances, it was not time to engage in an idealistic discussion. But the committee should place priority on narrowed important points rather than examine the whole evenly.⁸⁸ To Nomura, a drastically critical discussion on the central meaning of the fundamental law seemed inevitable for the renewal of Japan.

Matsumoto disagreed with Nomura. He argued that because the Potsdam Declaration stated that a responsible government should be established by “the freely expressed will of the Japanese people,” the United States could not force the Japanese government to abolish the *tenno* system. Although there were radical voices of communists and others, the general will of the Japanese people was as unmovable as a mountain. For Matsumoto, the core of the Meiji Constitution was permanent and thus unchangeable.⁸⁹ Moreover, Minobe Tatsukichi, another important adviser for the committee, agreed with Matsumoto’s diagnosis of the situation, asserting that the United States had said they would not intervene in maintenance of the *kokutai*.⁹⁰ The general direction of the Matsumoto Committee was thus so determined.

⁸⁶ Article 1 reads: “The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.” Article 4 reads: “The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitutions.”

⁸⁷ See Sato, *Seiritsushi*, 1: 264.

⁸⁸ See Irie, *Keij*, 24-28; Sato, *Seiritsushi*, 1: 263.

⁸⁹ See Sato, *Seiritsushi*, 1: 264.

⁹⁰ See Irie, *Keij*, 24-28.

Another chance of self-correction came from an interrogation in the House of Representatives. An important question was raised there on December 11, 1945, three days after Matsumoto clarified the four principles of the Committee for the Investigation of Constitutional Problems. Mizutani Chozaburo, a member of the Socialist Party, attacked Matsumoto's stance saying that it was unnecessary to revise Articles 1 through 4 of the constitution to achieve constitutional democratization. Mizutani argued that Matsumoto was simply wrong when true democratization of the constitution was on the immediate agenda because the principle that the *tenno* holds sovereign power conflicted with the as-ideal-as-possible democracy that was desperately needed in the new era.⁹¹ But Matsumoto once again refused to listen to an unorthodox opinion. He responded that monarchy and democracy did not necessarily conflict with each other. In the world, he contended, there were many cases in which a dictator governed a republic. The Weimar Constitution, which was established after the Kaiser system was abolished, served dictatorship. The idea, Matsumoto asserted, was absolutely wrong that the *tenno* system conflicted with democratic tendencies of politics or that abolition of the *tenno* system would bring democratic politics.⁹²

Matsumoto had a few more chances to frame a constitutional revision plan that would be more appropriate for a reconstructing nation. On January 16, 1946, at the twelfth research meeting, Irie and Miyasawa suggested that the government should stop assuming a vague position toward constitutional reform but instead positively declare to the public a policy and agenda of the government with a more determined attitude.⁹³ In reply, Matsumoto argued that under the situation that heated discussions on the *tenno* system were going on, he thought constitutional revision should be completed as soon as possible so that the amended constitution as a *fait accompli* would put a period to discussions of the *tenno* system.⁹⁴ On January 26, Takagi Yasaka, an assistant to Konoe, made a suggestion to Matsumoto that he should seek GHQ's advice on constitutional reform before

⁹¹ Mizutani Chozaburo, the Committee of the Budget, the House of Representative, December 11, 1945 in Sato, *Seiritsushi*, 1: 426-427.

⁹² See Sato, *Seiritsushi*, 1: 427.

⁹³ See Irie, *Keii*, 48-49; Sato, *Seiritsushi*, 2: 529.

⁹⁴ See Irie, *Keii*, 49-50; Sato, *Seiritsushi*, 2: 529-531.

the committee determined a final draft because Takagi believed that more radical reform was necessary. Matsumoto rejected Takagi's suggestion and repeated his basic position that constitutional amendment should be carried out independently and spontaneously and therefore the committee had no need to take counsel from GHQ.⁹⁵ On February 2 at the final general meeting, further, Ishiguro pointed out that as long as the general will of the people agreed on retaining the *tenno* system, open debate should be performed fearlessly so that a radical argument of a minority would lose its influence. But his suggestion was dismissed because many people felt that they could not bear to make the *tenno* system the target of public discussion from various angles.⁹⁶ Matsumoto and most members paid no attention whatsoever to the significance of public deliberation, which gives a democratic regime more legitimacy. After all, the idea of a line unbroken for ages is fundamentally inconsistent with a commitment to persuasion by speech.

A serious problem without any doubt lay in Matsumoto's personal character, with his stubbornness, self-conceit, and tunnel vision. It was unfortunate that such a person was a leader of constitutional reform in the new era.⁹⁷ However, there was a more common serious problem in the Matsumoto Committee. When they believed that the Meiji Constitution was flexible enough to execute the requirements of the Potsdam Declaration, Matsumoto and most members had misunderstood the meaning of the Potsdam Declaration. It was not as a contract between equals. Japan had no legitimate right to interpret its meaning.⁹⁸ Matsumoto and his members should have recalled the facts that the Prince Higashikuni cabinet could not withstand GHQ's freedom directive, that the directive of five major reforms would bring fundamental transformation of society, that the order on separation of Shinto and state inevitably influenced the spiritual foundation of authority of

⁹⁵ See Sato, *Seiritsushi*, 2: 618-619.

⁹⁶ See Irie, *Keii*, 64; Sato, *Seiritsushi*, 2: 578.

⁹⁷ Prime Minister Shidehara was worried that if Matsumoto was the minister competent to constitutional amendment, deliberation in the Diet would come to a pretty pass. See Irie, *Keii*, 21.

⁹⁸ See, e.g., Potsdam Declaration not a contract (9/5/45) Acting Secretary of State Dean Acheson to President Truman in RM033.

the *tenno*,⁹⁹ and above all that the *tenno* was no longer a living god.¹⁰⁰ Moreover, the Potsdam Declaration also required that: “Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.”¹⁰¹ The Meiji Constitution did not provide for full protection of the rights and liberties of the people, let alone its practice. The committee members seemed satisfactory when the revised constitution provided that civil rights and civil liberties should be protected within law, which would be enacted by the more democratized Diet.¹⁰² However, they never came to realize that true rights and liberties are constitutionally guaranteed against even the democratic majority.¹⁰³ Furthermore, the requirement of the Potsdam Declaration, which Matsumoto and his members had read on his terms, stated that the Japanese people, not the Japanese government, should freely express their will about the political structure as a nation. Matsumoto and his fellows confused the people with the government; the two are not necessarily the same.¹⁰⁴

Retrospectively, the rejection of Nomura’s proposal at the Matsumoto Committee was one of the turning points in Japanese history. Nomura, in fact, presented an eminently detailed proposal to the committee at the end of December 1945. The Potsdam Declaration, as Nomura understood it, allowed the Japanese people to make a final decision on their governmental system by the free expression of their will, as long as they tried to realize democracy in Japan. Accordingly, the *tenno*

⁹⁹ See *Kokka Shinto ni taisuru seifu no hoshō, shien, hozen, oyobi koufu no haishi ni kansuru oboegaki* (Abolition of Government Sponsorship, Support, Perpetuation, Control, and Dissemination of State Shinto) (SCAPIN 448) (12/15/45) SCAP to Japanese government in RM047. See also, Sato, *Seiritsushi*, 1: 387-389.

¹⁰⁰ On January 1, 1946, the *tenno* denied “the false conception that the Emperor is divine”. Dispelling false conceptions (“Ningen sengen”) (1/1/46) in RM096. See also, Sato, *Seiritsushi*, 2: 885-898. Sato says that during the deliberations of the committee, members were more or less aware of the problem of the *tenno*’s deity and thus they discussed changing the term “sacred” of Article 3 of the Meiji Constitution. See Sato, *Seiritsushi*, 2: 889. If they were ready to deny the *tenno*’s deity, however, why did the *kokutai* ideology so deeply captivate them? The founding myth and the notion of “a line unbroken for ages eternal” were the most important components of *kokutai* ideology.

¹⁰¹ The Potsdam Declaration, art. 10.

¹⁰² In this respect, there was no difference between Plans A and B. See *infra*.

¹⁰³ Judicial review or a constitutional court was easily rejected because in the members’ judgment, such institutions did not work well in other countries. See Sato, *Seiritsushi*, 1: 371. However, they lacked accurate knowledge about the U.S. Supreme Court. Whatever the members believed about judicial review, after World War II, indeed, the world has experienced a judicial review revolution. See Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971).

¹⁰⁴ See Tanaka, *Oboegaki*, 12.

system would have to undergo a fundamental transformation. Nomura thus proposed that a presidential system, or a publicly elected prime minister system, instead of traditional parliamentarism, should be established because strict separation of powers would bring full protection to rights and liberties for common citizens and realize politics in the people's interest. In addition, he gave much thought to the renovation of the judiciary system --- he proposed the introduction of a jury system for the sake of democratization of the constitution. Along with the nationalization of land and important industries, social rights such as the rights to work, education, rest, and welfare were also proposed in Nomura's report.¹⁰⁵ If the Matsumoto Committee had adopted some aspect of Nomura's proposal, the process of amending the Meiji Constitution would have been very different from what actually occurred. Unfortunately, Nomura's opinion seemed to Matsumoto and other members of the committee too radical to be taken seriously.¹⁰⁶

Instead, Matsumoto and most members had been convinced by legal formalism and technique. Thus, rather than adopting a method of comparative constitutional analysis, the research on the Meiji Constitution by the Matsumoto Committee was done provision-by-provision.¹⁰⁷ By its nature, this method could not produce fundamentally new outcomes. With such a method the members could not go beyond the horizon of the Meiji Constitution, which meant to them everything. From the very beginning, their work was doomed to fail. It is not surprising that the government draft of constitutional amendments was so conservative that it got a very poor evaluation from not only GHQ but also the common citizens. We can say that "imposition" of the postwar constitution was in large part self-inducement by the Japanese government.

We can draw lessons from the work of the Matsumoto Committee: A great constitutional scholar is not necessarily a good constitutional designer and it may be very difficult for elites in one regime to find new values outside the regime and polish them to create a new regime. The members

¹⁰⁵ Nomura Junji, "Report on Constitutional Amendment," in Irie, *Keii*, 119-190. Sato Tatsuo estimated that the perspective on the circumstances Nomura's report presented was mostly accurate and its policy proposals were highly reformative. See Sato, *Seiritsushi*, 1: 326.

¹⁰⁶ See Irie, *Keii*, 35; Sato, *Seiritsushi*, 1: 326.

¹⁰⁷ See Tanak, *Oboegaki*, 212-214.

of the committee often mentioned the difference between real politics and the work of amending the constitution. Historically, however, a constitution is usually tightly connected to politically remarkable achievements.¹⁰⁸ In this sense, writing a constitution is inevitably political, whether framers like it or not. The members of the Matsumoto Committee might be good interpreters, but they were definitely poor grand-designers for the future.¹⁰⁹ Unfortunately, Matsumoto and most members, who belonged to the top elite in the old established regime, failed to develop a good political sense to identify and solve issues in the new era.

5. The Japanese Government's Failure: The Lack of Passion and Ideals

The Committee for the Investigation of Constitutional Problems (Matsumoto Committee) continued its work for preparation of amendment to the Meiji Constitution. Unlike the drafts of the *Kenpo Kenkyukai* (Constitutional Research Group) and Takano Iwasaburo,¹¹⁰ what the Matsumoto Committee prepared was the minimum possible amendments and was thus extremely status-quo oriented. Matsumoto's explanation on the general directions of his committee's work in the Imperial Diet hinted at its conservativeness, which induced severe criticism regarding his committee in particular and the Shidehara cabinet in general.¹¹¹

When Matsumoto reported the constitutional revision plans as a result of his committee's work at the cabinet meeting at the end of January 1946, a critically important event occurred on

¹⁰⁸ See Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," 45 *Duke L.J.* 364 (1995). For constitutional writing in the United States, see Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991); Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass.: Harvard University Press, 1998).

¹⁰⁹ This fact may derive from the scholarly tradition of positivism in Japan. See Tanaka, *Oboegaki* 205-231. While positivism was, to some degree, effective for protecting democracy under *tenno* sovereignty, it did not function well when creativity was tested in the age of reform. See also Tanaka Hideo, "The Conflict between Two Legal Traditions in Making the Constitution of Japan," in Ward & Sakamoto, eds., *Democratizing Japan*, 107-132.

¹¹⁰ For the details of Takano Iwasaburo and the *Kenpo Kenkyukai*, see Chapter 3 section 2.

¹¹¹ For example, a long article of the *Tokyo Shinbun* criticized the secretiveness and delay of the committee's work and argued that the minimum amendments the committee sought would not be suitable under the drastically changing circumstances. The article suggested the *tenno* as the source of honor as a result of total constitutional revision. "Kaname ha tennosei (A Key Is the Tenno System)," *Tokyo Shinbun*, article, December 26, 1945 in *Shoron Shuroku*, 102-105.

February 1. The *Mainichi Shinbun* suddenly reported a governmental constitutional revision plan.¹¹² What the paper reported was actually Miyasawa Plan A, which Miyasawa Toshiyoshi framed in early January and was more liberal than the real plan of the government.¹¹³ The secrets of the work of the committee were so well maintained that the scoop was truly shocking for the insiders.¹¹⁴ Matsumoto explained at the cabinet meeting that the draft reported in the *Mainichi Shinbun* was not a governmental plan but merely one draft that was framed in the process of research and that the scoop was not the government's fault.¹¹⁵ Narahashi, the secretary general, issued a press release declaring that the draft that appeared in the *Mainichi Shinbun* had nothing to do with the Matsumoto Committee's work.¹¹⁶ Further, Matsumoto himself announced at a press conference that the government would continue to work out constitutional revision by depending upon Plan A and referring to Plan B only for explanation, both of which were irrelevant to the *Mainichi* draft.¹¹⁷ Matsumoto went on to defend his committee's work to argue that he felt perplexed with criticism that retention of Articles 1 through 4 of the Meiji Constitution was conservative. Because Article 4 provided that the *tenno's* sovereign power should be exercised according to the provisions of the constitution, in his opinion, democratization of constitutional provisions would change the content of sovereign power and then achieve democratization of the constitution. Retention of these articles should not be confused with the principle of monarchical sovereignty. Substance should be more important than appearance. It was all right to argue as part of a legal or political discussion from whom sovereignty derived, monarch, state, or the people but, he believed, it was wrong to write such a thing as a constitutional provision. Provisions in the amended constitution should be the minimum possible. The government tried hard to fully realize the requirements of the Potsdam Declaration

¹¹² See "Kenpo kaisei chousakai no shian (The Provisional Draft of the Committee for the Investigation of Constitutional Problems)," *Mainichi Shinbun*, article, February 1, 1946 in *Shoron Shuroku*, 174-178.

¹¹³ For the Miyasawa A Plan, see Sato, *Seiritsushi*, 2: 487-499.

¹¹⁴ See Sato, *Seiritsushi*, 2: 647.

¹¹⁵ For the cabinet meeting of February 1, see Irie, *Keii*, 77-79.

¹¹⁶ See "Kenpo kaiseian raishuchu ni kakugi kettei (The Cabinet will Decide a Constitutional Amendment Draft in Next Week)," *Asahi Shinbun*, article, February 2, 1946 in *Shoron Shuroku*, 184-185, 185.

¹¹⁷ See "Kenpo kaiseian raishuchu ni kakugi kettei," in *Shoron Shuroku*, 184.

and, he firmly believed, it would surely satisfy the high expectations of the people.¹¹⁸ It is difficult to understand what Matsumoto said in this conference because constitutional writing is nothing but a declaration of ideals and fundamental principles as a state. It is inevitably a political decision in nature. Matsumoto and his colleagues did make a political choice to retain the *kokutai*, which was expressed as *tenno* sovereignty in legal form. They trivialized the importance of constitutional text when they contended that legal reform was enough to guarantee a liberalized and democratized political process. In any event, Matsumoto here again showed that he would not modestly listen to criticisms.

The *Mainichi Shinbun*'s scoop also surprised the public. The draft was more conservative than people had expected from what the media reported, particularly the four principles Matsumoto declared on December 18, 1945. The *Mainichi Shinbun* itself commented that "We think most people will feel disappointed that it is so conservative and does nothing more than preserve the status quo."¹¹⁹ It added that a formal and ceremonial *tenno* system would be more desirable and that the principle of direct governance by the *tenno* should be abolished to avoid its abuse in the future.¹²⁰ Mizutani Chozaburo of the Socialist Party raised a serious question that the provisional draft would satisfy the requirements set forth by the Potsdam Declaration. So long as the principle that the *tenno* superintended sovereign power was unchanged, he pointed out, there was a good opportunity for politically powerful men to carry out undemocratic politics by utilizing the *tenno*'s authority.¹²¹ Even Kita Reikichi of the Liberal Party, one of the conservative parties, criticized the government plan for lacking clarification of sovereignty.¹²² Furthermore, Suzuki Yasuzo, one of the central persons in the

¹¹⁸ See "Kenpo kaiseian raishuchu ni kakugi kettei," in *Shoron Shuroku*, 184-185.

¹¹⁹ *Mainichi Shinbun*, February 1, 1946 in Koseki, *Tanjyo*, 98. Koseki, *Birth*, 61, translated by Moore.

¹²⁰ "Kenpo kaisei shian ni taisuru gigi (Questions to the Provisional Draft of Constitutional Amendment)," *Mainichi Shinbun*, editorial, February 1, 1946 in *Shoron Shuroku*, 178-179.

¹²¹ Mizutani Chozaburo, "Ikkouni kawaranu tennosei (The Never Changed *Tenno* System)," *Mainichi Shinbun*, February 2, 1946 in *Shoron Shuroku*, 182-183. Shiga Yoshio of the Communist Party also criticized the draft because it attempted to maintain the traditional *tenno* system and such a system would obstruct democratic rebuilding of the nation. Siga Yoshio, "Minshu samatagu amakudari (A Top-down Constitution to Obstruct Democratization)," *Mainichi Shinbun*, February 2, 1946, *ibid.*, 183.

¹²² Kita Reikichi, "Shinposei nashi (No Progressiveness)," *Mainichi Shinbun*, February 2, 1946, in *Shoron*

Kenpo Kenkyukai (the Constitutional Research Group), stated about the draft that the existence of the holder of sovereign power who should not assume any responsibility would involve a serious danger that undemocratic despotism might be practiced under the name of the *tenno* and thus the government officials who were in charge of constitutional revision should drop such provisions of the draft for the people and for the welfare of the *tenno* family. Suzuki continued to criticize the draft in that it still used the term of subjects, which seemed to him outdated and that it lacked equal protection and so on. In sum, he pointed out the limits of work by a small number of people and instead argued for a constitutional convention by the people.¹²³ The *Asahi Shinbun* rejected the reactionary manner of the Shidehara cabinet and required the government to make minority opinions public to enrich public deliberation among various classes because constitutional revision was not just a legal problem or narrow political matter but related to the whole state life of the people.¹²⁴

The *Mainichi's* report caused dissatisfaction and apprehensions among the Japanese people about governmental work on constitutional revision. An opinion poll showed that while only 16 percent of people supported the *tenno* system of the Meiji Constitution, 45 percent supported the *tenno* as the center of morality outside the political sphere and 28 percent were favorable to joint sovereignty between the *tenno* and the parliament.¹²⁵ The majority of the people wanted a more or less drastic change in the institution of the *tenno* although they overwhelmingly supported some kind of *tenno* system itself. Matsumoto and his fellow members obviously belonged to a minority and did not grip the people's mind of the day. The unresponsive attitude of the governmental committee caused a critical turn in the course of constitutional making in postwar Japan.

Shuroku, 183-184.

¹²³ Suzuki Yasuzo, "Kenpo shian koshitsu nimo kakon (The Provisional Draft of the Amended Constitution May Sow the Seeds of Trouble for the *Tenno* Family), *Mainichi Shinbun*, February 3, 1946 in *Shoron Shuroku*, 187-188.

¹²⁴ "Kenpo kaisei no tetsuduki wo tadasu (Ask the Government about Procedure of Constitutional Revision), *Asahi Shinbun*, editorial, February 3, 1946 in *Shoron Shuroku*, 185-186.

¹²⁵ "Kenpo kaisei to yoron (Constitutional Revision and Public Opinion)," *Mainichi Shinbun*, article, February 4, 1946 in *Shoron Shuroku*, 188-189. Those who were opposed to the *tenno* system numbered less than 9 percent. *Ibid.*

On February 4, the cabinet meeting ended discussion on amendments to the constitution. Surprisingly, the cabinet did not reach an official decision on the draft; more precisely did not try to conclude to clarify the cabinet's position. The *Asahi Shinbun* reported that disagreement over the fundamental issue of the *tenno* institution prevented the cabinet from deciding its official draft and that Matsumoto reported to the *tenno* his private provisional plan of constitutional amendment on February 7. The article criticized the cabinet for having lacked a serious attitude toward solving a politically important issue by pointing out that there had been no full-scale discussion over Articles 1 through 4 of the Meiji Constitution.¹²⁶ The cabinet members thought that the provisional draft of Matsumoto would be a starting point of their negotiations with GHQ and that after revisions through negotiation, they would gradually frame the final draft of the government.¹²⁷ The draft was thus privately provisional. On February 8, Matsumoto submitted to GHQ a draft that had not officially been approved by the cabinet as a whole.¹²⁸

We should remember that the Committee for the Investigation of Constitutional Problems was established with no official authority but with only a private understanding of the cabinet.¹²⁹ From the beginning to the end, the governmental work was performed privately.¹³⁰ The popular call of the Matsumoto Committee well presented the private nature of the governmental enterprise of constitutional amendment. Matsumoto and his colleagues of course believed that they represented the public. In reality, however, they replaced it with their own private thoughts; this self-indulgent concept of "publicness" was so hollow that they would soon experience a second defeat at GHQ. Constitutional writing as highest politics accompanied with passions and ideals for rebuilding a reinvigorated nation would never succeed by being handled in such a private manner.¹³¹ For the

¹²⁶ See "Kenpo kaisei shian joso (Matsumoto Reported to the Tenno the Provisional Draft of Constitutional Amendment)," *Asahi Shinbun*, article, February 8, 1946 in *Shoron Shuroku*, 192-193.

¹²⁷ See Irie, *Keii*, 85.

¹²⁸ For submission of the draft to GHQ, see Sato, *Seiritsushi*, 2: 686-711

¹²⁹ See this chapter *infra*.

¹³⁰ Koseki has raised this issue and severely criticized the governmental work. Koseki, *Tanjyo*, 104-105.

¹³¹ The very next day of the scoop, a column in the *Mainichi Shinbun* criticized the government work for lacking passions and ideals in building up a new nation. *Mainichi Shinbun*, February 2, 1946 in Sato, *Seiritsushi*, 2: 661-

Matsumoto Committee, the constitution had been something like a commercial code and, from start to finish, had an extremely trivial significance in national politics.

6. An Old Liberal in a New Era: Minobe Tatsukichi and Fading Glory

As discussed above, the Committee for the Investigation of Constitutional Problems (Matsumoto Committee) had most outstanding constitutional scholars of the time as its members but failed to frame a constitutional revision draft that was appropriate for the reconstruction of the state. This triggers serious inquiry of why distinguished constitutionalists could not present an innovative idea for the new era by using their knowledge and insight. In this section, we will examine the constitutional thought of Minobe Tatsukichi as a representative of outstanding academics in prewar Japan. He was truly a liberal champion under the Meiji constitutional regime. None could more ingeniously and more enthusiastically advocate liberal democratic causes than Minobe did in the Meiji constitutional framework. We will consider particularly how this liberal giant responded to the reality the defeat in the war had caused. No matter how exquisite his interpretation was, Minobe's idea of constitutionalism well indicated the limits of an old way of thinking in creating a new political order.

Under the Meiji Constitution, Minobe advocated a theory that the *tenno* should be understood as one of the governmental institutions in prewar Japan.¹³² By excluding the idea of the *kokutai*, the national polity or national character, from constitutional analysis and putting it into the ethical and moral sphere, he tried to rationalize political power originally based upon the ideology of one line unbroken for ages eternal. Despite the fact that the *tenno* was supposed to be above constitutional control, Minobe presented a theoretical foundation for a democratic operation of the Meiji Constitution. His constitutional theory focused on how the Imperial Diet could be democratized and how the parliamentary government system could be organized against the original

662. See also, Elster, "Forces and Mechanisms in the Constitution-Making Process," 45 Duke L.J. 394-395.

¹³² For Minobe's theory on the Meiji Constitution, see Chapter 1 section 8.

intent.

Minobe's thesis was most influential among intellectuals and higher officials in the 1920s. However, it seemed to some of his contemporaries that his interpretation of the Meiji Constitution was so liberal that it denied the *kokutai*, the essential nature of the Japanese state. Minobe became a victim of the fanatic movement that raged during the 1930s. He was accused of repudiating the sovereignty of the *tenno*. As a result, he was forced to resign from the House of Peers and his books were banned.

When the war ended, Minobe returned to public activity.¹³³ He joined the Matsumoto Committee as an adviser, which caused no question at all. He was widely regarded not only as one of the most distinguished professors of constitutional law, but also as the most eminent liberal scholar. That is why people wanted to listen to what Minobe was going to say about the future of the constitution.

Interestingly, Minobe himself opposed any immediate constitutional amendment after World War II, because he believed that the Meiji Constitution was by nature liberal democratic enough to achieve postwar reforms successfully. The militaristic clique had distorted the spirit of the Meiji Constitution. A liberal interpretation of the Meiji Constitution, he argued, could make democratic politics workable in postwar Japan. Under such an extraordinary condition as the occupation, moreover, it was wise and desirable to eschew amending the constitution.¹³⁴ In sum, constitutional text was not profoundly problematic for him.¹³⁵ If his constitutional interpretation had been fully

¹³³ After the *Tenno* Organ Theory Incident in 1935, Minobe was forced to retire from public activity. He continued to read and write privately. See Miyasawa Toshiyoshi, *Tenno kikanetsu jiken* (The Incident of the Organ Theory of the Emperor) (Tokyo: Yohikaku, 1970), 1: 319; 2: 484-496. For his work during wartime, see Ienaga Saburo, *Minobe Tatsukichi no shisoshiteki kenkyu* (A Study of Minobe Tatsukichi Based upon a History of Thought) (Tokyo: Iwanami Shoten, 1998, 1964), 263-337.

¹³⁴ Minobe Tatsukichi, "Kenpo kaisei mondai (Problems on Amending the Meiji Constitution) (1)-(3)," *Asahi Shinbun*, October 20, 21, and 22, 1945. At the beginning, he posed two questions: 1) whether it was necessary to amend the Meiji Constitution, and if so, whether it was appropriate to amend it in haste under the circumstances of the times; 2) if it were so, which part of the constitution should be amended.

¹³⁵ Minobe stated that "even if the text of the constitution had somewhat undesirable provisions, it would not be impossible to remove the hindrances by reforming other statutes and orders and political customs." Concretely, under the current provisions of the constitution, democratization would be accomplished by devising and properly executing statutes and orders, such as the Parliamentary Law, the Order of the House of

realized, constitutional revision would have been unnecessary. For Minobe, rather, democratic reform of the Diet was the most urgent problem of the day. When he argued so, he, as the elite, interpreted the Potsdam Declaration as free determination of the Japanese government. Thus he believed that the principle of *tenno* sovereignty would be retained in the postwar era.¹³⁶

When he discussed the problems on constitutional revision in the *Asahi Shinbun* for three consecutive days in late October 1945, Minobe was reluctant to commit himself to constitutional reform. Or he was at least very discreet. To realize the democratization of the constitution, he argued, its formal amendment would not be absolutely necessary because democratization of the constitution did not necessarily mean to abolish the *tenno* system or change the principle of the *tenno*'s direct government with sovereignty.

His hesitation to amend the constitution came from apprehension of abolition of the *tenno* institution in large part but also from prudential judgment in some part. Minobe believed that the constitution was the fundamental law of the nation and that therefore its revision should not be imprudently discussed. He regarded the fundamental law as “fuma no taiten (the immortal great code),” which the Meiji Constitution was called. To make a new immortal constitution, Japan should wait until exceptional circumstances as the occupation ended. For Minobe, that time had not yet come. For the time being, the government should try to do its best to democratize Japan without amending the constitution.¹³⁷ It is said, however, that most successful constitutions in the world tend to be established during political and social turmoil.¹³⁸

Although he kept his extremely cautious stance, Minobe acknowledged in late October 1946 that all the provisions of the Meiji Constitution should ultimately be reconsidered.¹³⁹ He

Peers, and the Law concerning Election of the House of Representatives, and systems of bureaucracy and local government. Minobe, “Kenpo kaisei mondai (1),” *Asahi Shinbun*, October 20, 1945.

¹³⁶ See Minobe Tatsukichi, *Shinkenpo no kihongenri (The Fundamental Principles of the New Constitution)* (Tokyo: Kunitachi Shoin, 1947), 71 (hereinafter cited as Minobe, *Kihongenri*).

¹³⁷ Minobe, “Kenpo kaisei mondai (3),” *Asahi Shinbun*, October 22, 1945.

¹³⁸ See Jon Elster, “Forces and Mechanisms in the Constitution-Making Process,” 45 *Duke L.J.* 364, 394-395 (1995).

¹³⁹ Minobe, “Kenpo kaisei mondai (3),” *Asahi Shinbun*, October 22, 1945.

pointed out conceivable issues for discussion. Among these were the dual system of the written constitution--the Meiji Constitution and the Imperial House Law, which made up a substantial part of the constitution, but was beyond the control of the Imperial Diet.¹⁴⁰ The prerogatives of the *tenno* and powers vested in the Diet were also mentioned as other issues to be taken seriously. Thus, Minobe was not necessarily a preservationist of the status quo. On the contrary, he had been an enthusiastic reformist from the prewar period. That was why Minobe's hesitant position for constitutional reform evoked general astonishment.

What exactly did Minobe then mean by the immediately unnecessary formal revision of the Meiji Constitution? He argued that meanings of a constitution should be distinguished into the formal and the substantial. The meanings of democracy should also be distinguished into the legal (formal) and the political (substantial). The substantial meaning of a constitution concerns the fundamental law of a state. A constitution in this sense is not always the same as a code that is called a constitution. Minobe argued that because the Meiji Constitution, which had a relatively few number of articles, was very simple, Japan was substantially ruled by many other important statutes, orders and political practices in addition to the Meiji Constitution.¹⁴¹ If the required democratization of the constitution were understood in the substantial sense, formal amendment to the constitution would not be necessary.

The same thinking was applicable to the idea of democracy. While the formal meaning of democracy presupposes popular sovereignty, democracy substantially requires the government to follow the popular will regardless of forms of government. Although democracy in the legal sense cannot be compatible with monarchy, democracy in the political sense can be realized even under monarchy if a monarch governs the people by following their will. What Minobe had in mind here was the British monarchy. The United States and Japan, in Minobe's view, were not based upon a common ground because American democracy adopts both legally and politically a republican

¹⁴⁰ See the Constitution of the Empire of Japan, art. 74.

¹⁴¹ Minobe, "Kenpo kaisei mondai (1)," *Asahi Shinbun*, October 20, 1945.

system as well as strict separation of powers. “It will be absolutely impossible,” Minobe argued, “to realize the American mode of democracy without any reservation in Japan, unless the Constitution is radically reformed.”¹⁴² On the other hand, Minobe asserted, “the British mode of democracy is by no means impossible under the current Constitution.”¹⁴³ Minobe pointed out the similarities between the Meiji Constitution and the British constitution. He even argued that because the institutions that some people regarded as obstacles to democracy, such as the House of Peers and the Privy Council, derived from the British system, it would not be impossible to execute democratized politics by learning the British practices. Minobe believed that the Meiji Constitution with few articles favored liberal democracy.

In this respect, Minobe was by no means unique among the Japanese intellectuals at that time. Most of them who wanted to maintain the *kokutai* asserted, by using the example of the United Kingdom, that the *tenno* system was not an obstacle to the democratization of Japan. We should be cautious about this comparison, however, because when Minobe wrote the essay in October 1945, the *tenno* was still “sacred and inviolable”¹⁴⁴ and a living god. The *tenno* did not declare himself a human being until January 1, 1946. He was considered the only source of all authority in government. In the United Kingdom, by sharp contrast, a monarch was under both law and God. Parliamentary sovereignty, moreover, is the most important factor in the British constitutional monarchy. Parliament is competent to control the status of the monarchy.¹⁴⁵ The real question, thus, was not a mere superficial comparison. It was, rather, how ready Minobe and other advocates were to accept the legal, political, and social foundations of the British constitutional monarchy.¹⁴⁶

How did Minobe then conceptualize democratization of politics, which was placed at the center of reconstruction of political order in the postwar era? He refused democracy as popular

¹⁴² Minobe, “Kenpo kaisei mondai (1),” *Asahi Shinbun*, October 20, 1945.

¹⁴³ Minobe, “Kenpo kaisei mondai (1),” *Asahi Shinbun*, October 20, 1945.

¹⁴⁴ Constitution of the Empire of Japan, art. 3.

¹⁴⁵ See Act of Settlement.

¹⁴⁶ Even the Constitution of Japan does not allow the Diet to give consent to succession to the throne.

sovereignty, particularly from contractual theories.¹⁴⁷ He regarded popular sovereignty as idealistic formalism because the people themselves could not exert sovereign power in reality. In Minobe's analysis, a minority always exercised sovereignty in the name of the people and thus popular sovereignty often caused dictatorship.¹⁴⁸

What he defended was democratization under the *tenno* system. Without the *tenno* institution, he feared, the unity of the state would have disappeared.¹⁴⁹ That could even have drawn the state into the vortex of a disturbance.¹⁵⁰ Democracy under the *tenno* system Minobe conceived assumed a form in which the *tenno* would regard the people's mind as his own mind and would administer the state affairs by conforming to the popular will.¹⁵¹ Then, how would the *tenno* govern the state with the popular will in rejecting his own arbitrariness and the advice of part of the military and bureaucrats? Minobe advocated that a parliament had to be a real representative organ of the people. To be so, the weak Imperial Diet should be changed to a more powerful institution.¹⁵² The most important issue was how to organize a new Diet. Minobe had argued in the prewar period for a proportional representation system in the House of Representatives. He understood that development of parliamentarism necessarily led to political party politics. He had supplied party politics with theoretical supports but never missed its evils. Administration of the political party needed a vast amount of money, which had caused corruption. He saw that the corruption had derived from a defective election system. Regulation on campaign finance had been emasculated, the election law had ignored the existence of political parties and presupposed individual candidates

¹⁴⁷ See Minobe Tatsukichi, *Kenpo satsuyo*, 5th ed. (Tokyo: Yuhikaku, 1932), 60; Minobe, *Kihongenri*, 26; Minobe Tatsukichi, *Nihonkoku kenpo genron* (Tokyo: Yuhikaku, 1948), 115 (hereinafter cited as Minobe, *Genron*).

¹⁴⁸ Minobe Tatsukichi, "Minshuseiji to kenpo (Democratic Politics and the Constitution)," *Seikatsu Bunka*, February 1946 in *Shoron Shuroku*, 381.

¹⁴⁹ Minobe Tatsukichi, "Minshushugi to waga gikaisei (Democracy and Our Parliamentarism)," *Sekai*, January 1946, 23.

¹⁵⁰ Minobe Tatsukichi, "Kenpo kaisei no kihonmondai (Basic Problems of the Constitutional Revision)," *Horitsu Shinpo*, 728(April-May 1946), 2.

¹⁵¹ Minobe, "Minshushugi to waga gikaiseido," 23.

¹⁵² Concretely, Minobe raised issues such as extension of a session of the Diet, closing the Diet, two and more consecutive orders to dissolve the House of Representatives, constitutionalization of the right to interrogation, deletion of the power to issue independent orders, introduction of the parliamentary government system, superiority of the House of Representatives over the House of Peers in the budget matter, and the power of the Diet to project constitutional amendment. See Minobe, "Minshushugi to waga gikaiseido," 29-31.

alone, and people could exercise only weak control over political parties because an election that was held just every four years was difficult to reflect popular will promptly and accurately.¹⁵³ Then, Minobe continued to analyze more profound problems in contemporary mass democracy. First of all, he pointed out, majority rule involved an intrinsic difficulty because people were not equal in reality. Secondly, common citizens lacked adequate knowledge and judgment about political matters. Finally, because such citizens failed to make an independent decision, they tended to be influenced by irrational and unreasonable factors such as interference of politics, agitation, favoritism, and bribery.¹⁵⁴

Interestingly, however, Minobe did not take an elitist approach to the weaknesses of mass democracy. Rather, he proposed institutional reform to respond to them. He believed that proper reform in an electoral system might alleviate, albeit not cure, the evils of the existing democratic politics. Even in the prewar period, he enumerated reformed systems such as elections based upon competition among political parties, not individual candidates, abolition of electoral districts and establishment of one national district, and annual elections to increase people's effective control over political parties, and concretely a proportional representation election system.¹⁵⁵ In addition, Minobe proposed abolishing the House of Peers he once described as the worst part of the Meiji Constitution¹⁵⁶ but maintain bicameralism to promote deliberation and establish an upper house of both occupational and regional representation¹⁵⁷ in the postwar democratic process.¹⁵⁸

¹⁵³ Minobe Tatsukichi, "Senkyo kakuseiron (An Essay on Electoral Reform)," *Gendai kensei hyoron* (Tokyo: Iwanami Shoten, 1930), 9-16.

¹⁵⁴ Minobe, "Senkyo kakuseiron," *Gendai kensei hyoron*, 16-19.

¹⁵⁵ Minobe, "Senkyo kakuseiron," *Gendai kensei hyoron*, 36-54.

¹⁵⁶ Minobe Tatsukichi, *Nihon kenpo no kihonshugi* (Tokyo: Nihon Hyoronsha, 1934), 126 (hereinafter cited as Minobe, *Kihonshugi*).

¹⁵⁷ Minobe, "Minshushugi to waga gikaisei," 26-29; Minobe, "Minshushugi seiji to kenpo," *Shoron Shuroku*, 383

¹⁵⁸ Surely, it is an important question whether occupational representation can advance deliberation in society. On the contrary, segmentation could be its outcome. What advances deliberation is indeed a crucial topic in current constitutional democratic discussion. See, e.g., James S. Fishkin, *Democracy and Deliberation: New Direction for Democratic Reform* (New Haven: Yale University Press, 1991); James S. Fishkin, *The Voice of the People: Public Opinion and Democracy* (New Haven: Yale University Press, 1995, 1997); Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996); James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass: MIT Press, 1997); Jon Elster,

In sum, Minobe considered that contemporary democratic politics took the form of party politics and that democratic politics by universal suffrage involved intrinsic difficulties, but that they might be controlled by innovative institutional arrangements. Thus, he clearly presented a position in which careful institutional designing could guide people's preferences in a more appropriate direction. Doubtlessly, what Minobe raised is an important question even today. However, the real question was whether he set forth an appropriate agenda when he conceived a postwar political order. Was the House of Representatives really represented by the people in the prewar period? Did prewar Japanese politics experience the intrinsic evil of democracy, the tyranny of the majority? Instead, a minority abused political power. Thus the real issue was still how majority of the Japanese people could gain political power in the political process after the wartime defeat. Minobe felt that he had to respond to the negative effects of the only partially democratic political process before majority rule was established in prewar Japan.

Such a reformative attitude seemed to disappear from Minobe, however, when the government published the outline of a revised constitution, which provided a symbolic *tenno* system. He strongly opposed a *tenno* institution as a ceremonial adornment or a symbol of the national unity.¹⁵⁹ Minobe believed that the *tenno* as sovereign would be what the Japanese people all wanted to have and was indispensable to retaining the unity of the state.¹⁶⁰ In his opinion, the *tenno* should hold the powers to give sanction to laws and to appoint directly or indirectly public officials, because such powers made a monarch authentic. Without them, in contrast, a monarch would have existed nominally but lost reality as a monarch. Minobe criticized the notion that the symbolic *tenno* system

ed., *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998).

¹⁵⁹ Minobe's attitude might be related to a problem of generation. Many other old liberals commonly shared unreserved respect for the *tenno*. They were otherwise rational and critical. See Takeuchi Yoshimi, "Riberarizumu no tennosei (The Emperor System in Liberalism)," *Orudo riberaristo ni taiketsusuru junia riberaristo* (Young Liberals Who Confront Old Liberals), *Kaizo*, September 15, 1952, 13-14; Nakamura Shinichiro, "Orudo riberaristo no nankaisa (Difficulties in Understanding Old Liberals)," *ibid.*, 11-12. See also, Kuno Osamu, Tsurumi Shunsuke, and Fujita Shozo, *Sengo nihon no shiso (Thoughts in Postwar Japan)* (Tokyo: Chuo Koronsha, 1959), 71-107; Ishida Takeshi, *Nihon no seiji to kotoba: 'Jiyu' to 'Fukushi' (Politics and Words in Japan: 'Freedom' and 'Welfare')* (Tokyo: Tokyo Daigaku Shuppankai, 1989), 186-194.

¹⁶⁰ Minobe, "Kenpo kasiei no kihonmondai," *Horitsu Shinpo*, 4.

would radically reform the *kokutai* of Japan, overturn the historical belief of the Japanese people and destroy the unity of the nation.¹⁶¹ For him, form was important because the inner workings of human nature actually relied upon form. A form of decision by the Diet or an order by the prime minister could not be as authoritative as an order from of the *tenno*.¹⁶² Minobe asserted that the *tenno* system meant the institution of the *tenno* as sovereign of the state and that maintenance of the *tenno* system in such a form was the general will of the people, a foundation of the unification of the nation and a ground to realize democracy in a real sense. The hollow symbolic *tenno* institution was rejected as nothing but empty idealism that failed to understand the psychology of the people.¹⁶³

In this way, Minobe refused to accept the symbolic *tenno* institution and attempted to defend the system in which the *tenno* was sovereign. In fact, Minobe's repulsion toward the symbolic *tenno* system was prepared in his constitutional theory. This is well reflected in his treatment of the *kokutai*. Minobe defined the *kokutai* as historical and ethical characteristics of the state.¹⁶⁴ He understood that Article 1 of the Meiji Constitution¹⁶⁵ not only declared that the empire of Japan was a monarchy but also clarified its historical foundation and eternality and thus showed that Japan had adopted the unique system incomparable in the world. As we saw,¹⁶⁶ unlike the majority of constitutional theorists, Minobe excluded the idea of the *kokutai* from constitutional analysis. This exclusion had dual effects. On the one hand, his constitutional theory to a considerable extent prevented the constitution from becoming an instrument for ruling the people under the absolute *tenno* system. Constitutionalism and parliamentarism could play a role, albeit limited, in the political process because his theory did not have to pay attention to the *kokutai*. On the other hand, however, understanding of the *kokutai* as the historical and ethical characteristics of the state could easily lead to Japanese exceptionalism. It is even truer when in rejecting both conceptual idealism and pure

¹⁶¹ Minobe, "Kenpo kasie no kihonmondai," *Horitsu Shinpo*, 4.

¹⁶² Minobe, "Kenpo kasie no kihonmondai," *Horitsu Shinpo*, 4.

¹⁶³ Minobe, "Kenpo kasie no kihonmondai," *Horitsu Shinpo*, 4. See also Minobe Tatsukichi, "Kenpo kaisei no kihonmondai," *Sekai Bunka*, May 1946, 62-63.

¹⁶⁴ Minobe, *Kihonshugi*, 16.

¹⁶⁵ "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal."

¹⁶⁶ See Chapter 1 section 8.

theory of law, Minobe believed that social, political and ethical value judgment was the most important element of discovering what is law.¹⁶⁷ There was a danger that the value presupposed beyond constitutional theory might become an unmovable premise.

Indeed, Minobe's conception of the *kokutai* was situated outside the constitution and played a role in supporting the constitutional order. For example, Minobe severely criticized the *Chian Iji Ho* (Peace Preservation Law) because it attempted to punish thought with penalty and even the attempt conflicted with the spirit of the constitution. So long as thought stayed as thought, it should be free and legally protected.¹⁶⁸ Further, surprisingly, Minobe pointed out something similar to the clear and present danger test.¹⁶⁹ His position was undoubtedly extremely liberal among constitutional theorists. In his view, however, the reason why the law was bad partially depended upon the manner of legislation. Minobe did not disagree on punishing conduct to overthrow the *kokutai*. There were already legal regulations against such conduct: the Penal Code, the Publishing Law, the Newspaper Law, the *Chian Keisatsu Ho* (Peace Police Law). The law seemed to Minobe redundant. The law also juxtaposed the overthrow of the throne in a line unbroken for ages eternal and denial of private property. Unlike the *kokutai*, private property might change with the transformation of society. Because a property system was a part of economic policy, the people could discuss freely which kind of system was appropriate. Because the *kokutai* was distinctively Japanese, to Minobe, it should not have been confused with what is not proper to Japan and everlasting. Most importantly, Minobe's conception of the *kokutai* vividly showed its limits when it came to the Constitution of Japan. While the symbolic *tenno* system changed the legal conception of the *kokutai*--the *tenno* should superintend the sovereign power---, he asserted, the postwar constitution kept intact the *kokutai* as the historical and ethical characteristics of the state because of the unchangeable retention of the *tenno* institution

¹⁶⁷ Minobe Tatsukichi, *Kenpo satsuyo*, preface, 7.

¹⁶⁸ Minobe, "Chian Iji Ho hihan (Criticism of the Peace Preservation Law)," *Gendai kensei hyoron*, 208-211.

¹⁶⁹ Minobe Tatsukichi, "Shinbunshi no hakkoteishi wo ronzu (Discussion about a Ban on Publishing Newspapers)," *Meiji Gakuho*, no. 94 (1905), 11. See Ienaga, *Minobe Tatsukichi no shisoshiteki kenkyu*, 232.

as a hereditary monarchy.¹⁷⁰

When he argued that constitutional revision should not be hastily carried out, Minobe recognized much room for liberal democratization in the Meiji Constitution. In fact, the work of the Matsumoto Committee, of which Minobe was an advisor, is well understood as a materialization of his *tenno* organ theory. Yet the fate the Meiji constitutional regime followed was completely different from what he was willing to defend. Once he triumphantly wrote in 1932 that the parliamentary government system as a political practice had recently become a constitutional convention, which was a betrayal of the framers' intention.¹⁷¹ Soon after he wrote that, however, political party politics came to an end with the May Fifteenth Incident. About three years later, his books were banned as the result of the *tenno* organ theory incident. After the war, when he republished the same book, Minobe could not help writing that "once the parliamentary government system had been established as a political practice, fall in the authority of political parties and rise of the military in politics caused a revival of a bureaucrat cabinet, particularly a military officer cabinet, and Japan was led to the Pacific War."¹⁷²

What, then, were Minobe's diagnosis and concrete prescription for the Meiji Constitution? From his perspective, the Meiji Constitution could have properly realized parliamentarism and constitutionalism to a considerable degree. He frankly admitted that the Japanese constitution, in a substantial sense, had been "despotic and militaristic and removed from the spirit of democracy or liberalism"¹⁷³ for the last dozen years. Minobe, however, attempted to defend the Meiji Constitution itself. For him, the text had nothing to do with the collapse. He implied that the ongoing criticism about the conservative character of the Japanese Constitution in the Allied countries was beside the point. He contended that "foreigners who are not familiar with the Japanese constitution easily

¹⁷⁰ Minobe, *Kihongenri*, 69-73.

¹⁷¹ Minobe, *Kenpo satsuyo*, 5th ed. (1932), 124.

¹⁷² Minobe, *Kenpo satsuyo*, revised ed. (1946), 120.

¹⁷³ Minobe, "Kenpo kaisei mondai (2)," *Asahi Shinbun*, October 21, 1945.

confound the malpractice of the constitution with its defect itself.”¹⁷⁴ The constitution did not cause the recent suppression of freedom of the people. Improper political practices, in Minobe’s view, distorted the spirit of the Meiji Constitution, which was supposed to be an ultimate reason of the failure.

However, there are very few, if any, constitutions in the world that specifically consist of clauses that suppress the rights and liberties of the people. Rather, an intention to be oppressive is often disguised in a democratic constitution. We thus should pay heed to the relationship between the articles of a constitution and a system of governance in the real legal and political process.

Minobe pointed out four reasons that led to the disastrous anti-democratic situation in Japan: 1) the politics of a military clique, 2) paralysis of the Imperial Diet, particularly of the House of Representatives, 3) the extreme oppression of freedom of the people, such as freedom of speech, freedom of religion, and academic freedom, and 4) coercion by the intolerant and mystical idea of the *kokutai*.

First, Minobe argued that the politics of a military clique had nothing to do with the text of the Meiji Constitution. Militarism in prewar Japan was accelerated by the rule that ministers of the army and navy must be a general or lieutenant general and admiral or vice admiral on active service. He stated, however, this was a law on bureaucratic organization, not the constitution itself. In Minobe’s optimistic opinion, furthermore, now that the Japanese army and navy had been abolished, it was unnecessary to amend the constitution by removing the militaristic trend of politics.¹⁷⁵

Secondly, Minobe discussed the failure of the Imperial Diet. He basically repeated the first point. Intimidation and violence by the military clique had led to a totalitarian system. Political parties had been forced to disband in order to form the *yokusan taisei* (the imperial rule assistance regime). No real elections had been held. As a result, the Diet could not perform its function of checking the reckless behavior of the government by reflecting the voice of the people. In a

¹⁷⁴ Minobe, “Kenpo kaisei mondai (2),” *Asahi Shinbun*, October 21, 1945.

¹⁷⁵ Minobe, “Kenpo kaisei mondai (2),” *Asahi Shinbun*, October 21, 1945.

comparative constitutional perspective, the Imperial Diet was weak in its powers. Yet such difficulties were not serious enough to respond to constitutionally. Minobe claimed here again that constitutional reform was unnecessary. As other countries, he believed, Japanese politics had adopted constitutionalism with the Meiji Constitution. According to Minobe, democracy, liberalism, and legalism were the principles the constitution had adopted. Mistaken interpretations on the prerogatives of the *tenno* prevailed for over a decade.¹⁷⁶ If the Meiji Constitution, as he understood it, was based upon liberal democracy, however, Minobe did not necessarily argue for “democratization of the Constitution.” Rather, it might be more reasonable to think that something was wrong with the text.

Thirdly, Minobe contended that the suppression of civil liberties and civil rights was derived from oppressive legislation and abuse of powers by the police and administrative authorities, but not from the constitution. Prompt abolition and change of statutes and orders and self-restraint of the police and administrative authorities would remove the evils inflicted upon the people. From this viewpoint, he accused the government of having been unwilling to reform the administrative court system to extend the protection of liberties of the people.¹⁷⁷ More seriously, however, Minobe failed to realize that even a democratic parliament cannot regulate some areas of human existence. In fact, Minobe believed that as far as the rights and duties of the *subjects* were concerned, a simple provision for each right and duty would suffice in a constitution.¹⁷⁸ The idea of fundamental rights was irrelevant for Minobe. Guarantee of rights by a majority in the parliament had been a basic thesis for him.

Whereas he argued in favor of the *tenno* system with sovereignty by following the model of the United Kingdom, he did not discuss much about the Anglo-American legal system, where the judiciary has played a pivotal role in protecting the liberties and rights of the people. At that time, to remake the Japanese judicial system, which was based on the German system, other systems should

¹⁷⁶ Minobe, “Kenpo kaisei mondai (2),” *Asahi Shinbun*, October 21, 1945.

¹⁷⁷ Minobe, “Kenpo kaisei mondai (2),” *Asahi Shinbun*, October 21, 1945.

¹⁷⁸ Irie, *Keii*, 25 (emphasis added).

have been widely referred to. The American judicial system particularly should have been taken seriously, not only because Japan was occupied mainly by the United States, but also because judicial review, which had been distinctively developed there, was a unique institution for liberal democracy. From Minobe's perspective, constitutional control by the judiciary was regarded as a hindrance to realizing the majoritarian political process under the system in which judge decided in the name of the *tenno*.¹⁷⁹ How could he have reconciled his quest for majoritarian democracy with his awareness about the irrationality of mass democracy based upon universal suffrage? He did not raise such a question. He did not come to understand the necessity to create a certain space out of reach of a majority of the people to keep liberal democracy well workable.

The fourth point was that the prevalence of the intolerant and mystical idea of the *kokutai* made it virtually impossible to discuss politics freely even in an academic environment, let alone to criticize the government. Minobe admitted that this idea of the *kokutai* suppressed academic freedom and freedom of speech. Indeed, he was an eyewitness to the infringement of fundamental rights. He himself was a victim of ultra-nationalism.

However, Minobe once again maintained that the text of the constitution had nothing to do with the suppression of liberties. The Meiji Constitution, he said, did not provide any good reasons for the mysterious theory of the *kokutai*.¹⁸⁰ In his interpretation, the Meiji Constitution adopted the principle of constitutional government and its founding spirits were democracy, liberalism, and legalism.¹⁸¹ In rejecting the false theory of the *kokutai* and operating the constitution by a proper interpretation, Minobe expressed a bright prospect of accomplishing democratization of the constitution. Constitutional amendments, therefore, were not vital to exclude the false theory. "If academic freedom and freedom of speech are completely protected," he argued, "such a fallacy will

¹⁷⁹ See the Constitution of the Empire of Japan, art. 57. Minobe denied judicial review on substantiality of statutes under the Meiji Constitution. See Minobe, *Kenpo satsuyo*, 567-571. In the postwar era, he was also negative about judicial review, which was provided for in the government draft of constitutional revision. See Minobe, "Kenpo kaisei no kihonmondai," *Sekai Bunka*, 63.

¹⁸⁰ When he criticized the mysterious theory of the *kokutai*, Minobe surely implied that it was what Hozumi Yatsuka and Uesugi Shinkichi had advocated. See Ienaga, *Minobe Tatsukichi no shisoshiteki kenkyu*, 342.

¹⁸¹ See Minobe, *Kihonshugi*, 101-107.

naturally lose its influence.”¹⁸²

Therefore, Minobe thoroughly refused to regard the constitutional text as the cause of the breakdown of the Meiji constitutional system. It seemed to him flexible enough to have sufficient room for the liberal democratization of politics. If one interpretation that was false but duly constitutional had caused the collapse of the constitutional order, however, it might be reasonable to think that there were some problems with the text. If the Meiji Constitution had elasticity as Minobe often claimed, it might be as widely open to the opposite direction as to the direction in which he wanted to interpret it. It was too optimistic for him to say that because the military no longer existed, it would be all right from then on. As democracy develops, the tyranny of the majority becomes a more and more real threat.

This is a problem of what is called constitutional guarantee. Minobe argued for supremacy of the constitution: All inferior legal norms had to conform to the constitution.¹⁸³ However, acknowledgment of supremacy of the constitution does not necessarily mean stability of the constitutional order. In the real world, the constitution is always exposed to danger that political power might be abused and legislation might deviate. Minobe showed a very cool recognition of constitutional guarantee. He contended that because the constitutional organs were equally supreme in the state, they were not subject to other organs’ supervision. Even if one organ acted unconstitutionally, there were no legal methods but to urge the organ to reconsider the matter by political pressures as checking among organs and public opinion. Particularly, he recognized that when the government and the Diet jointly took an unconstitutional measure, constitutional order might be significantly distorted. Thus, while, in theory, the constitution was the supreme will of the state and both the government and the Diet were controlled by it and obligated to respect and uphold it, in reality, the constitution might be inevitably distorted by actions of the government and

¹⁸² Minobe, “Kenpo kaisei mondai (2),” *Asahi Shinbun*, October 21, 1945.

¹⁸³ Unlike many constitutional theorists, Minobe maintained that even the Imperial House Law derived its legitimacy from the Meiji Constitution. See Minobe, *Kihonshugi*, 77-79; Minobe, *Kenpo satsuyo*, 107.

the Diet.¹⁸⁴

In this way, Minobe was realistic enough to calmly recognize that constitutional powers are possibly abused and there was no legal way to control it. It is always true that political institutions cannot work well without full commitment to their basic values by the people who run them. His cool recognition was, however, a reflection of his optimism that theoretically correct recognition would also eventually obtain correctness in practice.¹⁸⁵ Even after his academic career suffered from serious damage in the *tenno* organ theory incident, Minobe maintained his optimism because he firmly believed that correctness of his theory would be widely accepted after all.¹⁸⁶

Remarkably in this respect, Minobe was well understood as a believer and practitioner of the marketplace of ideas.¹⁸⁷ That was why Minobe severely criticized the *Chian Iji Ho* (Peace Preservation Law).

Healthy development of society and culture depends upon only the conditions that various different causes and ideas stand side by side and compete with one another to polish and deepen them. Competition among various ideas is never troublesome but rather desirable for development of culture. The competition must be fair. It is no more right that power holders use their power to suppress causes and ideas they disagree on than that the powerless resort to violence to realize their causes and ideas. We determinedly refuse these two. However, the *Chian Iji Ho* (Peace Preservation Law) indeed attempts to do this wrongness.¹⁸⁸

Minobe also practiced the theory of the marketplace of ideas. He in fact welcomed competition of ideas. When he learned that Yamamoto Senji, a representative of a proletarian party, had been assassinated, Minobe vehemently rejected the recent tendency to

¹⁸⁴ See Minobe, *Kenpo satsuyo*, 101.

¹⁸⁵ See Nagao Ryuichi, "Minobe Tatsukichi no hotetsugaku (Jurisprudence of Minobe Tatsukichi)," *Nihon kenpo shisoshi* (Tokyo: Kodansha, 1996).

¹⁸⁶ Minobe's mixture of recognition and practice drew severe criticism from his student, Miyasawa Toshiyoshi. See Miyasawa Toshiyoshi, "Kokumin daihyo no gainen (The Concept of Representation of the People)," *Kenpo no genri (Principles of the Constitution)* (Tokyo: Iwanami Shoten, 1967). See also, Higuchi Yoichi, *Kindai kenpogaku ni totteno ronri to kachi (Logics and Values for Modern Constitutional Theory)* (Tokyo: Nihon Hyoronsha, 1994).

¹⁸⁷ For the marketplace of ideas, see Stanley Ingber, "The Marketplace of Ideas," 1984 *Duke L.J.* 1; Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982), 15-34; C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989).

¹⁸⁸ Minobe, "Chian Iji Ho hihan," *Gendai kensei hyoron*, 213.

resort to violence. Although, from Minobe's perspective, Yamamoto's idea was too radical to gain the support of a majority of the people, the small proletariat party had brought fresh air to the political world and somewhat mitigated the wrongs derived from the corruption of the existing parties. Whether agreeable or not, arguments from Yamamoto's sincere belief should have been worth listening to as an example one may profit by. Minobe lamented Yamamoto's death as a great loss for not only the far leftist and proletariat parties but also for the entire Diet and the political world.¹⁸⁹

Minobe believed in competition of ideas and practiced it. However, does competition actually reveal a true idea? What is a criterion for trueness? Can we distinguish truth from falsehood about human ideas? Does quantity matter after all? More fundamentally, is there really free competition of ideas? If free competition means something, it is only when competitors are situated at a more or less similar starting point. We have already lived in the specific circumstances, they are the given conditions under which we form and accept our ideas. When Minobe argued for free competition of causes, how seriously did he suppose that communism would win in competition with his liberal but *tenno*-centered thought and then it would eventually be widely accepted?

Putting aside these questions, let us assume that coexistence of various ideas rather than their unification may lead to a better decision. The most difficult problem here is related to certainty of a condition of whether freedom of thought and freedom of speech are fully protected. What Oliver W. Holmes said just before his famous formula of the marketplace of ideas seemed more approximate to our real experience.

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises.¹⁹⁰

¹⁸⁹ Minobe, "Yamamoto daigishi no oshi wo tamu," *Gendai kensei hyoron*, 311-315.

¹⁹⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

That is why constitutional scholarship has hard groped for how free speech can be better protected. To support Minobe's optimistic belief, it seemed indispensable to explore the conditions under which freedom of expression would be fully guaranteed in the postwar regime. By the *tenno* organ theory incident, Minobe himself had witnessed that the Meiji constitutional system was not at all effective in protecting free speech. Unfortunately, nonetheless, Minobe did not discuss how to protect freedom of speech fully.

In fact, the Meiji Constitution could not offer a strong basis for protecting freedom of speech. In the Meiji constitutional system, the Imperial Diet could regulate speech and expression in any way through legislation. Liberties were guaranteed within the limits of law, that is, against the administrative departments.¹⁹¹ However, reservation of laws was critically dangerous for free speech in Minobe's majoritarian democratic thought. Even worse, the Imperial Diet was neither a legislative institution nor an organ representative of the people in the authentic meaning of the word.¹⁹² As discussed above, furthermore, Minobe was opposed to judicial review.¹⁹³ As a legal practice, the judiciary was not allowed to exercise the power of judicial review. A positivistic idea dominated the practice of law. Minobe could not articulate the conditions under which freedom of speech would be

¹⁹¹ Article 29 of the Constitution of the Empire of Japan read: "Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations." See Miyasawa Toshiyoshi, *Kenpo* (Tokyo: Yushikaku, 1973), 38.

¹⁹² The *tenno* held the prerogative to legislation to which the Imperial Diet merely gave consent. See the Constitution of the Empire of Japan, art. 5. The Imperial Diet consists of the House of Peers, which was regarded as the bulwark against democratization, and the House of Representatives, which was elected by universal male suffrage in 1925 and thus had no women representatives at all. See *ibid.*, arts. 33-35.

¹⁹³ Minobe made reference to the possibility of establishing *kenpo saiban* (a constitutional court). He suggested examining a constitutional court system "as a means to resolve disputes between two Houses of Parliament and between the Parliament and the Cabinet on constitutional interpretation." Minobe, "Kenpo kaisei mondai (3)," *Asahi Shinbun*, October 22, 1945. He appeared to conceive the constitutional court as a tribunal of conflicts in competence between governmental institutions. Yet Minobe found the institutionalization of constitutional justice extremely difficult. It was thus unwise for him to hasten to reach a conclusion. In January 1946, Minobe said that establishment of a constitutional court was an available option. See Minobe, "Minshushugi to waga gikaiseido," 31. But one month later, he argued that it would be unnecessary to set up a special institution as a constitutional court to decide constitutional disputes, which would only rarely occur and the minister of state should resolve politically. See Minobe, "Minshushugi seiji to kenpo," *Shoron Shuroku*, 384-385. After the government draft of constitutional revision was published, Minobe expressed doubt over the appropriateness on judicial review, which is now widely regarded as one of the most important devices in liberal democracy for protecting the liberties of the people. See Minobe, "Kenpo kaisei no kihon mondai," *Sekai Bunka*, 63. Minobe could not accept denial of democratic legislation by the judiciary, which directly lacks democratic legitimacy.

firmly secured in postwar Japan. The idea of a constitutional court as the guardian of fundamental rights was, after all, foreign to Minobe's majoritarianism. Minobe, who was highly sensitive to the evils involved in the political process under mass democracy, failed to conceive the existence of the rights of which even the full democratic process cannot deprive people.

At the end of his second article on constitutional reform in the *Asahi Shinbun*, Minobe repeated his position by opposing an opinion that the constitution should be reformed so that the totalitarian trend could never happen again. "Whatever provisions might be made in the Constitution, if persons with militaristic powers suppress the people, such provisions will be unable to be realized. Such provisions, after all, are mere dead letters." "When the Diet fully exercises powers vested in it and free speech is perfectly guaranteed," Minobe optimistically believed, "the current Constitution will prevent such anti-democratic trends from developing."¹⁹⁴ Yes, all codes of the fundamental law are nothing but written documents. However, Minobe failed to understand that constitutional text has an educational function. Commitment to liberal democratic values he contended were necessary for sustaining a constitutional order cannot grow spontaneously. Civic education is what is needed most. Unfortunately, Minobe as a constitutional theorist did not offer a perspective on how to educate citizens to bear political responsibility.

7. Conclusion

We have discussed how the Japanese government failed to respond appropriately to the reality that defeat in the war had caused. Long isolation from the world cost the governing elite sound political judgment. More importantly, they had all been so infatuated by the *kokutai* ideology that they could not conceive of a new political order independently of it. When liberal democratization of politics was required, a crucial thing should have been to present an idea of how to create a majoritarian political process and to constitute individual freedom in it. To the governing elites, the *tenno* organ theory seemed a legitimate prescription for liberal democratization in postwar

¹⁹⁴ Minobe, "Kenpo kaisei mondai (2)," *Asahi Shinbun*, October 21, 1945.

Japan. Thus they felt that it was sufficient to recover and constitutionalize the *tenno* organ theory that was banned in the fanatic ultra-nationalist movement. That was what the work of the Matsumoto Committee was all about.

However, the governing elite could not realize that the Meiji constitutional system did not ultimately coexist with the spiritual freedoms of individuals. The *kokutai* ideology occupied even their inner freedom by monopolizing value judgments. They were close to the power center and thus they could easily identify themselves with the orthodox value of the established regime. Therefore they failed to recognize correctly the defects the Meiji constitutional system had and to submit a solution for them. Minobe Tatsukichi is surely regarded as a representative of the governing elite. He was the most suitable to represent the Meiji constitutional world for his distinguished though victimized academic career.

If new constitutional ideas had been presented at all, that would have come from marginalized people. On the periphery of the regime, in fact, private citizens did gather with an innovative idea of popular sovereignty. They framed a new constitutional plan for postwar Japan. On the governmental level, moreover, since the scoop of the Matsumoto Committee's draft, leadership had moved from the Japanese government to GHQ, who was also surprised by the extremely conservative plan the *Mainichi Shinbun* broke.

Before we turn our eyes to citizens' ideas of constitutional government, here we will set the clock a little bit ahead to examine Minobe's reaction to the Constitution of Japan. Good or bad, he as a liberal giant embodied the limits of the Meiji constitutional system in the new era.

Minobe as a councilor of the Privy Council participated in deliberating on the government draft of the revised constitution. He alone opposed the draft. After the Imperial Diet adopted the partially modified constitution, it was sent back to the Privy Council and this time he was absent.¹⁹⁵ For him, the end of the war should have meant return to normalcy. It was quite natural for him to

¹⁹⁵ For the process of deliberation in the Privy Council, see Irie, *Keii*, 320-342, 427-428; Sato, *Seiritsushi*, 3: 374-446, 4: 985-1004.

think that revision of the Meiji Constitution was unnecessary. If necessary, that would have been a codification of his *tenno* organ theory.¹⁹⁶ To him, the postwar did not mean a new beginning. However, Minobe recognized that a revolution happened because there was a profound discrepancy between the amendment process of the Meiji Constitution and the principle of popular sovereignty the postwar constitution declared. However liberal he might be otherwise, Minobe had never doubted the sovereignty of the *tenno*. He interpreted Article 1 of the Meiji Constitution as the foundation of immovability of *tenno* sovereignty. Reign and governance of the *tenno* in one line unbroken for ages eternal not only showed a historical fact but also declared immortality in the everlasting future.¹⁹⁷ Thus the principle of popular sovereignty was outside his constitutional theory. How did Minobe understand the process of making the Constitution of Japan?

In Minobe's academic recognition, the acceptance of the Potsdam Declaration was crucially important. Building a postwar political order had to satisfy the terms set forth by the declaration. If a new constitution was required to be determined by the freely expressed will of the people, he argued, a new constitution was supposed to be a *minsei kenpo* (constitution established by the people) from the very beginning.¹⁹⁸ Minobe understood that the Meiji Constitution was virtually abolished when Japan accepted the Potsdam Declaration, which was interpreted to require the establishment of popular sovereignty. The question came down to how to obtain the freely expressed will of the people. In his view, the Imperial Diet was constitutionally regarded as an organ of representing the people. Thus, Minobe regarded the ninetieth Imperial Diet as a constitutional convention by the fact the Diet, one house of which was democratically elected, was allowed to freely discuss and even modify the government draft. He recognized that it was the Japanese people, not the *tenno* who established the Constitution of Japan. How did they gain constituting power, then? Minobe also

¹⁹⁶ The work of the Committee for the Investigation of Constitutional Problems (Matsumoto Committee) was best understood as a codification of the *tenno* organ theory. See Matsuo Takayoshi, "Kyushihaitaisei no shuen (The End of the Old Regime)," *Shuppatsu*, 19-20; Fukunaga Fumio, *Senryoka chudoseiken no keisei to hokai* (Tokyo: Iwanami Shoten, 1997), 57.

¹⁹⁷ Minobe, *Kenpo satsuyo*, 119-120.

¹⁹⁸ Minobe, *Kihongenri*, 33.

attributed that to acceptance of the Potsdam Declaration. The terms set forth by the declaration imposed absolute restraints upon the Japanese government. The principle of popular sovereignty was the most important among them. Thus, the fundamental political order had already changed. In his opinion, the Meiji Constitution provisionally continued to exist with its formal effectiveness until the new constitution was established.¹⁹⁹ The enactment of the Constitution of Japan was nothing but revolution for him retrospectively.²⁰⁰ The Japanese people as sovereign were granted the unlimited power to revise the Meiji Constitution as they wished. The Constitution of Japan was not a product of the amendment of the Meiji Constitution but a result of unconstitutional revolutionary conduct. The revolutionary constitutional transformation occurred to satisfy the demands of the victorious countries to the defeated country.²⁰¹

In Minobe's eyes, however, this revolutionary constitutional transformation did not change the *kokutai* as the historical and ethical characteristics of the state. Because he interpreted that even the prerogatives of the *tenno* had to be exerted according to the popular will, for Minobe there was nothing new about the governance of political affairs of the nation based upon "a sacred trust of the people".²⁰² The state as a corporation of which the people are an organ had never changed.²⁰³ Even though he regarded the constitutional change as revolutionary, Minobe trivialized the newness of the postwar constitution.

Minobe was unable to arrive at a conclusion as to why the democratic Diet and the movement for parliamentary government, which he tried to realize by presenting his constitutional interpretations in prewar Japan, were too weak to resist abusive militaristic politics. The Meiji Constitution might have a structural problem. Minobe failed to appreciate the tension liberal

¹⁹⁹ Minobe Tatsukichi, *Shinkenpo chikujyo kaisetsu (The Explanation of the New Constitution Article by Article)* (Tokyo: Nihon Hyronsha, 1947), 1-4 (hereinafter cited as Minobe, *Chikujyo*).

²⁰⁰ The revolutionary theory was developed more substantially by a student of Minobe, Miyasawa Toshiyoshi. See Miyasawa Toshiyoshi, "Hachigatsu kakumei to kokuminshuken shugi (The August Revolution and the Principle of Popular Sovereignty)," *Sekai Bunka*, May 1946, 64-71.

²⁰¹ Minobe, *Kihongenri*, 35-36.

²⁰² The Constitution of Japan, preamble.

²⁰³ Minobe, *Kihongenri*, 72.

democracy must inevitably confront: on the one hand, democratic decision-making based upon majoritarianism and on the other, the protection of the fundamental rights of the people. Ironically, the constitutional text was marginalized in the world of Minobe, who was an exquisite interpreter. To him, interpretation of the constitution was more important than the constitution itself. No matter how defective the text might be, Minobe was confident that he was capable of offering an appropriate theory from a liberal democratic point of view. If a constitution is the fundamental law of a nation, however, it should be more than a collection of legal rules. A constitution should be the expression of an ideal as a nation. The spirit of the constitution must be understood easily by the people, who are the most important constituents of the nation. Criticizing colloquialism of the postwar constitution as lacking simplicity, clarity and refinement in comparison with the style of the Meiji Constitution,²⁰⁴ Minobe took an elitist attitude of monopolizing meanings of the text. However, a constitution itself has not only an educational function but also an inevitable open-ended nature, by which the people will fill the constitution with their hope as to what kind of nation they as sovereign want to have.

Minobe's attempt to reform the existing systems by following his theory that the *tenno* is one organ of the state---which might have been liberal and progressive in the old era---worked as an obstacle to more thorough democratization in the new era. While he was an excellent interpreter of the Meiji Constitution, Minobe was poor at creating an institution appropriate in the fundamentally new world.²⁰⁵ In fact, as soon as the Constitution of Japan was established, Minobe started to be an interpreter once again. Putting criticism of the symbolic *tenno* system aside, Minobe energetically wrote four books on the postwar constitution during one and a half years after its promulgation on November 3, 1946 and before he died at the age of seventy-six on May 23, 1948. Interestingly,

²⁰⁴ See Minobe, *Chikujyo*, 5-6; Minobe, *Kihongenri*, 18-21. For the significance of colloquialism in the new constitution, see Chapter 4 section 2.

²⁰⁵ This may come from the character of constitutional scholarship in prewar Japan. Tanaka Hideo has raised this point. See Hideo Tanaka, "Nihonkoku kenpo seitei no katei ni arawareta kenpogaku no taishitu (The Characteristics of Constitutional Scholarship Appeared in the Process of Making the Constitution of Japan)," *Oboegaki*, 205-231.

furthermore, Minobe omitted a description of constitutionalism as one of main features of the Meiji constitutional system from his last book, *Nihonkoku Kenpo Genron (The Principles of the Constitution of Japan)*.²⁰⁶ Its omission in his postwar book has puzzled us, when we recall that he enthusiastically advocated as prominent characteristics of the Meiji constitutional regime constitutionalism based upon two ideas, democracy and liberalism in the prewar period.²⁰⁷ Did Minobe identify himself with the postwar constitution this time and evaluate the prewar constitutional practices from the new standard? Nagao Ryuichi has pointed out that this reflects the fact that Minobe himself realized that both the retention of the *kokutai* and democratization were not consistent with each other.²⁰⁸

Under the Meiji constitutional system, without any doubt, Minobe was an extremely liberal democratic theorist. In the postwar era, however, he failed to offer an appropriate model of constituting a political order. It was as though Minobe, who, through his *tenno* organ theory, was an intellectual leader of the day in prewar Japan, suddenly found himself behind the times. The Constitution of Japan has been far more liberal democratic than Minobe's excellent interpretive theory of the Meiji Constitution. Popular sovereignty has been explicitly principled with the symbolic *tenno* institution.

The external imposition theory and the internal continuity theory are both apt to obscure the meaning of the reality the lost war had brought to Japan. Whether one likes it or not, Japan was defeated in the war and accepted the international obligation of liberal democratization. Minobe's inability to adapt his organ theory to the new situation vividly shows that something fundamentally new was happening in the postwar era. The third way of theorizing the constitutional experience takes seriously the meaning of the defeat for the Japanese people and the novelty of the postwar period.

²⁰⁶ Minobe mentioned as main features of the Meiji Constitution *tenno* sovereignty, the prerogative-centered system, autonomy of the *tenno* family, independence of the military, the House of Peers, the cabinet system, and the Privy Council. These are all negative features from a liberal democratic point of view. See Minobe, *Genron*, 100-102. See also, Minobe, *Kihongenri*, 16-18.

²⁰⁷ See Minobe, *Kinoshugi*, 101-151.

²⁰⁸ Nagao Ryuichi, "Kenporonso no makugire (An Ending to a Constitutional Controversy)," *Nihon kokkashisoshi kenkyu (Studies on History of Japanese State Thoughts)* (Tokyo: Sobunsha, 1982), 129-139, 138.

In discussing Minobe's constitutional revolution, we do not wish to advance too far. It is time for us to return to a discussion of the process of constitutional writing immediately after the war.

Chapter 3

The Making of the Postwar Constitution: The First Public Deliberations on Constituting Freedom

1. Introduction
2. Constitutional Ideas among the Japanese People: The Seed of Popular Sovereignty
3. GHQ's Leadership: Popular Sovereignty with a Symbolic *Tenno* System
4. The Response of the Japanese Government to GHQ's Draft: A Second Defeat and Attempted Japanization
5. The First Public Debate: Constituting a New Political Order
6. Conclusion

1. Introduction

After the wartime defeat, the Japanese people became liberated from the long suppressive rule of ultra-nationalism. At the same time they had to face the important task of reconstructing the political order. The goal of the task was clearly focused on as the liberal democratization of politics. As we discussed in the last chapter, the Japanese government, obsessed with retention of the *kokutai*, failed to draw a grand design of constitutionalism appropriate for the new era. However, the governmental failure did not necessarily mean that the whole Japanese people also failed to present a new idea of constitutional government. In fact, some intellectuals on the periphery of the power structure in prewar Japan submitted an extremely liberal democratic conception of popular sovereignty with a ritualistic tenno system as a postwar constitutional plan.

Meanwhile, in order to keep leadership in the occupational mission, MacArthur and GHQ had to create a *fait accompli* by showing to the world that Japan would not disturb world peace again. Against the background of harsh criticism of the Japanese government among the Allied countries, the conservative constitutional revision plan by the Matsumoto Committee was going to do serious harm to MacArthur's occupational policy. Indeed, they could not ignore both domestic and international public opinion that the *tenno* should be tried as a war criminal. They needed a much more liberal democratic constitution of Japan than the draft of the Matsumoto Committee.

After the *Mainichi Shinbun* scoop, therefore, MacArthur decided to frame a constitutional draft by the Government Section of GHQ and present it to the Japanese government. In the process of drafting their constitutional plan, they referred to the constitutional revision plans of private Japanese groups and political parties.

Therefore, postwar constitutional making entered a rather complicated phase. The Government Section prepared a constitutional draft of liberal democracy with the principle of popular sovereignty, the symbolic tenno system and renunciation of war. The Japanese government, infatuated with *kokutai* ideology, finally realized that the proposed draft would be the only way to keep the *tenno* institution. The governing elite reluctantly decided to accept it in essence and to japanize it as far as possible. However, common citizens did not necessarily share the same interests. When the Japanese government announced the constitutional revision draft, they overwhelmingly welcomed it. They positively came to think of the new constitution as one connected with a free, peaceful, and bright life.

The process of making the postwar constitution indicates three innovative features of Japanese politics. First, the people actually participated in deliberation on the constitution. With universal suffrage, women and leftists occupied seats in the House of Representatives and participated in constituting political order for the first time in Japanese history. Second, the contents of public deliberation were due respect for fundamental human rights, popular sovereignty and thorough pacifism, which were all unprecedentedly novel for Japanese politics. Third and finally, the style of constitutional writing has become more democratic than ever before, using colloquial Japanese easy for common citizens to understand. All three characteristics of the postwar constitution deserve special attention in terms of the liberal democratization of politics. It can be said that with them, the new constitution brought a constitutional revolution to postwar Japan. It is true that there was no enormous popular mobilization for liberal democratic values. Undeniably, the constitutional making occurred under the Allied occupation. However, it is also true that the first

public deliberations on the constitution of freedom were actually carried out among the Japanese people. The postwar constitution with these three distinctive features broke off from the past to a significant extent.

This chapter will precisely examine the constitutional framing in postwar Japan. Both the external imposition theory and the internal continuity theory fail to appreciate the distinctiveness of the postwar constitutional experience for the Japanese people as a whole. On the one hand, the external imposition theorists emphasize that MacArthur and GHQ imposed the postwar constitution upon the Japanese government and thus the constitution is exogenous in essence. However, they do not pay much attention to the people on the periphery of the established power center. No matter how small and limited they might have been, they certainly struggled to solve the institutional problems that inhered in the Meiji constitutional system. Women and leftists along side traditional conservative men participated in deliberations on creating a new constitutional order for the first time in Japanese history. The imposition theory tends to ignore the efforts, both liberal and conservative, on the Japanese side. On the other hand, the internal continuity theory argues for restoration of the true tradition of the governmental style. However, the postwar constitutional making has revealed the transformation of the nature of authority. The first public deliberations turned traditional authority into an object of discussion, examination, and choice. Publicly deliberated authority is totally different from authority based upon mere tradition. The postwar constitution showed the break with the past. Thus, my argument of the postwar constitution as an unfinished constitutional revolution presents a more subtle theorization of the constitutional experience that well reflects the intricate interactions between the Japanese government, the Japanese people, and GHQ.

In this chapter, first, we will consider constitutional initiatives on the part of the Japanese people. The *Kenpo Kenkyukai* (the Constitutional Research Group) especially deserves careful examination because it framed a constitutional draft of popular sovereignty and a ceremonial *tenno*

institution, which had a great influence on GHQ's work.¹ Next, we will turn our eyes to the GHQ leadership in preparing a constitutional revision plan. It sufficiently expressed liberal democratization of politics. Then, we will discuss the reaction of the Japanese government to GHQ's proposal. An astonished Matsumoto attempted to resist in vain. However, the government members gradually came to understand that acceptance of the GHQ draft would be the only possible way of retaining the *tenno* himself and the institution. Thus they changed a strategy to japanization of the GHQ draft. The determined Government Section refused most attempts but they succeeded in not unimportant areas. Finally, the ninetieth Imperial Diet became a quasi-constitutional convention. Along with traditional conservative men, women and leftists participated in public deliberations there. We will examine detailed discussions on constituting a new political order in the constitutional convention. Our concern will lie in how the participants conceptualized the liberal democratization of politics in postwar Japan. The examination of the process of making the postwar constitution will reveal its revolutionary character.

2. Constitutional Ideas among the Japanese People: The Seed of Popular Sovereignty

In general, most Japanese people were passive during the constitutional making period. After defeat in the war, they found themselves both liberated and prostrated. Actually, they were starving to death. The most crucial thing for them at that time was how to obtain food. Thus, they basically had little time to think about the future of the nation. However, some intellectuals who were more or less on the periphery of the power structure in the Meiji constitutional regime, along with certain political parties, came up with several private drafts of a new constitution. Some of these private drafts were reformative enough to attract a great deal of public attention and have great influence on

¹ In fact, the members of the Government Section of GHQ consulted the draft framed by the *Kenpo Kenkyukai*. Milo E. Rowell analyzed its contents in his report to the chief, Courtney Whitney. "Comments on Constitutional Revision Proposed by Private Group," Takayanagi Kenzo, Otomo Yuichiro and Tanaka Hido, eds., *Nihonkoku kenpo seitei no katei (The Making of the Constitution of Japan)* (Tokyo: Yuhikaku, 1972), 1: 26-40 (hereinafter cited as Takayanagi, *Seitei Katei*). See also Charles L. Kades, "The American Role in Revising Japan's Imperial Constitution," *Political Science Quarterly* 104: 2 (1989), 215-247, 227. For the details, see this Chapter section 3.

the GHQ draft.²

The most important private draft of a new constitution was framed by the *Kenpo Kenkyukai* (the Constitutional Research Group). This draft proposed popular sovereignty and the *tenno* with only ceremonial roles, which shows the indigenous source of the principle of popular sovereignty with the symbolic *tenno* system the Constitution of Japan has finally provided for.³

Takano Iwasaburo (1871-1949) was the central person in the research group. Takano became interested in labor problems through the influence of his brother, Takano Fusataro.⁴ He resigned from his position as professor of statistics at the Tokyo Imperial University⁵ and established the *Ohara Shakai Mondai Kenkyusho* (Ohara Institute of Social Problems). As director he managed to do important research on social problems. When the war ended, Takano was seventy-four years old but he was energetic, on the one hand, in organizing the *Nihon Bunkajin Renmei* (League of Japanese Men of Culture) to build a democratic society and culture and, on the other, in taking the initiative in establishing the Socialist Party. Takano believed that it was necessary for nongovernmental private

² The members of the Public Administration Division of the Government Section paid attention to the drafts by private groups and political parties. Charles L. Kades, who was Deputy Chief of the Government Section, General Headquarters, Supreme Commander for the Allied Powers in Tokyo from August 1945 to December 1948, writes that “Japanese sources were most useful” in making the GHQ’s draft. He mentions particularly two groups named *Kenpo Kenkyukai* (Constitutional Research Group) headed by Takano Iwasaburo and *Kenpo Kondankai* (Constitution Discussion Group) by Ozaki Yukio, who had been a liberal representative from the first general election. Kades, “The American Role in Revising Japan’s Imperial Constitution,” 227, 219 -220.

In fact, the members of the Public Administration Division highly evaluated the draft of *Kenpo Kenkyukai* from a liberal democratic point of view. On January 11, 1946, Milo Rowell described the popular sovereignty provision of the draft by the research group as outstandingly liberal and declared that the proposed constitution as a whole was democratic and acceptable despite the omission of several essential provisions. See Takayanagi, *Seitei Katei*, 1: 26-40.

³ See McNelly, “The Role of Monarchy in the Political Modernization of Japan,” *The Origins of Japan’s Democratic Constitution*, 99.

⁴ Takano Fusataro, who stayed in the United States for eleven years and got several jobs, came to know Samuel Gompers personally. In July, 1879, Gompers authorized and legally commissioned Takano to act as General Organizer for Japan. After he returned to Japan, Takano engaged in the labor union movement and later in a consumer cooperation movement. He was an enthusiastic unionist but not a socialist. His devotion to unionism was spontaneous in its nature. Yet the *Chian Iji Ho* (Peace Preservation Act) of 1925, which made all labor unions illegal, prevented his movement from developing. See Takano Iwasaburo, “Torawaretaru minshu (The Captured Mass),” in *Kappa no he* (Tokyo: Sosei Daigaku Shuppanyoku, 1961). “Torawaretaru minshu” was originally published in the magazine *Shinse* of February 1946 issue with his *Kaisei Kenpo Shian Yoko* (Outline of a Private Draft of the Constitutional Revision).

⁵ Takano accepted the government’s appointment as labor representative at the First International Labor Conference but the unions did not agree to Takano’s appointment. He felt responsibility as a public citizen. He resigned from his professorship at the Tokyo Imperial University. “Takano Iwasaburo sensei nenpu and chosaku mokuroku (Takano Iwasaburo’s Biographical Note and List of Writings),” in *Kappa no he*, 382-383.

individuals to study and prepare constitutional reform. Thus, he started the activities of the *Kenpo Kenkyukai* in October 1945.

The Constitutional Research Group had no relationship with orthodox constitutional scholarship. Suzuki Yasuzo, another important figure in the group, had studied constitutional history without a professorship in any university. He indeed had no legal education at a university.⁶ He devoted himself to education for the proletariat, and thus was jailed in violation of the *Chian Iji Ho*. After his release, he became interested in Japanese and comparative constitutional history and wrote three books. For one of them he was interrogated for violation of the Publishing Law. After the war, Suzuki argued in the media about the necessity of establishing a new constitution.⁷ He argued that beyond the passive attitude of execution of the Potsdam Declaration, the Japanese people should positively discuss revision of the constitution from a democratic point of view to secure civil rights and civil liberties.⁸

Other members who frequently attended the meetings were Murofushi Takanobu, a journalist; Sugimori Kojiro, a critic and professor of philosophy at Waseda University; Morito Tatsuo, a former professor of economics at the Tokyo Imperial University and future minister of education in the Katayama cabinet, the first under the Constitution of Japan; and Iwabuchi Tatsuo, a political commentator, adviser to Konoe, who was known as a behind-the-scenes operator in the political world in prewar Japan. The group was a liberal coalition covering people from moderate conservatives to leftists, who formed its core.

On November 5, 1945, the Constitutional Research Group started its meetings. After three general discussions, Suzuki prepared the first draft along the members' common trend. According to this draft, instead of amendment, a new constitution should be established by the Japanese people

⁶ Suzuki first attended the department of letters and transferred to the department of economics at the Kyoto Imperial University, but finally had to leave because he was guilty of violating the *Chian Iji Ho*.

⁷ Suzuki Yasuzo, *Kenpo seitei zengo* (A Report of the Age of Convulsion over the New Constitution) (Tokyo: Aoki Shoten, 1977), 71-74.

⁸ See Suzuki Yasuzo, "Kenpo kaisei (Constitutional Revision) 1-3," *Tokyo Shinbun*, October 16, 17, & 18, 1945 in *Shoron Shuroku*, 12-17.

themselves. The draft understood the Meiji Constitution as based upon the most feudalistic absolutistic monarchism because of its principles of *kintei kenpo* (the constitution bestowed upon subjects by the benevolent *tenno*), divine right, intensified prerogatives, and the autonomy of the *tenno* household. Partial amendment to the constitution with such features was not appropriate for a new democratic Japan as fundamental law. Rather, the Meiji Constitution should be abolished. It is noteworthy that the draft laid claim to calling a constitutional convention of the people to frame a new constitution.⁹

In democracies, the first draft of the group asserted, sovereignty derives from, belongs to, and is exercised by the people. The draft then asked a crucially important question: whether a new constitution for Japan would adopt a republican form of government that is natural for a democracy. Although the members of the group believed a republican system to be desirable, they thought that it was appropriate, at this transitional stage, to establish first a constitutional monarchy that favors democracy.

In such a system, the following principles had to be adopted:¹⁰

- 1) The sovereignty of Japan as a state derives from or belongs to the Japanese people.
- 2) The *tenno* shall hold administrative power with mandate, approval, or recommendation (*suitai*) from the Japanese people.
- 3) Legislative power shall be vested in a parliament, consisting of representatives of the Japanese people.
- 4) Judges (*shihokan*) elected by the Japanese people shall exercise judicial power based only upon law.¹¹

Therefore, the former system in which the *tenno* held and exercised sovereignty would be replaced with a more democratic *tenno* system. Although the *tenno* system would be still hereditary in the new constitutional scheme, the members of the group proposed a means to secure democratic control over the *tenno*: succession of the throne would be confirmed by parliament and the *tenno* would, under oath, swear to parliament that he would abide by the constitution. To avoid emasculation of

⁹ Suzuki, *Kenpo seitei zengo*, 77.

¹⁰ Suzuki, *Kenpo seitei zengo*, 79.

¹¹ Later, the idea of popularly elected judges was limited only to judges of Daishinin (the former name of the highest court in Japan) because of the complicated process of election of all judges. See Suzuki, *Kenpo seitei zengo*, 84-85.

the constitution by abuse of the *tenno* system on the part of undemocratic forces, furthermore, the members raised three conditions under which that the *tenno* system would be operated: 1) Complete separation of politics from religion, particularly *Shinto*, which had been established under the old constitutional structure. People should not be forced to attend service. *Shinto* would become a truly private religion of the *tenno* family. 2) The estate of the *tenno* family would be rationally reduced. 3) The *tenno* household system would be completely reformed so that chamberlains and attendants would never intervene in politics. They would become responsible to the people to avoid abuse of their power.¹²

The draft therefore presented a picture of a political regime that was very different from the one envisaged by the Matsumoto Committee.¹³ Although both drafts maintained the *tenno* system, their foundation, function, and manner would be definitely dissimilar. While the idea of a line unbroken for ages eternal could not be reconciled with rational justification, the popular foundation of hereditary monarchy that might seem peculiar could be consistent with persuasion by reason. Although the text of the first draft does not clarify that their amended constitution would allow female *tenno* family members to succeed to the throne, we can here find a good footing for inclusion of the *tenno* into a constitutional system.

The first draft also contained innovative provisions about fundamental human rights.¹⁴ The concept of “the subjects” would be replaced by “the people,” which is more suitable in a democracy. Then, the draft would abolish the idea of reservation of laws.¹⁵ The idea is essentially dangerous for protecting the rights and liberties because while the parliament is basically a majoritarian institution,

¹² Suzuki, *Kenpo seitei zengo*, 77-80.

¹³ For the draft of the Matsumoto Committee, see Chapter 2 section 4.

¹⁴ Suzuki, *Kenpo seitei zengo*, 80-81.

¹⁵ The concept of the reservation of laws plays a dual role. On the one hand, liberties and rights cannot be restricted without a statute, which means that administrative power by itself cannot restrict liberties and rights of the people formally. Because the guarantee of rights is limited only “within the limits of the law,” on the other hand, rights can be restricted in any way as long as such restrictions are enacted in the form of law and executed by following legal procedures.

rights are meaningful if they trump decisions made by a majority.¹⁶ It was much easier for an alleged majority to restrict rights of the people in prewar Japan because the Imperial Diet was not a truly majoritarian institution. The *Chian Iji Ho* was a typical sample of how reservation of laws worked in a non-majoritarian governmental system. Precious rights such as freedom of thought and of speech were without any difficulty suppressed in the name of statute. When reservation of laws is repudiated, how to protect rights is deeply problematic in a political system based upon majority rule. Unfortunately, the draft failed to raise any issue of this kind and to provide for measures for securing the protection of rights. Control of constitutionality as above legality should be conceptualized when reservation of laws was rejected. Such conceptualization needed a tool for controlling unconstitutional invasions of rights and liberties by the government. Introduction of the tool to a constitution would be another challenge for Japanese people at that time. Anyway, in marked contrast with discussions in the Matsumoto Committee, the members of the Constitutional Research Group well recognized an important part of the problems of reservation of laws because they were situated on the periphery of the Meiji constitutional regime and some of them had actually experienced suppression of their academic work for violation of the *kokutai* ideology.¹⁷

In addition, this draft provided for more detailed rights such as freedom and protection of arts, scholarship, and education, equality of gender and race, and affirmative rights such as the right to work, be employed, and rest, and welfare rights, along with the right to establish a new government.¹⁸

The draft also provided for a new government structure. Its major features were the

¹⁶ See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977, 1978); Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

¹⁷ When he was an associate professor of economics at the Tokyo Imperial University, Morito Tatsuo published a paper on the social thought of Kropotkin. He was accused and convicted of sedition provided for in the Newspaper Law and sentenced to three months' imprisonment without labor in 1920. The faculty of economics at the university voted for the dismissal of Morito. He found a place for his activities at Takano's Ohara Institute. For suppression of academic freedom in prewar Japan, see Ienaga Saburo, *Rekishii no nakano kenpo (Constitutions in History)* (Tokyo: Tokyo Daigaku Suppankai, 1977), 1: 156-174.

¹⁸ The right to establish a new government was omitted later, because the Group regarded consensus among the members as important.

following: 1) A thorough democratization of parliament. While the first house should be based upon equal and universal election, the second house should adopt occupation and class representation by public election. The first house should be superior to the second. The parliament as representative of the general will of the people should hold the power to legislate and supervise the administrative departments. The parliament should have full control over laws, budgets, taxes, and *tenno* household expenses. 2) The parliamentary government system. Cabinet should be collectively responsible to the parliament and its continuity should depend upon the confidence of the parliament. 3) Public election of judges and the jury system. 4) Abolition of the House of Peers and the Privy Council. 5) Democratization of the national economy. 6) Referenda on constitutional amendment and nationally important issues.¹⁹

The Constitutional Research Group continued to discuss a desirable new constitution, using the first draft by Suzuki as a springboard, on November 28, 1945. Morito Tatsuo argued for revision of the Meiji Constitution rather than framing a totally new constitution. "Substance apart, the procedure must, in form, be based upon the amendment of the current Meiji Constitution. Following the principle that a bad law is still a law, the Meiji Constitution at first will be amended. On the basis of that amendment, then, a new constitution will be established. In short, two-time constitutional changes are necessary."²⁰

Morito proposed to add to the draft a provision for convening a new constitutional convention ten years later to frame a more democratic constitution. The present revision of the Meiji Constitution, he believed, was not truly democratic nor did it truly reflect the new will of the people. The members of the research group agreed on the strategy Morito proposed. Because freedom of thought had been suppressed for a long time, they believed that the people could not make a political decision in a proper way at that time. It was quite natural to assume, therefore, that as a result of the democratic education provided by the revision, the Japanese people would be able to act as wisely as

¹⁹ Suzuki, *Kenpo seitei zengo*, 81-82.

²⁰ Suzuki, *Kenpo seitei zengo*, 83.

popular sovereignty requires, and would establish a completely new democratic constitution by themselves.²¹ The idea of two-step constitutional reform was unique, realistic, and pragmatic immediately after the wartime defeat. The members were optimistic enough to believe that democratization of Japan would be thorough and complete with time.

In addition, based on the idea of popular sovereignty, the provisions of the first draft about the *tenno* were further democratized. Murofushi argued that the *tenno* system as a political institution should be completely abolished and that instead the *tenno* should remain only as the highest rank of state honors or a ceremonial representative. In his view, the *tenno* should be an authority to seal documents the parliament and cabinet had made.²² Morito also expressed the same kind of formalization of the *tenno*. Although the *tenno* as the head of the religious family should be the object of respect and affection of the people, according to the principle that the *tenno* reigns but does not rule, substantial parts of politics should be delegated to various constitutional bodies and the *tenno* should formally be the head of state. In Morito's conception, however, the *tenno* as the head of state should represent the state, appoint diplomats and sign treaties.²³

Thus the second draft included a more democratized *tenno* system than the first. The second draft deprived the *tenno* of any political power.²⁴ Although the *tenno* would formally remain the head of the state, the *tenno* who would be regarded as the source of honors should conduct only national ceremonies. The second draft clearly denied the principle of the *tenno*'s direct governance and provided that the *tenno* should have no responsibility whatsoever for state affairs and that the cabinet should assume responsibility for them. Interestingly, the second draft carried two alternative opinions: on the one hand, abolition of the *tenno* system to remove fear that militaristic and bureaucratic despotism might be realized under the name of the *tenno* or the *kokutai*;²⁵ on the other,

²¹ Suzuki, *Kenpo seitei zengo*, 85.

²² See Sato, *Seiritsushi*, 2: 798.

²³ See Sato, *Seiritsushi*, 2: 798-799.

²⁴ See Suzuki, *Kenpo seitei zengo*, 84.

²⁵ A conception of republic was advocated by Takano Iwasaburo. I will soon discuss Takano's plan more thoroughly.

the *tenno*'s enjoyment of the administrative power rather than conduct of only national ceremonies.²⁶ Other considerable changes from the first draft were that public election should be applied only to justices of the highest court and that the prosecutor general should be publicly elected and the prosecutors' office should be independent of the administrative department. In addition, a constitutional convention of the people would be held in ten years to establish a more democratic new constitution.²⁷

In this way, the Constitutional Research Group developed the second draft, which was sent to certain intellectuals on December 1, 1945. This draft placed special emphasis upon the unconditional and detailed provisions of human rights, particularly academic freedom and freedom of speech and of religion, together with a ceremonial *tenno* system based upon the principle of popular sovereignty.²⁸

Suzuki prepared the third draft, which was slightly different from the second, by following the previous discussions in mid December. Important changes included replacement of the right to establish a new government with the rights related to direct democracy such as initiative and referendum, and additions of dissolution of the House of Representatives by referendum and resignation of the cabinet by recall.²⁹ After further deliberation and little change, the Constitutional Research Group published the final version. On December 26, 1945, members submitted the *Kenpo Soan Yoko* (Gist of the Draft of the Constitution) both to the Japanese government and to GHQ. The major newspapers reported the draft to the public on December 28.³⁰ This attracted wide attention not only because it was the first published private draft about a new constitutional scheme for

²⁶ See Sato, *Seiritsushi*, 2: 800-801.

²⁷ See Sato, *Seiritsushi*, 2: 803.

²⁸ See Suzuki, *Kenpo seitei zengo*, 93-98.

²⁹ See Sato, *Seiritsushi*, 2: 809-814.

³⁰ At that time, GHQ censored Japanese media. For the censorship GHQ thoroughly executed, see Yamamoto Taketoshi, *Senryoki media bunseki (An Analysis of Media during the Occupation)* (Tokyo: Hosei Daigaku Shuppanyoku, 1996); Ariyama Teruo, *Senryoki media shi kenkyu: Jiyu to kisei 1945 (A Study of History of the Media during the Occupation: Freedom and Regulation 1945)* (Tokyo: Kashiwa Shobo, 1996); Dower, *Embracing Defeat*, 405-440.

postwar Japan, but also because it was novel and original in its content.³¹ In the interview with the *Mainichi Shinbun* on December 29, Suzuki explained the aim and intention of the proposed draft of the research group as the principle that the *tenno* should reign but should not rule.³² Suzuki also presented a rather long explanation of the group's draft to give people guidance on constitutional reform in the *Tokyo Shinbun*. Suzuki concluded his article by pointing out that building a democratic Japan had dual aspects: one was to abolish feudalistic vestiges in political, economic, and social systems; the other was to create new political and economic institutions with which the laissez-faire principle would be replaced. Thus, constitutional revision should reflect these two aspects by guaranteeing both classical freedoms and affirmative rights.³³

Unlike the Matsumoto Committee, the Constitutional Research Group had carefully studied not only various private constitutional drafts during the *Jiyu Minken Undo* but also foreign constitutions such as the U.S. Constitution, the French Constitution of 1791, the Soviet Constitution and particularly the Weimar Constitution.³⁴ The research group also worked well as a collaborative association to compose the draft of constitutional amendment. Deliberation among the members made their draft clearer and more focused. This was also in marked contrast to the Matsumoto Committee, in which only a few members actually worked and particularly the chairman Matsumoto assumed strong leadership.³⁵ The research group attached great significance not only to consensus among the members, as mentioned above, but also to the simplicity of the draft of an amended constitution. The members of the research group believed that it was essential that the Japanese government adopt the main points of their proposal.³⁶ In this sense, the research group was eminently pragmatic.

³¹ See Sato, *Seiritsushi*, 2: 784.

³² See "Kenpo minkan soan no ito (The Intention of the Private Constitutional Draft)," *Mainichi Shinbun*, article, December 29, 1945 in *Shoron Shuroku*, 106-107.

³³ See Suzuki Yasuzo, "Shin kenpo soan (The Draft of a New Constitution)," *Tokyo Shinbun*, January 5, 6, & 7, 1946 in *Shoron Shuroku*, 115-121.

³⁴ See Suzuki's interview, "Kenpo minkan soan no ito."

³⁵ For the style of work and its problems of the Matsumoto Committee, see Chapter 2 section 5.

³⁶ See Suzuki, *Kenpo seitei zenya*, 98.

This pragmatic characteristic of the Constitutional Research Group derived from the fact that it gathered people with different disciplines and had no orthodox constitutional scholar. The research group could approach constitutional reform with much broader outlooks of non-specialists than the Matsumoto Committee, which consisted only of those who were directly related to law, especially constitutional law. For example, Morito Tatsuo, an economist, an important member of the Socialist Party, and future minister of education, recommended readers to see constitutional revision in a broader perspective.³⁷ He claimed priority of politics based upon rational discussion and criticized idealistic approaches. Morito and his colleagues could not ignore the historical conditions under which the Japanese state was situated.

Morito clearly understood what had to be done when constitutional revision was required. Correction of the wording of constitutional provisions or making them internally consistent was, he pointed out, not essentially important in constitutional reform. What was more important was secularization of the constitution. When the constitution was about to be revised, he argued, the first duty was to sweep away the religious and mysterious atmosphere that surrounded the Meiji Constitution and to separate politics from religion in order to make a constitution the secularized and rationalized fundamental law of the state. Only through such revision, in his view, would the constitution become an object of rational discussion. Second, in his opinion, autonomous politics by the people should be established by reforming the constitution.³⁸

In his view, such constitutional revision could not be realized without connection with the *tenno* system. Morito refused as prejudices both an attempt to fit democracy to the fixed concept of the *kokutai* and an understanding that democracy was equal to republicanism and thus realization of democracy necessarily meant overthrow of the *tenno* system. He argued that the draft of constitutional revision by the Constitutional Research Group had tried to compromise between the irrational national sentiment that was still deep-rooted and rational needs of real politics by reducing

³⁷ See Morito Tatsuo, "Kenpo kaisei no kadai (Problems of Constitutional Revision)," *Tokyo Shinbun*, January 9, 10, 11, 12, & 13, 1946 in *Shoron Shuroku*, 112-127.

³⁸ See Morito, "Kenpo kaisei no kadai," 124.

the *tenno* system from a belief item over which fanatic struggles developed to an object of rational real politics.³⁹ His position can be understood as an attempt to take the *tenno* system into a constitutional scheme. To make a constitution an object of rational discussion after the war, Morito also added, guaranteeing the eighteenth century's classical liberal rights was not enough and further protection of the twentieth century's social rights was needed, as Suzuki also pointed out. Thus Morito urged readers to pay attention to constitutional practices in foreign countries.⁴⁰

Then Morito raised a crucially important issue about constitutional writing. The substance of a constitution, he pointed out, following Ferdinand Lassalle, lay not in a mere written paper but in an expression of actual power relations behind the text.⁴¹ Thus success of constitutional revision would depend upon reform in power relations. He saw the rapid change in power relations GHQ's reform policy had caused.⁴² Constitutional revision was being discussed and conducted in this changing circumstance. But the relation between the ruling and the ruled had not been substantially transformed yet. Although a compromise between new and old forces was necessary in the transitional stage, Morito appealed to readers to realize that more equal political, economic, and social power relations should be realized by enhancing political and social consciousness. He once again placed emphasis on the priority of politics in postwar reform.⁴³

In this way, Morito calmly recognized that a constitution was more or less a reflection of political achievements. Thus he gave priority to politics over constitutional text. We can observe here that there was much room for developing the governmental process by politics based upon rational discussion. He, as one of central persons in the Constitutional Research Group, represented a wider, more pragmatic and realistic viewpoint on constitutional matters.

Although the Japanese government disregarded it,⁴⁴ GHQ paid close attention to the draft of

³⁹ See Morito, "Kenpo kaisei no kadai," 124.

⁴⁰ See Morito, "Kenpo kaisei no kadai," 125.

⁴¹ See Morito, "Kenpo kaisei no kadai," 125.

⁴² See Morito, "Kenpo kaisei no kadai," 126.

⁴³ See Morito, "Kenpo kaisei no kadai," 126-127.

⁴⁴ Takano and Prime Minister Shidehara were classmates at the Tokyo Imperial University. Takano explained

the Constitutional Research Group. GHQ's Allied Translation and Interpreters Section finished a translation of the draft as early as December 31. George Atcheson sent to the Secretary of State a report of the draft with its translated full text on January 2, 1946. After he pointed out popular sovereignty with the *tenno* as the ritualistic and ceremonial head only, Atcheson observed that "It should be realized that the draft represents the views of private persons of outstandingly liberal reputation and that the group has received no recognition from the Government, whose proposals, according to all indications, will be very conservative in nature."⁴⁵ The Government Section, which would soon lead work of constitutional reform, also submitted a thorough examination report to MacArthur, on January 11. In its report, Lieutenant Colonel Milo E. Rowell pointed out outstanding liberal provisions of the draft as follows:⁴⁶

- a. The sovereignty of the people is acknowledged.
- b. Discrimination by birth, status, sex, race and nationality are prohibited. The peerage is abolished.
- c. Workers' benefits required include one 8-hour day, holidays with pay, free hospitalization and old-age pensions.
- d. A referendum permitting the people to express their will directly on legislation is provided.
- e. Control of all finances including expenditures of the Imperial family is placed in the Diet. Carry-over budgets are prohibited. Audits are required and the President of the Audit Bureau is to be elected.
- f. The right to possess property is limited by the requirement that it be useful to the public welfare.
- g. Land must be used for the best public interest.
- h. A new Constitution must be enacted in 10 years.

Although several issues such as criminal procedure and judicial review had to be further considered, Rowell concluded that the constitutional plan the draft had presented was "democratic and acceptable."⁴⁷ Colonel Charles L. Kades, deputy chief of the Government Section, clarified that when the members of the Government Section prepared it own draft of constitutional revision, they referred to various indigenous drafts such as those by political parties, the Constitutional Research

to Shidehara the conception of the *tenno* conducting national ceremonies that the group's draft had proposed. Shidehara disagreed with Takano that an institution dealing only with ceremonies was a problem and that such a conception went too far. See Sato, *Seiritsushi*, 2: 825.

⁴⁵ Proposals of Kempô Kenkyôkai (12/27/45) Takano Iwasaburô and others in RM094.

⁴⁶ See "Comments on Constitutional Revision Proposed by Private Group," Takayanagi, *Seitei Katei*, 1: 26-40.

⁴⁷ "Comments on Constitutional Revision Proposed by Private Group," Takayanagi, *Seitei Katei*, 1: 36.

Group, and the *Kenpo Kondankai* (Constitutional Discussion Group), which “were most useful.”⁴⁸ Because, as we will see later, GHQ’s draft provided a symbolic *tenno* system, which resembled the ceremonial *tenno* system the Constitutional Research Group proposed, along with Rowell’s high evaluation and Kades’ insider witness, it is quite reasonable to infer that this private draft had a great influence upon GHQ’s work on constitutional reform.⁴⁹

Another important constitutional revision plan came from Takano Iwasaburo. As mentioned above, the Constitutional Research Group was headed by Takano. On November 28, 1945, Takano presented to the group his own draft of a new constitution for a republic: The *Nihon Kyowa-koku Kenpo Shian Yoko* (the Gist of a Private Draft of the Constitution of the Republic of Japan). The majority of the members agreed with him that the republican form of government would be theoretically desirable. By considering the political circumstances of the day, however, they believed that it was premature to make and publish a republican constitutional draft.⁵⁰ Takano was dissatisfied with the compromising attitude among his fellow members of the group, because he as a spontaneous democrat believed that a more democratized and liberal way of thinking should have developed in a new era when long suppression had ceased. To him, a renovated Japan should have been nothing but a republic. His proposal thus contained a presidential system instead of the *tenno* system. Because he had presided over the Constitutional Research Group, however, Takano hesitated to publish his personal proposal at that time.⁵¹ He finally made his conception of a republican government public at a press conference on January 25, 1946⁵² and his constitutional draft appeared in the journal *Shinsei* in February 1946.⁵³

⁴⁸ Kades, “The American Role in Revising Japan’s Imperial Constitution,” 227.

⁴⁹ Sato Tatsuo expressed the same inference. See Sato, *Seiritsushi*, 2: 843.

⁵⁰ See Sato, *Seiritsushi*, 2: 800.

⁵¹ See Suzuki, *Kenpo seitei zengo*, 90.

⁵² “Takano hakase no shinkenpo soan (The Draft of a New Constitution by Dr. Hakano),” article, *Yomiuri Hochi Shinbun*, January 26, 1946 in *Shoron Shuroku*, 169-170.

⁵³ Takano Iwasaburo, “Torawaretaru Minshu (The Captured Mass),” *Shinsei*, February, 1946 reprinted in *Kappa no He*, 38-58.

Along with the constitutional draft, Takano wrote of his feelings toward his fellow countrymen. He saw the Japanese people as captivated by the old ideology.⁵⁴ He could not understand why his fellow citizens failed to think freely after their liberation from the long suppression by despotic rule.⁵⁵ Because he was born in 1871 well before the Meiji Constitution was promulgated and grew up in the liberal atmosphere of the *Jiyu Minken Undo*, Takano knew that there were options other than one line unbroken for ages eternal.⁵⁶ For younger generations, however, the Meiji Constitution was a matter of an accomplished fact and the Taisho Democracy was the most liberal period they experienced. Thus, even liberals such as Minobe Tatsukichi were apt to see problems within its framework and failed to think beyond it as liberally and democratically as possible.⁵⁷

Theoretically, Takano argued, the idea of popular sovereignty was inconsistent with the *tenno* system. But he saw a lot of compromised opinions on the *tenno* system. Takano took for example the article of Yokota Kisaburo, who was a professor of international law at the Tokyo Imperial University and future chief justice of the Supreme Court. Yokota clarified that neither state corporation theory nor king-in-parliament could solve an ultimate question and that thorough democracy meant popular sovereignty. If Japan truly wanted to establish democracy, Yokota admitted, it should start by recognizing the sovereignty of the people. Takano completely agreed on Yokota's lucid analysis so far. But he disagreed on what Yokota presented as a compromise. Yokota believed that democracy could be realized even under the *tenno* system, in which the *tenno* would no

⁵⁴ "Torawaretaru Minshu (the captured people)" is the title of his article.

⁵⁵ Takano wrote: "Ours is a time of rapid change. The old ways have suddenly disappeared, and the new age of democracy had spread over the whole country. Why must we say we are so satisfied with this new age of democracy? In spite of everything, the majority of the people of our country still have not understood the true meaning of democracy. Their clinging as before to the notion of a kind of superstitious worship is something that, to someone like me who embraces a view of democratic government as developing naturally, is weird and painfully difficult to understand. It is for that reason that I must proclaim that the masses are imprisoned." Takano, "Torawaretaru Minshu," *Kappa no He*, 43-45 (translation by Moore in Koseki, *Birth*, 38).

⁵⁶ See Koseki, *Tanjo*, 64.

⁵⁷ See Ienaga, *Minobe Tatsukichi no Shisoshiteki Kenkyu*, 341-342. See also, Takahashi Hikohiro, *Keisei*, 232-235.

longer hold sovereign power but occupy the status of ritualistic institution.⁵⁸ Yokota actually supported the plan of the Constitutional Research Group. Thus Takano had to express dissatisfaction with Yokota's halfway argument as with his fellow members'.⁵⁹

Because it was too formal, in Takano's view, the ritualistic *tenno* system could not satisfy those who had always proclaimed the majesty of the *tenno* family. These people might feel that the *tenno* as a ceremonial institution was meaningless and that such a *tenno* system degraded the status of the traditional *tenno*. Royalists might rouse themselves to resistance. Further, if, as some people believed, under the current circumstances, the revision of the Meiji Constitution was able to adopt the principle of popular sovereignty, Takano wondered whether it was necessary to retain the *tenno* system as nothing but a ritualistic organ.⁶⁰ Takano's real fear was that the *tenno* system once again would be abused by the military cliques and bureaucrats.⁶¹ If the *tenno* system remained even with the principle of popular sovereignty, there would be opportunities for the remnants of the reactionary forces to make a second attempt to seize political power with the *tenno* at the head.

However, most Japanese people were reluctant to abolish the *tenno* system. In Takano's view, those who fostered a lingering attachment for the *tenno* and did not make a dash forward to adopt pure democracy still placed some trust in the *tenno* system and had only tenuous confidence in democracy. Takano refused such sentiments. At the beginning of the liberated new era in Japan, he argued, the Japanese people should rather overcome any difficulties and seek a truly new way to learn to govern themselves. Therefore, according to Takano, it was high time for them to abolish the *tenno* system and to remove the danger of reviving reactionary forces in order to establish democracy based upon popular sovereignty in Japan. Under the ideal of full popular democracy, Takano

⁵⁸ See Yokota Kisaburo, *Mainichi Shinbun*, January 9, 1946.

⁵⁹ See Takano, "Torawaretaru Minshu," *Kappa no He*, 46-48.

⁶⁰ Takano, "Torawaretaru Minshu," *Kappa no He*, 49.

⁶¹ Suzuki, *Kenpo seitei zengo*, 94.

implored, the Japanese people should have a complete change of heart, and make a great effort to educate themselves as holders of sovereign power.⁶²

Referring to the Constitutions of the United States, the Soviet Union, Switzerland, and Weimar Germany,⁶³ Takano drafted a constitution for a liberal democracy, leading toward a welfare state. In his view, the issue of this constitutional reform should not be limited to the *tenno* system. Development of capitalism in Japan had already brought about unfairness such as monopolies and exploitation. The liberation of the Japanese people in the new era must go beyond the political arena and cover the economic and cultural aspects of life as well. Takano thus understood a constitution in a broad sense. “The modern constitution is the fundamental principle as the standard for the people’s life in the three dimensions of politics, economy, and culture, and must be useful in fully and smoothly developing our democratic politics in the present and the future.”⁶⁴

At the very beginning of his draft, Takano declared the fundamental principle that the president instead of the *tenno* should be the head of the state in the republic of Japan. Sovereignty should belong to the people, who shall elect the president. The people should enjoy classical rights without reservation of laws and social rights such as rights to life, education, and culture. In addition, two chapters of economy and labor and of culture and science were included for declaring national policies. Referenda should be also introduced.⁶⁵

However elaborate a constitution might be, Takano argued, it should contain only the central framework for the life of the Japanese people. He recognized that it was thus necessary and important to construct this framework. At the end of his proposed constitution, Takano clarified his

⁶² Takano, “Torawaretaru Minshu,” *Kappa no He*, 50.

⁶³ The reference was omitted in *Shinsei*’s version. See Koseki, *Tanjo*, 63 n.33.

⁶⁴ Takano, “Torawaretaru Minshu,” *Kappa no He*, 52.

⁶⁵ Takano Iwasaburo, “Kaisei kenpo shian yoko (the Outline of Private Draft of the Revised Constitution),” *Kappa no He*, 53-58. According to Takahashi Hikohiro, Takano understood constitutional reform after the war as a change of constitutional development in Japan. See Takahashi Hikohiro, *Keisei*, 235-237.

intention to make such a framework public.⁶⁶ Unfortunately, Takano, who died in April 1949, missed an opportunity to express his own detailed constitutional scheme for a democratic Japan.

Although it is uncertain that Takano's draft of the revised constitution had any specific influence upon GHQ's work,⁶⁷ it is fair to say that Takano's plan was important not only because Takano announced his new constitution draft before the Government Section started its work but also because the draft showed to the Japanese people that abolition of the *tenno* system was one actual option for the people to create a new Japan. It was true that the communist party had already clarified its basic principle of abolishing the *tenno* system and of establishing a republican government for a new constitution.⁶⁸ However, Takano's plan meant that abolition of the *tenno* system was not monopolized by the communists. It was clear evidence that there was an indigenous effort to transform the Japanese state fundamentally.

Therefore, we cannot ignore the theoretical achievements of the drafts of the Constitutional Research Group and of Takano. We should remember that the established intellectuals, including eminent liberals such as Minobe, were obsessed with outdated ideology. Popular sovereignty with a ritualistic *tenno* system was a unique device, not to mention a conception of a republican form of government. The former was at least practically significant for the situation in Japan at that time. Takano with Suzuki also urged the public to support a voluntary constitutional convention for establishing a new democratic constitution. This convention was not a means of petition to the government but a meeting of the people themselves for demanding the creation of a fundamental principle of their life. Takano conceived such a convention as a national democratic common cause

⁶⁶ Takano mentioned Sidney and Beatrice Webb's "A Constitution for the Socialist Commonwealth of Great Britain." See Takano, "Torawaretaru Minshu," *Kappa no He*, 58.

⁶⁷ Sato Tatsuo has introduced GHQ's document written by the Civil Historical Section: "History of Nonmilitary Activities of the Occupation of Japan 1945 through Dec. 1951, vol. III; Political and Legal-Part B; Constitutional Revision". It mentioned the draft of the *Kenpo Kenkyukai* and explained features of the draft. Sato pointed out its confusion between the draft of the *Kenpo Kenkyukai* and Takano's plan because it described the president and the *tenno* together. Sato Tatsuo, *Seiritsushi*, 2: 846.

⁶⁸ *Asahi Shinbun*, November 12, 1945 in Sato, *Seiritsushi*, 2: 772-773. The *Mainichi Shinbun* reported the same content on January 30 1946. See "Kyosanto no kenpo kaisei hoto (The Ways to Revise the Constitution by the Communist Party)," *Mainichi Shinbun*, article, January 30, 1946 in *Shoron Shuroku*, 172-173.

among socialists, communists, labor unions, cultural associations, and media.⁶⁹ Calling a constitutional convention and the two-stage amendment strategy the Constitutional Research Group proposed are also worth noting. Whatever might have been the outcome of a convention or referendum ten years later, the commitment of the Japanese people to the values of public deliberation and democracy would have made the Constitution more meaningful in their lives.⁷⁰ Unfortunately, neither constitutional convention nor a referendum in ten years was realized in the real postwar politics. Unlike the Matsumoto Committee, however, both the Constitutional Research Group and Takano paid close attention to the people as sovereign. Here we can recognize the birth of the idea of popular sovereignty in postwar Japan.

The constitutional revision plan of the *Shakaito* (Socialist Party) is also important from the viewpoint of the later course of events. At its reorganization, the Socialist Party immediately started to do research on constitutional revision. On December 4, 1945, the national executive committee declared the basic principles of the *tenno* system: 1) to adopt the theory of state corporation and retain the *tenno* system; 2) to reduce the prerogatives of the *tenno*; 3) to make progress to realize democracy and socialism under the democratized *tenno* system.⁷¹ On January 16, the committee further decided that considering the circumstances of the nation and feeling of the people, the problems they had to solve were to abridge the powers of the *tenno* and to sweep away feudalistic residuals around the *tenno*. In such a basic structure, the *tenno* would hold abridged powers such as a ceremonial role in international negotiation and the formal source of honor. The power to make the government would be given to a majority party in the parliament. And most of the powers the *tenno* enjoyed in the Meiji constitutional system would reside in the parliament.

⁶⁹ “Takano hakase no shinkenpo soan (The Draft of a New Constitution by Dr. Takano),” *Yomiuri Hochi Shinbun*, article, January 26, 1946 in *Shoron Shuroku*, 170.

⁷⁰ It was very doubtful whether a majority of the Japanese people would agree to abolish the *tenno* system. Less than 9 percent of people were opposed to the *tenno* system. See “Kenpo kaisei to yoron (Constitutional Revision and Public Opinion),” *Mainichi Shinbun*, article, February 4, 1946 in *Shoron Shuroku*, 188-189.

⁷¹ See Sato, *Seiritsushi*, 2: 778.

On February 23, the party published the outline of a new constitution. The outline first described three criteria---course, method, and aim---for making a new constitution. The course was that of establishment of democratic politics and carrying out resolutely policy toward a socialist economy. As a method, the outline sought extension of a special session of the Imperial Diet after the upcoming general election to be a constitutional convention. It aimed to dismiss the traditional view of a power state and promote the interests and welfare of the people to build a peace state.⁷² Because the Socialist Party involved an inner struggle between the right and left factions, its constitutional plan showed a compromising attitude toward the *tenno* system by reflecting the struggle. It provided that "Sovereignty shall reside in the State (a cooperative body of the people including the *tenno*). Governing powers shall be divided, the more important part shall be assigned to the National Diet and one part shall be assigned to the *tenno* (broadly limiting the *tenno*'s prerogatives). The *tenno* shall be retained."⁷³ In the outline, the *tenno* would hold rather formal powers on the exercise of which the *tenno* would have no veto power. Other features of the outline are as follows. The Diet would be more powerful and the House of Representatives elected as proportional by the people would be superior to the House of Councilors elected by occupational groups. A parliamentary system would be introduced with a system of national recall of the cabinet. Reservation of law would be abolished and social rights including the right to life as well as classical rights would be protected. Emphasis was placed upon equality when it provided not only that the people would be all equal and that all discriminations based upon gender and status should be abolished but also that peers, ranks, and orders of merit all should be abolished. The outline also provided for independence of the judiciary and abolition of administrative court and of death penalty but no judicial review. In sum, although the principle of popular sovereignty was not clearly declared and the *tenno* enjoyed more powers, the outline by the Socialist Party was relatively similar

⁷² For the text of the outline of a new constitution by the Socialist Party, see Sato, *Seirisushi*, 2: 779-782.

⁷³ For translation, I referred to Koseki, *Birth*, translated by Moore, 39-40.

to the draft of the Constitutional Research Group. That was because Takano and Morito played an important role in the party as well.

As for other party plans, while the communist party proposed a republican form of government,⁷⁴ the *Jiyuto* (Japan Liberal Party) and *Shinpoto* (Progressive Party) published considerably conservative constitutional revision drafts. When the Liberal Party proposed its constitutional revision plan, the president, Hatoyama Ichiro, released a press talk of its position of constitutional revision on January 21, 1946. He expressed the maintenance of the *kokutai* and their hope to establish politics based upon real constitutional monarchy along with further protection of the rights of the people.⁷⁵ However, there was no essential difference between the text of the draft and the Meiji Constitution. The draft provided that “The possessor of sovereignty shall be the Japanese state. The *tenno* shall be the superintendent of sovereignty. The *tenno* shall be of a line unbroken for ages eternal. The *tenno* shall have no responsibility either legally or politically.”⁷⁶ It is true that the draft reduced the *tenno*’s prerogatives broadly, established a more powerful parliament, introduced a parliamentary cabinet system, and provided for a more independent judiciary system.⁷⁷ However, the draft replaced simple reservation of law with prohibition of arbitrary restriction of freedom of thought, speech, religion, scholarship, and arts by law and still offered no conceptualization of the constitutionality of rights and liberties. As long as the principle of a line unbroken for ages eternal and of direct governance of the *tenno*, moreover, constitutionalism would suffer from serious damage because constitutionalism required governmental activities to be limited and controlled by written documents.⁷⁸

⁷⁴ For the text of *Nihon Jinmin Kyowakoku Kenpo* (The Constitution of the People’s Republic of Japan) on June 29, 1946, see Suzuki, *Kenpo seitei zengo*, 248-260.

⁷⁵ Hatoyama Ichiro, “Shin no rikken kunshu seiji no kakuritsu wo kisu,” *Yomiuri Hochi Shinbun*, January 22, 1946 in *Shoron Shuroku*, 163.

⁷⁶ For the full text, see Sato, *Seiritsushi*, 2: 737-740. For translation, I referred to Koseki, *Birth*, translated by Moore, 44.

⁷⁷ For its legislative history, see Sato, *Seiritsushi*, 2: 741-770.

⁷⁸ For example, *Mainichi Shinbun* criticized the constitutional revision plan of the Liberal Party as too conservative and basically similar to the Meiji Constitution. See “Jiyuto no kenpo kaseian (The Draft of Constitutional Revision by the Liberal Party),” *Mainichi Shinbun*, editorial, January 23, 1946 in *Shoron Shuroku*,

The proposal of constitutional revision by the Progressive Party was more conservative than that by the Liberal Party. In its basic policy, the proposal declared that retainment of the *kokutai* was the party's basic platform and that thus the party determinedly rejected both a republican form of government and a ritualistic *tenno* system.⁷⁹ Although the prerogatives of the *tenno* should be exercised with resolution of the Imperial Diet and the Supreme Court should enjoy the power of judicial review, the concept of the *kokutai* was untouched so that the fundamental structure of the Meiji constitutional system could be kept intact. In fact, preservation of law on rights of subjects was maintained.⁸⁰

As for other important private drafts of constitutional revision, the draft of the *Kenpo Kondankai* (Constitution Discussion Group) is noteworthy. Ozaki Yukio, a liberal representative nicknamed the god of constitutional government, and Iwanami Shigeo, a famous academic publisher, were central persons of the Constitution Discussion Group. However, Inada Masatsugu, a constitutional historian, with Unno Shinkichi, a lawyer and one of the drafting committee members of the Socialists, played a pivotal role in preparing the draft of constitutional revision. The draft basically followed the British model of constitutional monarchy and introduced as a base of the proposed constitution the concept of joint sovereignty of the *tenno* and the people, which was related to the plan of the Socialist Party. The revised constitution would include important parts of the *tenno*'s house law, which would be a statute. It also rejected reservation of law for rights of the people, declaration of which came before the chapter of the *tenno*. The judiciary might review constitutionality of law. Policies of the social state were also declared as constitutional principles.⁸¹ This draft was published on March 5, 1946, only one day before the governmental outline of the revised constitution based upon GHQ's plan was made public.⁸²

164-166. See also, Koseki, *Tanjyo*, 74-76.

⁷⁹ See Sato, *Seiritsushi*, 2: 774-775.

⁸⁰ For the full text, see Sato, *Seiritsushi*, 2: 775-778. See also, Koseki, *Tanjyo*, 76.

⁸¹ See Sato, *Seiritsushi*, 2: 853-860.

⁸² Charles Kades explained that the draft of the *Kenpo Kondankai* was one of the most useful sources when he and his colleagues at the Government Section of GHQ prepared their own constitutional draft. See Kades,

Unlike the Matsumoto Committee and the conservative parties, there were innovative plans among private citizens about the principle of popular sovereignty and the concept of the *tenno* as a ritualistic institution. The Japanese people did actually listen to public discussion on new conceptions of political power and the state.⁸³ We can trace indigenous efforts to make relative a line unbroken for ages eternal. However limited these efforts might be, some people surely made a positive commitment to a renovated political practice as public deliberation. If the private plans had been successful at that time, the constitution would have independently become a common baseline for the political process between the governed and the governing elite. In any event, because there was good soil more or less ready, most Japanese people welcomed and cherished the basic idea of a revised constitution, when the government plan based upon the GHQ model was published and made into an actual constitution later.

3. GHQ's Leadership: Popular Sovereignty with a Symbolic *Tenno* System

“The American Role in Revising Japan’s Imperial Constitution,” 227. As mentioned in text, however, this draft was published one day before the Japanese government announced its outline of constitutional revision, the origin of which was the so-called MacArthur constitution. Thus they probably referred to the draft at a much later course of the work.

⁸³ For example, an editorial of the *Tokyo Shinbun* discussed a progressive institution of dissolution of the House of Representatives by national referendum the *Kenpo Kenkyukai*'s draft proposed. See “Gikaiken to minken (The Power of the Diet and the Popular Right to Participate in Politics),” editorial, *Tokyo Shinbun*, January 22, 1946 in *Shoron Shuroku*, 162-163.

The *Nihon Sangyo Keizai Shinbun* rather lengthily analyzed public opinions on the *tenno* system. The article pointed out three general trends of opinions. First, conservatives argued that Japan had been a country in which the *tenno* and the people had been together and thus that it did not matter whether sovereignty belonged to the *tenno* or the people. They also argued for minimum revision of the constitution. The government and the Progressive Party and the Liberal Party took this position. The second argument was that while democracy was essentially inconsistent with the *tenno* system, popular sentiment should be also respected and thus that the *tenno* institution should be retained but its prerogatives should be largely reduced. This was the stance the Socialist Party and the *Kenpo Kenkyukai* had taken. Third, the most radical discussion argued that the *tenno* system could not coexist with democracy and its abolition alone would serve democratic politics. The communists clearly took this position. The article continued to state that while the first opinion was shared by the ruling class, intellectuals and students and young generation supported the second position. “Tennosei taihei zenya no arashi (The Emperor System and the Storm before a Calm),” article, *Nihon Sangyo Keizai Shinbun*, January 1& 3, 1946 in *ibid.*, 108-114, 110-112.

The United States government understood that the Potsdam Declaration demanded reform of the Meiji Constitution.⁸⁴ On January 7, 1946, the interdepartmental State-War-Navy Coordinating Committee (SWNCC) in Washington, D.C. approved a document entitled “Reform of the Japanese Government System” (SWNCC-228) and forwarded it to the Supreme Commander for the Allied Powers in Tokyo on January 11. SWNCC-228 is a document that shows “culmination of State Department plans for constitutional and governmental changes in postwar Japan that extend back to at least mid-1943.”⁸⁵

This document discussed the general objectives to be accomplished in political reform in postwar Japan. The occupation was indirect or through the Japanese government⁸⁶ and thus the Supreme Commander had to indicate that the Japanese government needed drastic reform of its governmental system. The document attempted to provide the Supreme Commander with general guidance for his supervision. The basic items included the following:

- (1) A government responsible to an electorate based upon wide representative suffrage;

⁸⁴ For the preparation for occupation of postwar Japan by the Allied Powers, effectively the US, see Robert E. Ward, “Presurrender Planning: Treatment of the Emperor and Constitutional Changes,” Ward & Sakamoto, *Democratizing Japan*, 1-41; Hellegers, *We the Japanese People*, vol. 1.

⁸⁵ Ward, “Presurrender Planning,” in Ward & Sakamoto, *Democratizing Japan*, 29.

⁸⁶ SWNCC-150 provided for the relation between SCAP and the Japanese government as the following. “The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and the control of Japan.” “In view of the present character of Japanese society and the desire of the United States to attain its objectives with a minimum commitment of its forces and resources, the Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers United States objectives. The Japanese Government will be permitted, under his instructions, to exercise the normal powers of government in matters of domestic administration. This policy, however, will be subject to the right and duty of the Supreme Commander to require changes in governmental machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms. This policy, moreover, does not commit the Supreme Commander to support the Emperor or any other Japanese governmental authority in opposition to evolutionary changes looking toward the attainment of United States objectives. The policy is to use the existing form of Government in Japan, not to support it. Changes in the form of Government initiated by the Japanese people or government in the direction of modifying its feudal and authoritarian tendencies are to be permitted and favored. In the event that the effectuation of such changes involves the use of force by the Japanese people or government against persons opposed thereto, the Supreme Commander should intervene only where necessary to ensure the security of his forces and the attainment of all other objectives of the occupation.” SWNCC-150, August 29, 1945, Part II Allied Authority, 2. Relationship to Japanese Government, in RM030.

- (2) An executive branch of government deriving its authority from and responsible to the electorate or to a fully representative legislative body;
- (3) A legislative body, fully representative of the electorate, with full power to reduce, increase or reject any items in the budget or to suggest new items;
- (4) No budget shall become effective without the express approval of the legislative body;
- (5) Guarantee of fundamental civil rights to Japanese subjects and to all persons within Japanese jurisdiction;
- (6) The popular election or local appointment of as many of the prefectural officials as practicable;
- (7) The drafting and adoption of constitutional amendments or of a constitution in a manner which will express the free will of the Japanese people.⁸⁷

A fundamental problem was of course the treatment of the *tenno* system. The United States government considered the *tenno* system with its various prerogatives in the Meiji constitutional system to be inconsistent with the democratization of Japan. “Though the ultimate form of government in Japan is to be established by the freely expressed will of the Japanese,” the document contended, “the retention of the Emperor institution in its present form is not considered consistent with the foregoing general objectives.”⁸⁸ “The Japanese,” therefore, “should be encouraged to abolish the Emperor Institution or to reform it along more democratic lines.”⁸⁹ The document also supposed responses when the Japanese people decided to retain the *tenno* system. In that case, the Supreme Commander further indicated that the Japanese government should adopt more democratized governmental institutions as additional safeguards.⁹⁰ However, the document was very careful not to impose the political reforms it listed upon the Japanese people, because “the knowledge that [the

⁸⁷ “Reform of the Japanese Government System,” SWNCC-228, “a” in Takayanagi, *Seitei Katei*, 1: 412-14.

⁸⁸ “Reform of the Japanese Government System,” SWNCC-228, “b” in Takayanagi, *Seitei Katei*, 1: 414.

⁸⁹ “Reform of the Japanese Government System,” SWNCC-228, “d” in Takayanagi, *Seitei Katei*, 1: 414.

⁹⁰ The concrete indicated reforms were as follows:

- (1) That the Ministers of State, chosen with the advice and consent of the representative legislative body, shall form a Cabinet collectively responsible to the legislative body;
- (2) That when a cabinet loses the confidence of the representative legislative body, it must either resign or appeal to the electorate;
- (3) The Emperor shall act in all important matters only on the advice of the Cabinet;
- (4) The Emperor shall be deprived of all military authority such as that provided in Articles XI, XII, XIII, and XIV of Chapter I of the Constitution;
- (5) The Cabinet shall advise and assist the Emperor;
- (6) The entire income of the Imperial Household shall be turned into the public treasury and the expenses of the Imperial Household shall be appropriated by the legislature in the annual budget.

“Reform of the Japanese Government System,” SWNCC-228, “d” in Takayanagi, *Seitei Katei*, 1: 416.

reforms] had been imposed by the Allies would materially reduce the possibility to [reforms'] acceptance and support by the Japanese people for the future.”⁹¹ The Supreme Commander should order the Japanese government to execute the listed reforms, the document claimed, “[o]nly as a last resort”.

General Douglas MacArthur, the Supreme Commander for the Allied Powers, was basically of the same opinion. Long before he received SWNCC-228, MacArthur had already suggested the necessity of amending the Meiji Constitution by depending upon the original directive that authorized him to supervise the occupation.⁹² Because the Allied Powers' occupation was indirect,⁹³ after MacArthur's suggestion, he and his staff at GHQ generally respected the Japanese initiatives and waited for the conclusion of the Matsumoto Committee's work. In fact, MacArthur had prohibited his staff from contacting the Japanese concerned after the Konoe affair.⁹⁴ Although the Government Section of GHQ had made preliminary studies of the Meiji constitution system,⁹⁵ however, they were not ready at all to take over the work of constitutional revision.

As preliminary study, the Government Section of GHQ analyzed the Meiji Constitution. Mile E. Rowell, Major (later Lieutenant Colonel) and a member of the Public Administration Branch of the Government Section, made a report of the Meiji constitutional regime on December 6, 1945. In the report, he pointed out “many abuses of authority which permitted militarists to obtain

⁹¹ “Reform of the Japanese Government System,” SWNCC-228, “d” in Takayanagi, *Seitei Katei*, 1: 416.

⁹² SWNCC-150, August 29, 1945 in RM030. One of the ultimate objects of the occupation was “To bring about the eventual establishment of a peaceful and responsible government which will respect the rights of other states and will support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations.” “The United States desires that this government should conform as closely as may be to principles of democratic self-government, but it is not the responsibility of the Allied Powers to impose upon Japan any form of government not supported by the freely expressed will of the people.” One of the principal means for achieving the objectives was “The Japanese people shall be encouraged to develop a desire for individual liberties and respect for fundamental human rights, particularly the freedoms of religion, assembly, speech, and the press. They shall also be encouraged to form democratic and representative organizations.” SWNCC-150, Part I Ultimate Objectives.

⁹³ For the GHQ's occupation, see Takemae Eiji, *Inside GHQ: The Allied Occupation of Japan and Its Legacy* (New York: Continuum, 2002). See also, Takemae Eiji, *GHQ no hitobito: Keireki to seisaku (The People in GHQ: Profiles and Policies)* (Tokyo: Akashi Shoten, 2002); Takemae Eiji, *Senryo sengoshi (Occupied Postwar History)* (Tokyo: Iwanami Shoten, 2002).

⁹⁴ See Chapter 2 section 3.

⁹⁵ “Report of Preliminary Studies and Recommendations of Japanese Constitution” written by Milo E. Rowell. See Takayanagi, *Seitei Katei*, 1: 2-24.

control of the government and subvert it to their ends during the past two decades.”⁹⁶ In Rowell’s view, the following defects in the constitutional system had caused the abuses.⁹⁷

- a. Lack of effective rights of individual citizens.
- b. Extra-constitutional bodies having access to the Emperor which are not responsible to the will of the people.
- c. Direct control by the Emperor of the strength, organization and budget of the armed forces.
- d. Control of the courts by the procurator as the representative of the Emperor's will rather than the judge holding such position.
- e. Lack of control of all functions of government by a constitution.
- f. A government not responsible to the will of the people.
- g. Exercise of legislative functions by the executive branch.
- h. Lack of authority in the people to amend or alter the constitution.
- i. Centralized authority over local governments.

Rowell concluded the report by suggesting the necessity of constitutional revision and attaching there appendices of detailed analyses and recommended provisions on bill of rights, responsible government, and local responsibility. However, he was careful enough to say that these recommendations were “tentative only” and “not inflexible.”⁹⁸

Rowell regarded reservation of law as a serious problem in the Meiji constitutional system. To encourage democratic tendencies and modify authoritarian tendencies, he believed, it was necessary for the revised constitution to protect freedom of religious worship, opinion, speech, press and assembly, along with personal freedom, particularly the rights of the accused. An independent judiciary was supposed to play an important role in protecting such freedoms and rights.⁹⁹ As for the governmental system, Rowell emphasized political responsibilities to the people. He especially denounced extra-constitutional agencies that were responsible to only the *tenno* and directly irresponsible to the people. Although a total constitutional change in government institutions was believed to be necessary for the less feudalistic and authoritarian and more democratic political

⁹⁶ “Report of Preliminary Studies and Recommendations of Japanese Constitution,” in Takayanagi, *Seitei Katei*, 1: 2.

⁹⁷ “Report of Preliminary Studies and Recommendations of Japanese Constitution,” in Takayanagi, *Seitei Katei*, 1: 2-4.

⁹⁸ “Report of Preliminary Studies and Recommendations of Japanese Constitution,” in Takayanagi, *Seitei Katei*, 1: 2, 4.

⁹⁹ “Annex ‘A’ Bill of Rights,” in Takayanagi, *Seitei Katei*, 1: 6-10.

process, Rowell presupposed that the *tenno* system would continue to exist and that the *tenno* would be more powerful than in the actual postwar constitution, when he wrote “That direct access to the Emperor be expressly given to a limited number of government officials who are directly responsible to the people.”¹⁰⁰ The report added that the decentralization of authorities to local and prefectural governmental organizations would also reinforce democratic tendencies in Japan.¹⁰¹

This preliminary study is important evidence that GHQ, on the one hand, thought that constitutional revision would be necessary to fulfill the requirements the Potsdam Declaration had set forth and, on the other hand, assumed retention of the *tenno* system. As importantly, a crucial picture was still unclear on the relationship between the retained *tenno* system and a fully democratized political process in which the people would actively participate. Popular sovereignty had not yet emerged as a central idea of constitutional revision among the Government Section.

As discussed above, the Government Section also paid careful attention to the trends of the discussions about constitutional reform by the Japanese people. The private draft of the *Kenpo Kenkyukai* (Constitutional Research Group) particularly attracted their attention. On January 11, 1946, Rowell again framed a thorough report on the draft of the proposed constitutional revision. The document found the draft “outstanding liberal” because it provided, among other things, the sovereignty of the people.¹⁰² Although there were expressed dissatisfactions on its lack of rights in criminal procedure¹⁰³ and a concept of the supreme law of the land and of judicial review,¹⁰⁴ the document was generally favorable on the draft and concluded that it was “democratic and

¹⁰⁰ “Annex ‘B’ Responsive Government,” in Takayanagi, *Seitei Katei*, 1: 10-20, 16.

¹⁰¹ “Annex ‘C’ Local Responsibility,” in Takayanagi, *Seitei Katei*, 1: 20-24.

¹⁰² “Comments on Constitutional Revision Proposed by Private Group,” in Takayanagi, *Seitei Katei*, 1: 26-40, 36.

¹⁰³ “Comments on Constitutional Revision Proposed by Private Group,” in Takayanagi, *Seitei Katei*, 1: 38.

¹⁰⁴ “Comments on Constitutional Revision Proposed by Private Group,” in Takayanagi, *Seitei Katei*, 1: 38. Most of the lawyers in the Government Section were New Dealers. They did not support judicial activism. They were very careful not to use the phrase “due process of law.” They were familiar with the severe conflict between President Franklin Roosevelt and the Old Supreme Court of the United States. Rowell graduated from Stanford University Law School and was an attorney. Tanaka, *Oboegaki*, 73.

acceptable.”¹⁰⁵ Because this document was signed by Courtney Whitney, Brigadier General, U. S. Army and Chief of the Government Section, it is reasonable to infer that the staff in the Government Section shared with Rowell knowledge about the proposed constitutional revision of the *Kenpo Kenkyukai*.¹⁰⁶ Through the analysis of this constitutional revision plan, the Government Section clearly understood that there was reason to believe that the principle of popular sovereignty would be accepted and be developed among the Japanese people and found a possible way that the *tenno* system could be connected with the principle.

However, except for these two documents framed by Rowell, the Government Section of GHQ had no substantial preparation to undertake constitutional reform.¹⁰⁷ As of January 1946, they did not expect that they would make a draft of the Constitution of Japan by themselves. Why did they then decide rather suddenly to make their own draft of a new Japanese constitution, instead of waiting for more by work of the Japanese government? Was adoption of the own draft and its presentation to the Japanese government an order? If so, was it “as a last resort”?¹⁰⁸

Three important incidents---the visit of the FEAC (FEC), the *Mainichi* scoop of the Matsumoto Committee’s draft, and the report of possible abdication of the *tenno*---occurred between mid-January and February 1946. One was the visit to Tokyo of the members of the Far Eastern Advisory Commission. On January 17, they met the members of the Government Section of GHQ. At the meeting,¹⁰⁹ Tomas Confesor, representative of the Philippines, asked whether the Government Section was considering reform of the Japanese Constitution. Charles Kades, the Chief of the Public Administration Branch of the Government Section, replied that the Government Section was not working on it. He explained that constitutional reform was a long-run issue involving a fundamental

¹⁰⁵ “Comments on Constitutional Revision Proposed by Private Group,” in Takayanagi, *Seitei Katei*, 1: 36.

¹⁰⁶ In fact, Kades stated that the draft of the *Kenpo Kenkyukai* was a useful source when the Government Section prepared their draft of the revised constitution. See Kades, “The American Role in Revising Japan’s Imperial Constitution,” 227.

¹⁰⁷ From interviews with Kades and Rowell, Tanaka Hideo judges that the Government Section was busy with other things such as making a list of people who had been ousted from public offices, and problems about the reform of election law and so on for January 1946. Tanaka, *Oboegaki*, 67-69.

¹⁰⁸ “Reform of the Japanese Government System,” SWNCC-228, “d” in Takayanagi, *Seitei Katei*, 1: 416.

¹⁰⁹ “A Meeting between Government Section and the FEC,” Hussy Papers, reel no. 5 in RM053.

change in the governmental structure of Japan, and that it was within the limits of the authorities of the Far Eastern Commission.¹¹⁰

In fact, the FEC was established by the Moscow Agreement of December 27, 1945, first of all, “To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.”¹¹¹ It might also check actions taken by the Supreme Commander for the Allied Powers. The agreement provided that the FEC should be entitled “To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.”¹¹² However, the agreement carried a compromised provision that the U.S. government might issue interim directives to MacArthur for urgent matters that were not decided yet by the commission under the condition that “any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole, will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.”¹¹³ Literal understanding of the terms of the commission might place GHQ out of constitutional revision.¹¹⁴

¹¹⁰ See Tanaka, *Oboegaki*, 50-60; Koseki, *Tanjyo*, 115-119.

The FEAC was the predecessor of the Far Eastern Committee and “the inter-Allied agency initially charged with making recommendations on the implementation of the Japanese surrender terms.” Ward, “Origins of the Present Japanese Constitution,” *American Political Science Review*, 50: 980, 987 n. 16. At that time, the Far Eastern Commission, which officially started on February 26, 1946, was supposed to replace the FEAC. However, there was some ambiguity of when the replacement happened. The U.S. government understood and asserted that the Far Eastern Commission succeeded the Far Eastern Advisory Commission on December 27, 1945. But the FEAC members called themselves the FEAC, not the FEC in the Tokyo visit and the U.S. government did not oppose this practice. The USSR assumed that the FEC would start its functions after it returned to Washington. GHQ followed the understanding of the U.S. government and thus treated their guests as the FEC. See Moore & Robinson, *Partners for Democracy*, 88-89. For the FEC, see *infra* note 115.

¹¹¹ “Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan,” A. II. A. 1 in RM049.

¹¹² “Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan,” A. II. A. 2 in RM049.

¹¹³ “Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan,” A. III. 3 in RM049.

¹¹⁴ See Koseki, *Tanjyo*, 107-108.

Yet the reactions of GHQ seem puzzling. MacArthur himself had been strongly against the decision made at the Moscow conference to establish the Far Eastern Commission in order to decide and implement the policies of the occupation of Japan.¹¹⁵ On January 30, however, MacArthur told the visiting members of FEC (FEAC) that the matter of constitutional reform “had been taken out of his hands by the Moscow Agreement” and that “insofar as his own part in this work was concerned, [he] had ceased to take any action whatever.”¹¹⁶ He added that he had issued no orders or directives on constitutional revision, but that he had limited himself merely to suggestions. Then he expressed his belief about constitutional reform.¹¹⁷

It is his hope that whatever may be done about constitutional reform in Japan, this will be done in such a way as to permit the Japanese to look upon the resulting document as a Japanese product, for he feels that only in this way can the work be permanent. It is his belief, that it is his conviction, that a constitution, no matter how good, no matter how well written, forced upon the Japanese by bayonet will last just as long as bayonets are present, and that he is certain that the moment force is withdrawn and the Japanese are left to their own devices they will get rid of that constitution and get something in its place that will be as far from the discarded document as they can get, merely for the purpose of asserting and maintaining their independence of ideas that they have been forced to accept.

¹¹⁵ Other Allied countries such as the USSR, UK, China, Australia, and so on were dissatisfied with the lenient occupation policy toward Japan that the United States had adopted. In the Moscow Agreement, the UK and USSR succeeded in setting up a more powerful agency, the FEC, which was empowered “to formulate the policies, principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished” and “to review, on the request of any member, any directive issued to SCAP or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.” The FEC was composed of the representatives of the USSR, UK, US, China, France, the Netherlands, Canada, Australia, New Zealand, India, and the Philippine Commonwealth. In the FEC, the US, UK, China, and the USSR would have veto power. In exchange for the concession, the United States obtained the authority “to issue interim directives to SCAP pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.” See “Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan,” in RM049. See also Ward, “Origins of the Present Japanese Constitution,” 988-989.

¹¹⁶ “Memorandum by the Secretary General of the Far Eastern Advisory Commission (Johnson),” US Department of State, *Foreign Relations of the United States*, 8(1946), in RM139.

¹¹⁷ “Memorandum by the Secretary General of the Far Eastern Advisory Commission (Johnson),” US Department of State, *Foreign Relations of the United States*, 8(1946), in RM139.

At least superficially, thus, MacArthur and his staff of the Government Section pretended to be indifferent to the constitutional revision. In reality, however, the very interest the FEC (FEAC) had shown had stimulated GHQ to reconsider its authority to deal with constitutional reform.¹¹⁸

On February 1, indeed, Courtney Whitney wrote a memorandum for MacArthur about constitutional reform. In this memo, Whitney examined the extent of the Supreme Commander's power to "deal with fundamental changes in the Japanese constitutional structure."¹¹⁹ His opinion was that "in absence of any policy decision by the Far Eastern Commission on the subject," the Supreme Commander legitimately had authority over constitutional reform.¹²⁰ At first, Whitney considered MacArthur's authority from the Allied Powers and concluded that his "authority to effectuate constitutional reform designed to develop a form of government responsible to the people" was "*implicit* in the terms of [his] designation by the Allied Powers as Supreme Commander for the purpose of enforcing the surrender terms."¹²¹ Then Whitney moved to an examination of SCAP's relation to Joint Chiefs of Staff. In Whitney's judgment, it was clear that MacArthur could not "accomplish these aspects of [his] mission without effecting fundamental changes in the Japanese constitutional structure." "Since the development of a democratic Japan [had] been explicitly made a part of [his] mission," Whitney continued, MacArthur had "ample authority from the Joint Chiefs of Staff to approve or order constitutional reform designed to achieve the desired results."¹²² Thus, a conflict over jurisdiction might occur with the FEC. In Whitney's view, before the FEC officially started its activities, MacArthur had "unrestricted authority to take any action [he deems] proper in effecting changes in the Japanese constitutional structure."¹²³ Whitney then discussed the relationship in power between the Supreme Commander and the Far Eastern Commission and the Allied Council for Japan in the following way: "Should the FEC issue a policy

¹¹⁸ See Tanaka, *Oboegaki*, 58-60; Koseki, *Tanjo*, 117-119.

¹¹⁹ Takayanagi, *Seitei Katei*, 90.

¹²⁰ Takayanagi, *Seitei Katei*, 1: 92 (emphasis added).

¹²¹ Takayanagi, *Seitei Katei*, 1: 92.

¹²² Takayanagi, *Seitei Katei*, 1: 94.

¹²³ Takayanagi, *Seitei Katei*, 1: 96. Whitney points out the only restriction, that is, removal of the Emperor, in which case the Supreme Commander is "required to consult with the Joint Chiefs of Staff."

directive dealing with the matter of constitutional reform, then and in such event the issuance of any constitutional reform directive (order) upon the Japanese government would be subject to objection by any member of the Allied Council for Japan and [Supreme Commander's] decision would not be controlling.”¹²⁴ MacArthur and his staff now were theoretically justified in dealing with constitutional reform in Japan. However, timing was crucial for GHQ's enterprise because MacArthur would lose a free hand in decision-making and subject himself to review after the Far Eastern Commission officially inaugurated its function.

Coincidentally, the second important event happened on the same day. As we saw above,¹²⁵ the *Mainichi Shinbun*, one of the major newspapers, published a provisional draft of a constitution that was virtually the same as one of drafts Miyasawa prepared for consideration in the Matsumoto Committee. This publication totally changed the process of making the constitution.

The Matsumoto Committee had failed to understand fully what the Potsdam Declaration had required the Japanese government to do and thus to propose a constitutional system in which the *tenno* system would be rationally founded. In terms of discussion, the committee had decided to isolate itself from the outside world. The committee neither listened to what the Japanese people said, nor tried to have contact with GHQ, unlike the Konoe group.¹²⁶ The secrecy was well maintained. The anxious and irritated GHQ had urged the Japanese government to submit a result of the work on constitutional reform as early as possible. On the basis of Matsumoto's explanation of the four principles for revising the Meiji Constitution in the Imperial Diet,¹²⁷ GHQ had expected

¹²⁴ Takayanagi, *Seitei Katei*, 1: 96-98 (underline in original).

¹²⁵ See Chapter 2 section 5.

¹²⁶ As mentioned above, MacArthur actually prohibited his staff from contacting any Japanese concerned with the matter of constitutional revision. GHQ, therefore, believed that the published draft was Matsumoto's own draft and that its publication was a trial balloon by Foreign Minister Yoshida Shigeru. See “Memorandum for the Supreme Commander: Subject: Constitutional Reform (Matsumoto Draft),” in Takayanagi, *Seitei Katei*, 1: 40-44, 42.

Yet the truth is different. The Japanese government had no intention of testing the reactions of GHQ and the Japanese public. The Matsumoto Committee was very proud of itself. In a personal interview with Mr. Nishiyama Ryuzo, who was a reporter for the *Mainichi Shinbun*, Tanaka Hideo shows that Nishiyama really went to the secretariat of the Matsumoto Committee and got the scoop on January 30, 1946. Tanaka, *Oboegaki*, 45-47.

¹²⁷ Among the four principles, retention of the *tenno* system as superintendent of sovereign power and a line

that the draft of the committee would be conservative. However, the *Mainichi* scoop astonished GHQ as well as the Japanese people. The reported governmental draft was much more conservative than their expectation. GHQ became more eager to know the content of the governmental work on constitutional revision than ever before.¹²⁸

The Government Section quickly responded to the *Mainichi* scoop. As early as February 2, Whitney wrote a memo to MacArthur with a translation of the *Mainichi* article. Whitney reported that the draft was “extremely conservative in character” and left “substantially unchanged the status of the Emperor with all rights of sovereignty vested in him” and that it was “poorly received by the press and the public.”¹²⁹ The translated draft reported as a provisional governmental plan was thoroughly examined provision-by-provision with comments from a liberal democratic point of view.¹³⁰ This memo shows that the chief of the Government Section had already intended to frame a constitutional draft by themselves and orient the Japanese government to follow it. In fact, Whitney thought that it was “better strategy to orient them before the formal submission of a draft than to wait and force them to again start from scratch once an unacceptable draft had been submitted to which they were committed.”¹³¹

In any event, the Government Section considered the reported draft to be too conservative to accept as an official draft of the Japanese government, although the real final draft of the committee was based upon another draft prepared by Matsumoto himself, which was actually more conservative than the draft that was revealed in the *Mainichi Shinbun*. International opinion would understand that the publication of such a conservative constitutional draft was to serve as a symbol

unbroken for ages eternal was the most important for the members of the committee because they were preoccupied with a belief that such a principle was absolutely unmovable. For Matsumoto’s four principles, see Sato, *Seiritsushi*, 1: 422-426.

¹²⁸ See Irie, *Keii*, 86-87; Sato, *Seiritsushi*, 2: 679-680.

¹²⁹ “Memorandum for the Supreme Commander: Subject: Constitutional Reform (Matsumoto Draft),” in Takayanagi, *Seitei Katei*, 1: 40-42.

¹³⁰ For the translated draft with detailed comments, see “Constitutional Investigation Committee Provisional Draft Published in the *Mainichi Shinbun*, February 1, 1946 (Tentative Translation),” in Takayanagi, *Seitei Katei*, 1: 46-74.

¹³¹ “Memorandum for the Supreme Commander: Subject: Constitutional Reform (Matsumoto Draft),” in Takayanagi, *Seitei Katei*, 1: 42.

of the failure of the lenient occupational policy of the Supreme Commander towards Japan. As discussed above, the Far Eastern Commission would inaugurate its official functions imminently.

As Koseki Shoichi has recently pointed out,¹³² the third factor causing GHQ to hasten to write their own constitutional draft and make the new constitution was related to the maintenance of the *tenno* system. There were severe international criticisms of the *tenno* as a war criminal after defeat in the war.¹³³ Many Japanese people thought that the *tenno* should take some responsibility for the disaster. Of course it was not political or legal, but moral in nature. Abdication had been a real issue.¹³⁴ Prince Higashikuni, Hirohito's uncle by marriage, secretly discussed abdication with the *tenno* when he headed the cabinet. And the abdication matter was indeed publicly argued in the media. On October 21, 1945, Konoe Fumimaro told a reporter of the Associated Press that a new constitution he was working on might include a procedure of abdication.¹³⁵ Three days later, Konoe corrected the report to deny future abdication of the *tenno* and say that the *tenno*'s interest in abdication meant that the *tenno* has been very interested in the stiffening American public opinion, after he received an objection from the Shidehara cabinet.¹³⁶ On December 21, the *Yomiuri Hochi Shinbun* carried an article by a reporter of the *New York Herald Tribune* that the *tenno*'s aides had discussed abdication and MacArthur had said nothing about war criminalization of the *tenno*.¹³⁷ On February 27, further, the *Yomiuri Hochi Shinbun* again reported an article of the Associate Press about abdication rather minutely. According to the article, a high official at the Ministry of Imperial Household told an AP reporter that the *tenno* himself wanted to step down at the proper time but his

¹³² See Koseki, *Tanjiyo*, bunkoban heno atogaki (Postscript to the Bunko Edition), 442-450; Koseki Shoichi, *'Heiwa kokka' nihon no saikento (Reconsideration of 'Peach State' Japan)* (Tokyo: Iwanami Shoten, 2002), 9-17.

¹³³ For international views of the *tenno* and its system, see Takeda Kiyoko, *Tenno kan no sokoku: 1945 nen zengo (Conflicting Images of the Emperor: Around 1945)* (Iwanami Shoten, 1978, 2001).

¹³⁴ For the abdication matter, particularly on how the *tenno* and GHQ evaded moral responsibility, see Dower, *Embracing Defeat*, chap. 11 Imperial Democracy: Evading Responsibility, 319-345.

¹³⁵ "Tenno taii no jyoko sonyu mo aieru (A Provision of Abdication from the Throne might be Included)," *Yomiuri Hochi Shinbun*, article, October 23, 1945 in *Shoron Shuroku*, 45.

¹³⁶ "Konoeko shini wo benmei (Prince Konoe Explained His Real Intention)," *Asahi Shinbun*, article, October 25, 1945 in *Shoron Shuroku*, 47-48.

¹³⁷ "Sokkinsha ga taiiron (Aides Discuss the Abdication)," *Yomiuri Hochi Shinbun*, article, December 21, 1945 in *Shoron Shuroku*, 92.

aides said that it would be unnecessary for the *tenno* to abdicate from the throne because responsibility of the war should be assumed by his cabinet members. And the article also mentioned a speculation that if he abdicated, his son, crown prince Akihito would succeed to the throne and his brother Takamatsunomiya would become a regent until Akihito came of age. Finally, the article presented that there were conflicting two views among the aides on a future *tenno* system: something like the British monarchy, and setting up a moral leader of the state without any political powers. It concluded by stating that the Prime Minister Shidehara and the Minister of the Imperial Household Matsudaira reportedly were opposed to the abdication now.¹³⁸

The media coverage on the abdication had annoyed MacArthur and his staff. MacArthur had already decided that the *tenno* was excluded from trial as a war criminal. On November 29, 1945, the Joint Chiefs of Staff sent to MacArthur the terms of SWNCC-55/6 and directed him to gather information and evidence regarding the *tenno*'s possible war criminality.¹³⁹ Although the U.S. government also had decided to preserve and use the *tenno* to make their occupational policy easily executed, they could not completely rule out the possibility that the already heated domestic and international public opinion would burst out demanding the *tenno* be tried as a war criminal. On January 25, 1946, MacArthur replied to Eisenhower by saying that "No specific and tangible evidence has been uncovered with regard to [the *tenno*'s] exact activities which might connect him in varying degree with the political decisions of the Japanese Empire during the last decade."¹⁴⁰ Then MacArthur added that the *tenno*'s indictment would "unquestionably cause a tremendous confusion among the Japanese people, the repercussions of which cannot be overestimated"¹⁴¹ and as a result, a fundamental change in occupational policy would be necessary for responding to active or negative resistance of the Japanese people and maintaining order. He estimated "a minimum of a million

¹³⁸ "Gotaii womegutte (Over the Abdication)," *Yomiuri Hochi Shinbun*, article, February 27, 1946 in *Shoron Shuroku*, 206-208.

¹³⁹ See Ward, "Presurrender Planning," in Ward & Sakamoto, *Democratizing Japan*, 15.

¹⁴⁰ General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower), *FRUS*, 1946 VIII, 395-397 in RM054.

¹⁴¹ General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower) in RM054.

troops would be required which would have to be maintained for an indefinite number of years.”¹⁴² Further, he warned that after failure of democratization and military suppression of chaotic disorder, “some form of intense regimentation probably along communistic line would arise from the mutilated masses.”¹⁴³ However, such stations were impossible because top military officers had been already “under the strongest political and public pressure to repatriate and demobilize American’s armed forces with the greatest possible speed.”¹⁴⁴ On the U.S. governmental level, the issue was solved for retaining and using the *tenno* for smooth occupational operations. The remaining task was how to lead the heated public opinion to give the *tenno* system a soft-landing in the new political order of postwar Japan. For this purpose, the work of the Matsumoto Committee was absolutely unsatisfactory for MacArthur and his staff.¹⁴⁵ The publication of the too conservative plan of constitutional revision would spoil all efforts by MacArthur to save the *tenno*.¹⁴⁶ This was the third factor of acceleration in making a more democratized constitutional plan on the part of GHQ.

On February 3, 1946, as the consequence of the circumstances mentioned above, therefore, MacArthur decided to make a draft of a constitution for a new Japan and to orient the Japanese government to adopt the draft by following GHQ’s outline. MacArthur informed Whitney, Chief of the Government Section, of his decision and presented three basic points that were to be necessary in the constitutional revision.¹⁴⁷ This “musts” list is often called “MacArthur’s Notes.” The first item

¹⁴² General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower) in RM054. In the same memo, MacArthur contended that the *tenno* was “a symbol which unites all Japanese” and that “Destroy him and the nation [would] disintegrate.” He added that “Practically all Japanese venerate [the *tenno*] as the social head of the state and believe[ed] rightly or wrongly that the Potsdam agreements were intended to maintain him as the Emperor of Japan.” Ibid (emphasis added).

¹⁴³ General of the Army Douglas MacArthur to the Chief of Staff, United States Army (Eisenhower) in RM054.

¹⁴⁴ Ward, “Presurrender Planning,” in Ward & Sakamoto, *Democratizing Japan*, 16.

¹⁴⁵ The fact that the *tenno* did not abdicate but continued to be on the throne has diluted a distinguishably new value of the postwar constitution. I will return to this point later.

¹⁴⁶ The *tenno* himself knew well about the state of things. See Kinoshita Michio, *Sokkin Nikki* (Tokyo: Bungei Shunjyu, 1990).

¹⁴⁷ The full text of “MacArthur Notes” is the following:

I
Emperor is at the head of the state.
His succession is dynastic.

of the notes was that the *tenno* system itself would remain, although the duties and powers of the *tenno* had to be based upon the basic will of the Japanese people expressed in the constitution. The symbolic *tenno* system with the principle of popular sovereignty was now ready for introduction in the new constitution. It is noteworthy, however, that there was no direct mention of the principle of popular sovereignty in the notes, unlike the draft of the *Kenpo Kenkyukai*.¹⁴⁸ The second point was related to the most prominent issue, namely, the renunciation of war and armed forces. Although there has been a long controversy over who is attributed to the renunciation, MacArthur or Shidehara,¹⁴⁹ in any event, this was the origin of the peace constitution in which the Japanese people declared the absolute renunciation of war and rejection of any armed forces.¹⁵⁰ Finally and third, the notes suggested abolishing the old feudal system. In fact, equality has become one of the fundamental concepts of Japanese constitutionalism. However, MacArthur contradicted himself when he, on the one hand, had decided to retain the *tenno* system for smooth operations of the

His duties and powers will be exercised in accordance with the Constitution and responsive to the basic will of the people as provided therein.

II

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.

III

The feudal system of Japan will cease.

No rights of peerage except those of the Imperial family will extend beyond the lines of those now existent.

No patent of nobility will from this time forth embody within itself any National or Civil power of government.

Pattern budget after British system.

“Three basic points stated by Supreme Commander to be ‘Musts’ in constitutional revision. Government Section paper prepared about 4 Feb. 1946,” Takayanagi, *Seitei Katei*, 1: 98-100.

¹⁴⁸ See this Chapter section 2.

¹⁴⁹ Of who was an originator of the denunciation of war, there are the Shidehara Theory, the MacArthur Theory, the Kades Theory, and the Whitney-Kades Theory. See Koseki, *Tanjyo*, 131-137. See also, Theodore McNelly, “General MacArthur and the Constitutional Disarmament of Japan,” “General MacArthur’s Pacifism,” and “Japan’s ‘Peace Constitution’ and World Politics,” *The Origins of Japan’s Democratic Constitution*, 105-169.

¹⁵⁰ The Japanese actually conceived of Japan as a culture state without armed forces. Unfortunately, however, this intellectual break-through was not codified as a constitutional draft. An early draft of the *Kenpo Kondankai* (Constitution Discussion Group headed by Ozaki Yukio) did include such a provision. See Koseki, *Tanjyo*, 76-79.

occupation and, on the other, order abolition of feudalism, the most influential legacy of which was and is beyond doubt the *tenno* system itself.

In fact, these principles MacArthur's Notes raised constituted the basic structure of the Constitution of Japan. It is surprising, however, that the Notes failed to point out strengthening the liberties and rights of the people, which was one of the most important purposes of the occupation of Japan. Reservation of law was a most serious problem for protecting liberties and rights in prewar Japan.

The following day, Whitney called a meeting and told his staff that "General MacArthur has entrusted the Government Section with the historically significant task of drafting a new Constitution for the Japanese people."¹⁵¹ Whitney presented the three principles of MacArthur that had to become basic elements of a draft of a new constitution.¹⁵² They then had an open discussion in which they confirmed the points to which they should pay close attention in drafting a constitution. 1) The draft would follow the existing Japanese Constitution's structure and headings.¹⁵³ This agreement would be a main cause of seeming continuity between the two constitutions, which has made it difficult to acknowledge revolutionary characteristics of the new constitution. 2) The proposed constitution should have "explicit controls" of political power, "if deemed necessary to protect the fundamental rights of the people."¹⁵⁴ The item shows that what the members of the Government Section cared most about was protection of liberties and rights of the people. This supplemented a pivotal deficiency in MacArthur's Notes. 3) The draft should emphasize "sovereignty squarely in the hands of the people". The role the *tenno* would play would

¹⁵¹ "Summary Report on Meeting of the Government Section, 4 February, 1946," in Takayanagi, *Seitei Katei*, 1: 102. See also Tanaka, *Oboegaki*, 61-76; Koseki, *Tanjo*, 124-131.

¹⁵² MacArthur's Notes and the principles Whitney presented were not completely identical. See editors' note, in Takayanagi, *Seitei Katei*, 1: 103.

¹⁵³ "Summary Report on Meeting of the Government Section, 4 February, 1946," Points in Open Discussion, par. 1 in Takayanagi, *Seitei Katei*, 1: 104.

¹⁵⁴ "Summary Report on Meeting of the Government Section, 4 February, 1946," Points in Open Discussion, par. 2 in Takayanagi, *Seitei Katei*, 1: 104.

be “that of a social monarch, merely.”¹⁵⁵ The members now clearly viewed popular sovereignty at the center of the proposed constitution with connected to a *tenno* institution that would play only a social role. 4) The principles of the United Nations Charter should be “implicit in [their] thinking as [they] draft the Constitution.”¹⁵⁶

The Government Section then divided itself to organize a steering committee and several subcommittees, each of which prepared a preliminary draft on an assigned chapter.¹⁵⁷ After that, the steering committee and each subcommittee met to compose the second draft. Finally, the steering committee checked all provisions and completed the draft of the constitution. All this work was accomplished in eight days, February 5 through 12.¹⁵⁸ When they wrote their drafts, they used as referencing sources several Japanese drafts of the revised constitution, about a dozen other countries’ constitutions, state constitutions, and SWNCC 228 and so on. Kades, an important member of the Steering Committee, emphasizes that they paid attention to “Japanese liberal traditions, which had persisted throughout more than six decades”.¹⁵⁹

The final draft was complete on February 13, when it was handed to the Japanese government. Let us briefly look at its characteristics. 1) Preamble: The preamble solemnly declared the political philosophies of a new Japan. Most importantly, it was the Japanese people that established the constitution. The principle of popular sovereignty was materialized in “the universal principle that government is a sacred trust the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are

¹⁵⁵ “Summary Report on Meeting of the Government Section, 4 February, 1946,” Points in Open Discussion, par. 3 in Takayanagi, *Seitei Katei*, 1: 104.

¹⁵⁶ “Summary Report on Meeting of the Government Section, 4 February, 1946,” Points in Open Discussion, par. 4 in Takayanagi, *Seitei Katei*, 1: 104-105.

¹⁵⁷ The subcommittees were Legislative, Executive, Civil Rights, Judiciary, Local Government, and Finance Committees and Committee on the Emperor, Treaties and Enabling Provisions. See “Memorandum setting forth organization of Public Administration Division of Government Section into Committees for preparation of draft constitution,” in Takayanagi, *Seitei Katei*, 1: 110-112.

¹⁵⁸ The Government Section maintained absolute secrecy in all aspects of the work of drafting the new constitution. See “Summary Report on Meeting of the Government Section, 4 February, 1946,” Working Arrangements, 1 & 3 in Takayanagi, *Seitei Katei*, 1: 106. For the work of the Government Section, see Takayanagi, *Seitei Katei*, 1: 116-264; Tanaka, *Oboegaki*, 130-169; Koseki, *Tanjyo*, 137-151; Hellengers, *We the Japanese People*, 2: 518-526; Moore & Robinson, *Partners for Democracy*, 93-110.

¹⁵⁹ Kades, “The American Role in Revising Japan’s Imperial Constitution,” 227.

enjoyed by the people”.¹⁶⁰ A profound commitment to pacifism also led to recognition of all peoples’ “right to live in peace, free from fear and want.”¹⁶¹ 2) The *tenno*: the symbolic *tenno* institution was now officially introduced into a constitutional scheme. The *tenno* should be “the symbol of the State and of the Unity of the People, deriving his position from the sovereign will of the People, and from no other source”¹⁶² and “have no governmental powers”.¹⁶³ The proposed constitution obviously denied the idea of a line unbroken for ages eternal and placed the *tenno* upon nothing but a solid basis of the popular will. It would also make a new imperial household law a genuine statute.¹⁶⁴ Although the state functions the *tenno* should be planned to discharge with the advice and consent of the cabinet were constitutionally provided, a political function to dissolve the Diet was included.¹⁶⁵ In this respect, the GHQ draft pictured a more political image of the *tenno* than the *Kenpo Kenkyukai* draft, which provided for only its ceremonial functions. 3) Positive pacifism: Chapter II consisted of one article of denunciation of war and armed forces.¹⁶⁶ This chapter differentiated the GHQ draft from the Meiji Constitution in organization and from any other drafts Japanese people prepared. 4) Rights: Protection of rights of the people now became free from the limitation of laws but instead

¹⁶⁰ The GHQ Draft, Constitution of Japan, preamble, par. 1 in Takayanagi, *Seitei Katei*, 1: 266.

¹⁶¹ The GHQ Draft, Constitution of Japan, preamble, par. 2 in Takayanagi, *Seitei Katei*, 1: 266.

¹⁶² The GHQ Draft, Constitution of Japan, preamble, art. 1 in Takayanagi, *Seitei Katei*, 1: 268.

¹⁶³ The GHQ Draft, Constitution of Japan, art. 3 par. 2 in Takayanagi, *Seitei Katei*, 1: 268.

¹⁶⁴ The GHQ Draft, Constitution of Japan, art. 2 in Takayanagi, *Seitei Katei*, 1: 268.

¹⁶⁵ The *tenno*, on behalf of the people, should perform, with the advice and consent of the cabinet, the following state functions:

“Affix his official seal to and proclaim all laws enacted by the Diet, all Cabinet orders, all amendments to this Constitution, and all treaties and international conventions;

Convoke sessions of the Diet;

Dissolve the Diet;

Proclaim general elections;

Attest the appointment or commission and resignation or dismissal of Ministers of State, ambassadors and those other state officials whose appointment or commission and resignation or dismissal may by law be attested in this manner;

Attest grants of amnesty, pardons, commutation of punishment, reprieves and rehabilitation;

Award honors;

Receive ambassadors and ministers of foreign States; and

Perform appropriate ceremonial functions.”

The GHQ Draft, Constitution of Japan, art. 6 in Takayanagi, *Seitei Katei*, 1: 270.

¹⁶⁶ The GHQ Draft, Constitution of Japan, art. 8 in Takayanagi, *Seitei Katei*, 1: 272.

came under an obligation to serve “the common good.”¹⁶⁷ This would be a source of judicial passivism in the postwar constitutional regime. Enumeration covered not only classical negative freedoms such as freedom of thought, religion, expression, and association, and personal liberties, but also newly recognized social rights such as rights to work, and to organize, bargain and act collectively.¹⁶⁸ However, the right to life the *Kenpo Kenkyukai* raised was not protected in this draft. 5) The parliamentary government system: The cabinet was collectively responsible to the unicameral Diet. The Diet might pass a resolution of non-confidence, in response to which the cabinet should resign or order the Diet to dissolve.¹⁶⁹ 6) The independent judiciary: The Supreme Court should determine the constitutionality of any legal norms but its judgment of the constitutionality of legal norms on matters other than cases concerning the rights of the people was subject to the Diet’s review. And in this review, the Diet might override decisions of the Supreme Court by a concurring vote of two-thirds of all the members.¹⁷⁰ This well shows that GHQ lawyers were New Dealers who admitted judicial activism on civil rights and civil liberties but were extremely skeptical about it on democratic decisional matters.¹⁷¹ 7) Guarantee of local government and declaration of supreme law were distinctive in this draft.¹⁷² 8) The Diet would initiate amendment to the constitution and referendum should be necessary.¹⁷³

The GHQ work of the proposed constitution gives us a hint of what constitution-writing means in the post-civil revolution era. Unlike the work of the Matsumoto Committee, in which the drafts had been more or less written by a single person, the process of drafting the constitution by the

¹⁶⁷ The GHQ Draft, Constitution of Japan, art. 11 in Takayanagi, *Seitei Katei*, 1: 272.

¹⁶⁸ As Rowell believed from his analysis of the Meiji constitutional system, personal liberties of the suspected and accused were minutely protected in this draft as a reflection of poor practices in this field. See the GHQ Draft, Constitution of Japan, arts. 30-39 in Takayanagi, *Seitei Katei*, 1: 278-282. See also “Report of Preliminary Studies and Recommendations of Japanese Constitution, Annex ‘A’ Bill of Rights,” prepared by Milo Rowell, *ibid.*, 1: 6-10.

¹⁶⁹ The GHQ Draft, Constitution of Japan, arts. 41, 57, & 61 in Takayanagi, *Seitei Katei*, 1: 282, 286-288.

¹⁷⁰ The GHQ Draft, Constitution of Japan, art. 73 in Takayanagi, *Seitei Katei*, 1: 294.

¹⁷¹ See *United States v. Carolene Products*, U.S. (1938). See also, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard University Press, 1980).

¹⁷² The GHQ Draft, Constitution of Japan, arts. 86-88, & 90-91 in Takayanagi, *Seitei Katei*, 1: 300, 302.

¹⁷³ The GHQ Draft, Constitution of Japan, art. 89 in Takayanagi, *Seitei Katei*, 1: 300.

Government Section was full of discussion and collaboration. The American style of making a constitution was that the people who actually wrote the draft shared the basic principles of a liberal democracy with each other. In fact, the members of drafting committees were men and women and lawyers and non-lawyers with various backgrounds.¹⁷⁴ Although they were guided by the basic principles of constitutional writing that MacArthur and Whitney established, their concrete images of what is a good governmental structure differed.¹⁷⁵ Thus deliberation was necessary for working together. The Japanese people who participated in the drafting process, by sharp contrast, were homogenous in gender and education and oriented by no significant principle except the old *kokutai* ideology.¹⁷⁶ They needed no serious discussion on what the government serves. These contrasts characterize the constitution in Japan ultimately as an instrument of the elite for ruling the people. Up to that time, unfortunately, a constitution as an expression of the peoples' ideals had been essentially irrelevant to the governing elites in Japan.

On February 13, 1946, in the meeting with Foreign Minister Yoshida Shigeru and Minister of State Matsumoto Joji, Whitney and three members of his staff rejected the draft of the Matsumoto Committee¹⁷⁷ because it was “wholly unacceptable to the Supreme Commander as a document of freedom and democracy.”¹⁷⁸ The day before, in fact, the Government Section prepared comments on the document “Gist of the Revision of the Constitution.”¹⁷⁹ They understood that the gist had been informally submitted by the Japanese side.¹⁸⁰ The memo the Government Section prepared gave an extremely low evaluation to the gist of the Matsumoto Committee. It concluded that the proposed

¹⁷⁴ For the members of drafting committees, see Kades, “The American Role in Revising Japan’s Imperial Constitution,” 225-226; Tanaka, *Oboegaki*, 69-76.

¹⁷⁵ Tanaka has pointed out a conflict in the view of rights between the Steering Committee consisting of only lawyers and the Civil Rights Committee composed of only non-lawyers. While the former saw protection of rights through judicial review, the latter was more idealistic in trying to transform Japanese society by appealing to high values of civil rights and civil liberties. Tanaka, *Oboegaki*, 130-150.

¹⁷⁶ Koseki, *Tanjyo*, 127-128, 172.

¹⁷⁷ “Comments on the Document ‘Gist of the Revision of the Constitution,’” Takayanagi, *Seitei Katei*, 1: 80-90.

¹⁷⁸ “Record of Events on 13 February 1946,” Takayanagi, *Seitei Katei*, 322.

¹⁷⁹ For the contents and explanation of the *Kenpo Kaisei Yoko* (Gist of the Revision of the Constitution), see Sato, *Seiritsushi*, 2: 686-711.

¹⁸⁰ “Memorandum for : Chief, Government Section,” Takayanagi, *Seitei Katei*, 1: 78-80, 78.

constitutional revision failed to “fulfill the objectives set forth in the Potsdam Declaration”.¹⁸¹ Interestingly, this memo clearly interpreted that Article 12 of the Potsdam Declaration¹⁸² required Japan to establish the principle of popular sovereignty according to which the government would be organized.¹⁸³ Because the gist did not basically change provisions of the *tenno* from those of the Meiji Constitution,¹⁸⁴ the memo understood, the constitutional revision of the Matsumoto Committee was fundamentally inconsistent with the idea of popular sovereignty.¹⁸⁵ Thus the cabinet should have been collectively responsible only to a Diet fully representative of the people.¹⁸⁶ The cabinet should have been the solo executive organ having access to the *tenno* and thus the *tenno* could act in all state matters only by following the advice of the cabinet.¹⁸⁷ The memo further pointed out that a bill of rights should have been guaranteed without reservation of law and extended to all people who live in Japan.¹⁸⁸ These comments the memo made were naturally along the views that formed the basis of the GHQ draft of the revised constitution. In sum, the plan Matsumoto submitted was regarded as too conservative to realize a liberal democratic government in postwar Japan. At that point, the members of the Government Section had recognized the coexistence of popular sovereignty and the *tenno* institution. They were ready to require Japan to adopt such a mixed system.

After he denounced the Matsumoto plan based upon an inner analysis, Whitney personally presented to the Japanese representatives fifteen mimeographed copies of the GHQ draft of the

¹⁸¹ “Memorandum for: Chief, Government Section,” Takayanagi, *Seitei Katei*, 1: 78.

¹⁸² Article 12 of the Potsdam Declaration reads: “The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely will of the Japanese people a peacefully inclined and responsible government.”

¹⁸³ “Comments on the Document ‘Gist of the Revision of the Constitution’ 1,” Takayanagi, *Seitei Katei*, 1: 80.

¹⁸⁴ One exception in the first six provisions was the change from the word “sacred” in Article 3 of the Meiji Constitution to the word “supreme”. See “Comments on the Document ‘Gist of the Revision of the Constitution’,” Takayanagi, *Seitei Katei*, 1: 82. See also, Sato, *Seiritsushi*, 2: 551.

¹⁸⁵ “Comments on the Document ‘Gist of the Revision of the Constitution’ 1,” Takayanagi, *Seitei Katei*, 1: 82.

¹⁸⁶ “Comments on the Document ‘Gist of the Revision of the Constitution’ 2, 3, and 9,” Takayanagi, *Seitei Katei*, 1: 82, 84, 88.

¹⁸⁷ “Comments on the Document ‘Gist of the Revision of the Constitution’ 2 and 10,” Takayanagi, *Seitei Katei*, 1: 84, 90.

¹⁸⁸ “Comments on the Document ‘Gist of the Revision of the Constitution’ 4,” Takayanagi, *Seitei Katei*, 1: 84, 86.

revised constitution in English.¹⁸⁹ Whitney then informed them of MacArthur's understanding of "the desperate need of the people of Japan for a liberal and enlightened Constitution which will defend them from the injustices and the arbitrary controls of the past."¹⁹⁰ The Japanese representatives, who had assumed that they would discuss their own draft with the members of the Government Section, were stunned to receive the American draft like a bolt from the blue. This meeting was clearly a turning point in history and has been the main source of a serious controversy over the imposed constitution: the assertion that GHQ imposed the Constitution of Japan upon the reluctant Japanese government in exchange for the safety of the *tenno*.¹⁹¹

The phrases Whitney used might be understood as intimidation because he, among other things, mentioned the possibility that the *tenno* might be on trial for war crimes. Matsumoto later testified how he felt: "General MacArthur had for some time been considering most seriously the maintenance of the Emperor, but that it was essential to the accomplishment of this aim that the Japanese Government proclaim a revised constitution similar to the draft here being presented. If this was not done, the person of the emperor could not be guaranteed."¹⁹² However, the record of the American side took a different tone.

As you may or may not know, the Supreme Commander has been unyielding in his defence of your Emperor against increasing pressure from the outside to render him subject to war criminal investigation. He has thus defended the Emperor because he considered that that was the cause of right and justice, and will continue along that course to the extent of his ability. But, gentlemen, the Supreme Commander is not omnipotent. He feels, however, that acceptance of the provisions of this new Constitution would render the Emperor practically unassailable. He feels that it would bring much closer the day of your freedom from control by the Allied Powers,

¹⁸⁹ For the full text of the constitutional draft presented to the Japanese government by GHQ on February 13, 1946, see "Draft, Constitution of Japan," Takayanagi, *Seitei Katei*, 1: 266-302.

¹⁹⁰ "Record of Events on 13 February 1946 When Proposed New Constitution for Japan Was Submitted to the Foreign Minister, Mr. Yoshida, in Behalf of the Supreme Commander," Takayanagi, *Seitei Katei*, 1: 320-336, 322.

¹⁹¹ See e.g., Ward, "The Origins of the Present Japanese Constitution," *American Political Science Review* 50: 4 (1956), 980-1010. When he wrote the article, because of scarcity of data, Ward relied upon only Matsumoto's testimony. Later, he changed his position and told Takayanagi that if other evidence had been available, he would not have written the threat theory. See Takayanagi, *Seitei Katei*, 2: 59-60. But see, Eto Jun, *1946 nen kenpo: sono kosoku (The Constitution of 1946: Its Restraints)* (Tokyo: Bungei Shunju, 1980).

¹⁹² Ward, "The Origins of the Present Japanese Constitution," 997. Ward relies upon Sato Tatsuo's account Sato, *Seiritsushi*, 3: 47.

and that it would provide your people with the essential freedoms which the Allied Powers demand in their behalf.¹⁹³

In fact, no Japanese and American participants except Matsumoto remembered that Whitney said that if the Japanese government did not proclaim a revised constitution similar to the GHQ draft, the person of the *tenno* could not be guaranteed.¹⁹⁴

At that time, as discussed above, MacArthur had already decided to exclude the *tenno* from war criminal investigations and told the Joint Chiefs of Staff that he strongly opposed to a plan to render the *tenno* subject to a war crimes trial. However, the Japanese government did not know this fact but listened to only international opinions extremely harsh to the *tenno*.¹⁹⁵ In such a situation, the Japanese participants who cared about nothing but retention of the *kokutai* might well misunderstand GHQ's intention as a threat. It is reasonable, however, to conclude what Whitney told them in that meeting as an objective warning of "what might happen if the Japanese Government failed to effect a constitutional reform in accordance with the terms of the Potsdam Declaration."¹⁹⁶ It should be interpreted as advice to the Japanese government that lacked the knowledge of international tension over the occupation policy and world politics itself.¹⁹⁷ Charles Kades, one of the American participants, explains Whitney's intention on the analogy of a lawyer's counsel of a danger if a client refuses to follow his or her advice in the lawyer-and-client relationship.¹⁹⁸

After all, the governmental elites were infatuated with the obsolescent ideology of the *kokutai*, understood the situation only from their narrow view on world politics, and would not be

¹⁹³ "Record of Events on 13 February 1946," Takayanagi, *Seitei Katei*, 326, 328.

¹⁹⁴ See Takayanagi, *Seitei Katei*, 2: 57-59; Sato, *Seiritsushi*, 3: 53-56 (Sato Isao adds this portion in 1994). For the comparison between the American record and the Japanese understanding, see Kades, "The American Role in Revising Japan's Imperial Constitution," 228-230.

¹⁹⁵ For international opinions on the *tenno* during the period around 1945, see Takeda Kiyoko, *Tenno kan no sokoku* (Tokyo: Iwanami Shoten, 1978, 2001).

¹⁹⁶ Tanaka Hideo, "Introduction," in Takayanagi, *Seitei Katei*, 1: xxii.

¹⁹⁷ Tanaka Hideo argues that Whitney's statement was intended as friendly advice. Tanaka, *Oboegaki*, 189-204. McNelly has the same opinion. McNelly, "Induced Revolution," Ward & Sakamoto, *Democratizing Japan*, 82.

¹⁹⁸ See Kades, "The American Role in Revising Japan's Imperial Constitution," 228-230.

careful enough to listen to weak but certain different voices among the Japanese people. If imposition occurred, that was surely self-induction. Whitney, indeed, lent the Japanese conservative elites a helping hand for survival:

General MacArthur feels that this is the last opportunity for the conservative group, considered by many to be reactionary, to remain in power; that this can only be done by a sharp swing to the left; and that if you accept this Constitution you can be sure that the Supreme Commander will support your position. I cannot emphasize too strongly that the acceptance of the draft Constitution is your only hope of survival, and that the Supreme Commander is determined that the people of Japan shall be free to choose between this Constitution and any form of Constitution which does not embody these principles.¹⁹⁹

The Japanese participants now acknowledged that they had been required to fundamentally transform the constitution to fulfill the terms the Potsdam Declaration had set forth. However, they still did not completely understand that such constitutional transformation would be unavoidable. The Japanese government needed time to adjust to the unexpected situation.

4. The Response of the Japanese Government to GHQ Draft: A Second Defeat and Attempted Japanization

Surprisingly enough, the stunned Japanese representatives did not take the situation seriously. In vain, they attempted to revive the Matsumoto draft. On February 15, Shirasu Jiro, an adviser to the Central Liaison Office, who attended the critical meeting two days before, sent to Whitney a letter of bold allegation that the object of the two drafts of Matsumoto and GHQ was “one and the same in spirit”, although they took very different routes.²⁰⁰ The letter well showed an elitist bias toward constitutional writing, when Shirasu wrote that Matsumoto was anxious that Japan “should be placed on a constitutional basis once for all” but that he and his colleagues had “no means of knowing how much they can count on the support of the people.” They fear that “too complete a reform all at once would only invite too extreme a reaction”, the letter said, as the Taisho

¹⁹⁹ “Record of Events on 13 February 1946,” Takayanagi, *Seitei Katei*, 1: 328.

²⁰⁰ “Letter from Jiro Shirasu to General Whitney, dated 15 Feb 1946 (The “jeep way” letter),” in Takayanagi, *Seitei Katei*, 1: 336-341, 338.

Democracy went too far and then caused a reactionary militaristic rule.²⁰¹ The letter showed no serious reflection on the failure of the Meiji constitutional regime on the side of political leaders and attributed it to difficulty of the people in accepting democracy. However, this rhetoric did not work at all because the difference in substance between the two drafts was so clear that it sounded like a meaningless joke. Whitney determinedly rejected reconsideration of the Matsumoto draft and warned the Japanese government to realize the severe circumstances around Japan in international politics²⁰² and not to miss this opportunity for them to take the leadership to build “a new and enlightened Japan charted to the path of peace and dedicated to upholding the rights of man in the fraternity of nations”.²⁰³

Matsumoto himself also unsuccessfully attempted to persuade GHQ to approve his draft. At the February 13 meeting, when he was presented with the unexpected draft, Matsumoto lectured the GHQ staff on the significance of bicameralism in constitutionalism because he found it provided for unicameralism.²⁰⁴ When the most fundamental principle was an objective of the discussion, his behavior with a triumphant attitude was out of place and even hilarious.²⁰⁵ Matsumoto once again explained his idea of constitutional writing. Constitutional failure derived from “the arbitrary transplantation of a constitutional system unadapted to the condition and circumstance of the

²⁰¹ “Letter from Jiro Shirasu to General Whitney, dated 15 Feb 1946 (The “jeep way” letter),” in Takayanagi, *Seitei Katei*, 1: 340.

²⁰² Whitney urged Matsumoto and his colleagues to see the reality of the world. “[I]t must be realized that the matter of constitutional reform in Japan is not confined to the exclusive interest of the Japanese people or even to them jointly with the Supreme Commander, but rather is it the opinion of the world which must be fully satisfied before the Allied Forces will release their complete control over Japan. In the final analysis, unless this issue is met forthrightly by the Japanese Government or the Supreme Commander himself takes action, it is quite possible that a constitution might be forced upon Japan from the outside which would render the term ‘drastic’ as used by you in your letter to describe the document submitted by me on the 13th, far too moderate a term with which to describe such new constitution--a constitution which well might sweep away even those traditions and structures which the Supreme Commander by his instrument makes it possible to preserve.” “Letter from General Whitney to Mr. Shirasu, dated 16 Feb 1946 answering ‘jeep way letter’”, Takayanagi, *Seitei Katei*, 1: 342-349, 346.

²⁰³ “Letter from General Whitney to Mr. Shirasu, dated 16 Feb 1946 answering ‘jeep way letter’”, Takayanagi, *Seitei Katei*, 1: 342.

²⁰⁴ “Record of Events on 13 February 1946,” Takayanagi, *Seitei Katei*, 1: 330, 332.

²⁰⁵ In fact, the Government Section considered bicameralism a bargaining chip when they presented the Japanese government with their draft. See Takayanagi, *Seitei Katei*, 1: 120, 122.

nation concerned”.²⁰⁶ The Weimar German Constitution was a good example of reality that a democratic constitution did not necessarily guarantee that democratic politics would be realized. Matsumoto then criticized the Japanese people for lacking knowledge of and motivation for democracy.²⁰⁷ Because the GHQ draft seemed to him too idealistically democratic, he expressed a profound fear that when constitutional revision was carried out along the draft, there would occur “the internal friction which may be brought on by an attempt at too sudden and too drastic a move, which may beget reactionaryism and in the end retard the smooth and wholesome progress of democracy.”²⁰⁸ Matsumoto never thought that constitutional text played an educational function to the people unless a constitution was an instrument for ruling them.²⁰⁹ Here again Matsumoto failed to understand the meaning of a constitution in a democracy and made a constitution as trivialized in the public life as possible.

Whitney again decisively denounced Matsumoto’s noncommittal attitude toward a liberal democratic constitution and requested that the Shidehara cabinet, not Matsumoto himself, reply within 48 hours whether the government would accept the basic principles of the GHQ draft and frame a revised constitution along the draft.²¹⁰ Matsumoto now understood that GHQ would not

²⁰⁶ “Letter from Dr. Matsumoto to General Whitney, dated 18 Feb 1946, inclosing supplementary explanation of constitutional revision” Takayanagi, *Seitei Katei*, 1: 352-365, 356.

²⁰⁷ Matsumoto seems to attribute the failure of the Meiji constitutional system to the popular attitude toward democracy: “[A]fter all, the question whether or not democracy shall prevail in Japan is not one of revision of the constitution, article by article, but rather of the understanding on the part of the people of what democracy really stands for and their genuine desire for a democratic government. Accordingly, it is deemed of the greatest importance to teach democracy in and out of school. If the knowledge about democratic principles is disseminated, and the democratic sentiments are developed, in the nation, the proposed new constitution will prove sufficiently elastic to bring about a situation where the sovereign power may be said to be vested in the people as far as practical politics are concerned. And when that stage has been reached, then the Diet will be in a position to vote for further revision of the constitution by exercising its right to take the initiative in constitutional amendment, as is provided for in the present draft revision.” “Letter from Dr. Matsumoto to General Whitney, dated 18 Feb 1946,” Takayanagi, *Seitei Katei*, 1: 360, 362.

²⁰⁸ “Letter from Dr. Matsumoto to General Whitney, dated 18 Feb 1946,” Takayanagi, *Seitei Katei*, 1: 362, 364.

²⁰⁹ See the Federalist Anti-Federalist debate. Bernard Bailyn, ed., *The Debate on the Constitution* (New York: Library of America, 1993).

²¹⁰ “Memorandum for the Record: Subject: “Supplementary Explanation of Proposed Constitution Revision” Presented by Mr. Shirasu,” Takayanagi, *Seitei Katei*, 1: 366-371. Whitney told Shirasu who submitted Matsumoto’s explanation that GHQ would not reconsider his draft. “The Supreme Commander is determined that the people of Japan shall have an opportunity to pass upon the constitution principles contained in the document transmitted by me the other day. This does not mean that minor variations, the better to adapt it to

make an easy compromise. On February 19, finally, Matsumoto for the first time explained the situation in the cabinet meeting. Minister of Education Abe Yoshishige criticized the manner in which Matsumoto had handled such a critical issue. Each cabinet member should have had enough chances to express his opinion and after full deliberation the cabinet should have made its own decision. Irie Toshio, who attended the cabinet meeting as Deputy Director General of the Cabinet Legislation Bureau, witnessed that many cabinet members were not satisfied with the secretiveness and privateness of Matsumoto's conduct.²¹¹

Prime Minister Shidehara at last took the lead and decided to see MacArthur by himself on February 21. The next day, Shidehara explained the meeting with MacArthur to the cabinet members. MacArthur's point was that constitutional revision along the GHQ draft would be necessary under the current international circumstances, which would secure the status of the *tenno* and that popular sovereignty and denunciation of war were two major principles of the draft. Matsumoto still persisted in his draft. Shidehara and some members were opportunistic enough to allege that there was no difference in essence between the American and Japanese plans. Abe was again critical of persistence in the private draft of Matsumoto and of the opinion that because the two drafts were considerably different, if the government framed a draft of constitutional revision following the American model, the cabinet would make a truly important decision for the *tenno* and the people. Eventually, the cabinet decided to accept the GHQ plan basically and to frame a draft that would be as japanized as possible.²¹² What most surprises us is that when they agreed to make a revised constitution based upon the GHQ plan, most cabinet members did not know the concrete contents of the GHQ draft Matsumoto and company were presented with on February 13 because

the understanding or requirements of the people, are not acceptable. The Supreme Commander, however, is insistent that the principles embodied in the draft constitution which I submitted must be maintained; therefore, unless I hear from the Cabinet within 48 hours that the principles of the constitution which I submitted are acceptable to the Cabinet, and will be sponsored by it before the people, the Supreme Commander will take the constitution to the people directly and make it a live issue in the forthcoming campaign in order that the people will have the opportunity to enact this constitution." *Ibid.*, 1: 368.

²¹¹ See Irie, *Keii*, 198-201.

²¹² See Irie, *Keii*, 201-203.

neither the American draft nor its translation was distributed to them.²¹³ We have to wonder how they could make a responsible decision on accepting the American model and even what they actually decided without precise knowledge something that was crucially important. Public deliberation had nothing to do with constitutional making for the governmental elite. A second defeat of the Japanese government was a necessary outcome of the lack of politics based upon public reason,²¹⁴ which forms the basis of the constitutional regime in a liberal democracy.

Matsumoto was still in charge of framing a Japanese draft modeled on the GHQ plan. On February 26, he asked Sato Tatsuo, chief of the first division of the cabinet legislation bureau, to join the work. Matsumoto and Sato alone engaged in preparing a revised constitution along the lines of the GHQ draft. They hastily carried forward the work of making a draft and finished anyway on March 2.²¹⁵ Here again secretiveness rather than open discussion was important. Work as a group was totally foreign to the governing elites. More importantly, through the work, they considerably modified the GHQ model.²¹⁶ For example, the preamble was completely excluded because the principle of popular sovereignty was believed to be inconsistent with Article 73 of the Meiji Constitution, which provided for the *tenno's* exclusive prerogative to amend the constitution.²¹⁷ But this was merely a superficial reason. The real reason resided elsewhere.²¹⁸ Matsumoto was so deeply captured by the *kokutai* ideology that he could not easily accept the principle of popular sovereignty. As an instrument of ruling the people, a declaration of ideals and values the people cherish seemed unnecessary in a constitution. Only technicality mattered. Such an attitude was shared by Shidehara, who also disliked declaring straightforwardly the principle of popular sovereignty. Article 1 was a crucially important provision in the revised constitution because the symbolic *tenno* institution would

²¹³ See Koseki, *Tanjyo*, 170-172.

²¹⁴ For the public reason, see John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993, 1996).

²¹⁵ For the full text of the March 2 Japanese draft, see Sato, *Seiritsushi*, 3: 93-104.

²¹⁶ For a comparison between the GHQ draft and the March 2 Japanese draft, see Hellegers, *We the Japanese People*, Appendix J, 2: 673-709.

²¹⁷ See "Setsumeisho (Explanation)," prepared by Matsumoto, in Sato, *Seiritsushi*, 3: 91-93, 93.

²¹⁸ Sato speculated that Matsumoto ignored the preamble due to his feelings. Sato Tatsuo, *Nihonkoku kenpo tanjyoki* (Tokyo: Chuokoron Shinsha, 1999, 1957), 46 (hereinafter cited as Sato, *Tanjyoki*).

be founded upon the principle of popular sovereignty. However, the Japanese draft intentionally used the ambiguous expression of “nihon kokumin shiko no soi (supreme will of the Japanese people)” instead of the phrase “sovereign will of the people”.²¹⁹

Protection of rights also was substantially changed in the March 2 Japanese draft. A subject of rights was changed from “person” in the GHQ draft to “all of the people” in the Japanese draft.²²⁰ Thus the latter would bring foreigners into a highly vulnerable position.²²¹ Preservation of law was also revived. Freedom of speech, which is the most pivotal right in liberal democracy and thus deserves full protection, should be guaranteed “to the extent that [speech, writing, publication, assembly and association] do not interfere with peace and order.” Although guaranteeing freedom of speech foremost means exemption from prior restraint, censorship should be allowed “in cases specially provided for by law.”²²² Sato explained the alternations saying that he worried that without reservation of law, protection of freedom of speech might be literally interpreted as license.²²³ Furthermore, socialization of land and other natural resources was discarded and instead, a more moderate version of the welfare state was declared.²²⁴

In this way, japanization of the GHQ draft was carried out at the possible maximum. GHQ carefully responded. On March 4, Matsumoto, Sato, and three other officials met the Government

²¹⁹ Shidehara proposed the expression “supreme will.” See Sato, *Seiritsushi*, 3: 74-75.

²²⁰ See Sato, *Seiritsushi*, 3: 77.

²²¹ Compare Article 13 of the GHQ draft with Article 13 of the Japanese draft. The former read: “All natural persons are equal before the law. No discrimination shall be authorized or tolerated in political, economic or social relations on account of race, creed, sex, social status, cast or national origin.” The latter read: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”

²²² See Article 20 of the March 2 Japanese draft.

²²³ See Sato, *Seiritsushi*, 3: 78.

²²⁴ Articles 27, 28 and 29 of the GHQ draft read: “The right to own property is inviolable, but property rights shall be defined by law, in conformity with the public welfare.” “The ultimate fee to the land and to all natural resources reposes in the State as the collective representative of the people. Land and other natural resources are subject to the right of the State to take them, upon just compensation therefore, for the purpose of securing and promoting the conservation, development, utilization and control thereof.” “Ownership of property imposes obligations. Its use shall be in the public good. Private property may be taken by the State for public use upon just compensation therefor.” Articles 35 and 36 of the Japanese Constitution read: “The right of every person to own property shall be inviolate. The substance and scope of the right to own property shall be prescribed by law to the extent that it does not conflict with the public welfare. Any measures necessary for the public welfare shall be provided for by law. However, just compensation must be given.” “The right to own property is accompanied by obligations. It shall be used for the public welfare.”

Section officers to write up the final draft. Kades told Sato that the final Japanese draft should revive the preamble, which the March 2 draft purposely omitted. Kades continued to criticize the March 2 draft for lacking important factors of the American model: The phrases “from no other source” and “such Imperial House Law as the Diet may enact”, which were significant in American thought, were missing in the Japanese draft.²²⁵ When the *tenno* performed some state functions, the Americans required the cabinet’s advice and consent for the solo basis of action of the *tenno*, but the Japanese draft omitted “consent”. GHQ feared that the *tenno* might be democratically uncontrolled once again in the revised constitutional system. Kades uncompromisingly attacked the change. Matsumoto aggressively responded that advice or consent did not matter, because once the advice of the cabinet was required, the *tenno*’s conduct was under the control of the cabinet and that first of all, the word consent (*kyosan*) was usually used for the Diet, not the cabinet.²²⁶ Both of them were excited, even enraged. Matsumoto was so annoyed that he lost his temper and left the table at two thirty in the afternoon. Irresponsibly enough, he walked out on his most important duty.²²⁷ Matsumoto was so profoundly infatuated by the *kokutai* ideology that he could not recognize his own objective mission.

Sato Tatsuo and three other Japanese, who mostly served as interpreters and organizers of documents, were left in the GHQ building and continued to negotiate with at least sixteen officers of the Government Section plus interpreters.²²⁸ Harsh negotiations lasted from 10:00 a.m. through 4:00 p.m. on the following day.²²⁹ With the Government Section officials, Sato worked on an article-by-article discussion of the draft prepared by the Japanese government. Sato by himself struggled for possible japanization.²³⁰ He failed for the most part but succeeded in some instances. The members

²²⁵ See Sato, *Seiritsushi*, 3: 105-107.

²²⁶ See Sato, *Seiritsushi*, 3: 107-109.

²²⁷ Koseki has characterized Matsumoto’s behavior as *gyokusai* (honorable death). See Koseki, *Tanjyo*, 191-194.

²²⁸ See Ward, “The Origins of the Present Japanese Constitution,” 1001-1002 n45.

²²⁹ The Government Section rushed to frame a final draft. Its staff and Sato spent thirty consecutive hours with few interruptions in finishing up the work. The image that Sato sat by himself surrounded by many American officials for such a long time has been one source of the imposed constitution theory. Nevertheless, Sato fought back impressively for the conservative cause of the Japanese government. Sato, *Seiritsushi*, 3: 110-174; Sato, *Tanjyoki*, 52-72.

²³⁰ Koseki has argued that japanization of the GHQ draft has worked to some extent. See Koseki Shoichi,

of the Government Section paid very close attention to the Japanese attempts to distort the spirit of the GHQ draft. They particularly feared that the idea of popular sovereignty would be diluted. They would not make an easy concession to the Japanese side on popular sovereignty and the symbolic *tenno* institution. They were also very skeptical about the Japanese way of protecting rights. Thus reservation of law was repudiated because of its possible abuses.²³¹ The Japanese government was required to follow strictly the American model concerning procedural rights of suspects and the accused because police power was consistently abused in prewar Japan.²³² For some reason, however, equal protection for foreigners vanished from the final draft.²³³ Because the current constitution provides that nationality is determined by law, not by the constitution,²³⁴ the omission of a clause of equality of foreigners has significantly reduced the value of equality.²³⁵ Socialization of land and other natural resources was also omitted.²³⁶ Sato later testified that while the Americans adopted a tough policy on the crucial issues, they often showed a cooperative attitude to try to frame a final draft together.²³⁷

Sato often confronted the Government Section staff by saying that phrases the Americans required the Japanese to adopt sounded so odd as Japanese that people might speculate the constitution had been imposed by foreigners.²³⁸ A member of the Government Section who did not participated in drafting the constitution writes about the ability of top Japanese legal bureaucrats:

It is true that in the negotiations the bungotai [literary] translation of the English draft which Government Section had prepared was used. What was most essential for the Americans as they undertook the work of approving the Japanese text of the

“Japanizing the Constitution,” 35 *Japan Quarterly* 234-240 (1988); Koseki, *Tanjo*, 173-191.

²³¹ See Sato, *Seiritsushi*, 3: 121.

²³² See Sato, *Seiritsushi*, 3: 125-128.

²³³ See Sato, *Seiritsushi*, 3: 118-119.

²³⁴ Article 10 of the Constitution of Japan reads that “The conditions necessary for being a Japanese national shall be determined by law.”

²³⁵ Before defeat in the war, Japan was an empire with colonies. The majority of foreigners who lived in Japan during the postwar constitution writing were former colonial subjects from Korea and Taiwan. Omission of equal protection for foreigners actually meant denial of equality for such Koreans and Taiwanese. Because the Japanese government has not taken the problem of protection of foreigners seriously, the legacy of injustice is still clearly visible in this area. See Koseki, “Japanizing the Constitution,” 235-236.

²³⁶ See Sato, *Seiritsushi*, 3: 124-125.

²³⁷ See Sato, *Seiritsushi*, 3: 150-151.

²³⁸ See Sato, *Seiritsushi*, 3: 117 n. 1.

Constitution was to be proficient in Japanese. In this kind of give and take the highly trained Japanese bureaucrats, even though few in number, were probably justified in thinking that they could easily outdo the many Nisei [second generation Japanese-Americans] interpreters and translators.²³⁹

Sato tried to write constitutional text as simply and briefly as possible.²⁴⁰ To him, the Meiji Constitution was a good model for drafting because it was indeed simple and brief. Simplicity and briefness gave wide room for legislation and interpretation. Sato's strategy served for the conservative cause among the governing elite. We can find here the traditional attitude of legal elite who preferred legal technicality to constitutional text itself. Constitutional text was once again trivialized.

On March 5, at last, the Shidehara cabinet decided to approve the draft of constitutional revision based upon the GHQ model.²⁴¹ At the cabinet meeting, Matsumoto explained the unexpectedly rapid development of things the day before and expressed regret that he should have presented the March 2 draft to the cabinet meeting to have open discussion.²⁴² But regret would not mend matters. It was too late to have any choice but to adopt the text as the official governmental plan. The Shidehara cabinet, who had been captivated by the *kokutai* ideology, had no thinking based upon principle. If the "imposition" of the fundamental law of the land matters, it is the Shidehara cabinet that we should first blame for causing it.

After it further modified the March 5 draft in minor points of wording as Japanese,²⁴³ the next day, the Japanese government published "the General Outline of the Draft Revision of the Constitution,"²⁴⁴ along with an Imperial Rescript dated March 5.²⁴⁵ To respond to the fear Shidehara,

²³⁹ Thomas A. Bisson, in Koseki, *Birth*, 122.

²⁴⁰ See Koseki, *Tanjo*, 191.

²⁴¹ For the full text of the March 5 draft, see Sato, *Seiritsushi*, 3: 163-174.

²⁴² See Irie, *Keii*, 214.

²⁴³ Precisely, the alternations were not all minor. As mentioned above, equal protection for foreigners was finally omitted in the March 6 outline. See Sato, *Seiritsushi*, 3: 176, 179-180; Irie, *Keii*, 218-219.

²⁴⁴ For the full text of the general outline, see Sato, *Seiritsushi*, 3: 188-199.

²⁴⁵ For the full text in Japanese, see Sato, *Seiritsushi*, 3: 200. The English text was as follows: "Consequent upon our acceptance of the Potsdam Declaration the ultimate form of Japanese government is to be determined by the freely expressed will of the Japanese people. I am fully aware of our nation's strong consciousness of

Matsumoto, and others expressed on the deep inconsistency between the Meiji Constitution based upon *tenno* sovereignty and the proposed general outline of the revised constitution declaring popular sovereignty, Irie proposed a form that the *tenno* who was almighty under the current regime would issue an imperial rescript to the effect that he would delegate his constituting power to the people by announcing his endorsement as an imperial rescript.²⁴⁶ This meant that, formally, the establishment of the Constitution of Japan was based upon the procedure provided for in the Meiji Constitution. Article 73 of the Meiji Constitution required that in amending the constitution, the *tenno* might exclusively assume the initiative right and that the amendment project must be submitted to the Imperial Diet by “Imperial Order.” The members of the Government Section believed that legal continuity in form was crucially important, because they could not confidently conclude that framing a completely new constitution during military occupation would not be considered improper interference in violation of the Hague Convention of Land Warfare.²⁴⁷ To retain the *tenno* system, there were no other feasible options available to Japanese government. This apparent continuity in legal form and discontinuity in substance have been a serious problem for a democratic point of view. GHQ and the conservative Japanese government jointly deprived the people of a precious opportunity to express themselves as sovereign.

Meanwhile, newspapers had reported that the work of the Matsumoto Committee had come to a deadlock because of serious disagreement over approaches to revision among cabinet

justice, its aspirations to live a peaceful life and promote cultural enlightenment and its firm resolve to renounce war and to foster friendship with all the countries of the world. It is, therefore, my desire that the Constitution of our empire be revised drastically upon the basis of the general will of the people and the principle of respect for the fundamental human rights. I command hereby the competent authorities of my government to put forth in conformity with my wish their best efforts toward the accomplishment of this end.” “Emperor Hirohito’s endorsement (3/5/46) Imperial Rescript,” in RM228.

²⁴⁶ See Irie, *Keii*, 215-217. On February 26, in fact, Whitney suggested to Matsumoto an imperial rescript as a liaison for the gap between the two documents. See Sato, *Seiritsushi*, 3: 62. Irie, who attended the cabinet meeting as deputy chief of the cabinet legislation bureau, independently proposed using an imperial rescript because Matsumoto never mentioned Whitney’s suggestion.

²⁴⁷ See Koseki, *Tanjo*, 148-151. Article 43 of the Hague Convention reads: “The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” For the discussions on the Hague Convention of Land Warfare, see Ashibe Nobuyoshi, *Kenpo seitei kenkyoku (The Power to Create a Constitution)* (Tokyo: Tokyo Daigaku Shuppankai, 1983), 160-162.

members.²⁴⁸ On March 6, in fact, the *Mainichi Shinbun* carried an article speculating that the Matsumoto private draft would be completely changed.²⁴⁹ The next day, suddenly, newspapers covered the general outline of constitutional revision with the statements of Shidehara and MacArthur. Shidehara told the people that the *tenno* “has with firm resolve indicated clearly that we should establish a solid foundation for the building of a democratic and peaceful nation by undertaking fundamental revision of the present Constitution” and that “[i]n order for the Japanese people to occupy a place of honor in human society, we must look forward to establishing the foundations of basic democratic politics within the country and to taking the initiative toward the destruction of war in the whole world.” and that “[t]he Government is publishing the principal points of the draft revised Constitution in close liaison with the Supreme Commander of the Allied Powers.”²⁵⁰ MacArthur “with a sense of deep satisfaction” endorsed the draft of constitutional draft the Japanese government announced.²⁵¹

Most of the Japanese people must have been surprised when they learned that the governmental draft declared the principle of popular sovereignty. From media reports that repeated the conservative attitude of Matsumoto, they had assumed that the core of the Meiji Constitution would be untouched. The government draft was a far more democratic and liberal text than the Matsumoto draft revealed on February 1. Because GHQ had censored all mention of its involvement in making the draft of the new constitution, the Japanese people could not understand exactly what was going on about the government draft. At the same time, most Japanese people were generally in favor of the government draft. The editorial of the *Tokyo Shinbun* on March 8 well expressed such a

²⁴⁸ See e.g., “Seifu no kenpo kaiseian jyudai annsho ni noriagu (The Government Draft of Constitutional Revision Ran on Grave Rocks),” *Nihon Kezai Shinbun*, article, March 1, 1946 in *Shoron shuroku*, 208; “Kenpo kaisei mondai Kakunai iken tairitsu (A Conflict of Opinions in the Cabinet over Constitutional Revision),” article, *Mainichi Shinbun*, March 3, 1946 in *Shoron Shuroku*, 209-210.

²⁴⁹ “Matsumotoan konponteki ni kaihen ka (Will be the Matsumoto Draft Drastically Changed?),” *Mainichi Shinbun*, article, March 6, 1946 in *Shoron Shuroku*, 213.

²⁵⁰ Prime Minister Shidehara’s statement on March 6 draft (3/6/46) in RM229.

²⁵¹ See “Ma gensui seimeisho wo hapyo (General MacArthur Announced a Statement),” *Mainichi Shinbun*, article, March 7, 1946 in *Shoron Shuroku*, 214-215. For the English text of his statement, see Endorsement by General MacArthur (3/6/46) SCAP in RM226.

popular sentiment when it said that the government draft had unexpectedly made a rapid and marvelous change from the Four Matsumoto Principles to the symbolic *tenno* system, that popular sovereignty and denunciation of war were landmark principles and that because the people now had a decisive voice, democratization of society should be developed along the basic points of the government draft.²⁵² Other newspapers carried editorials of more or less the same opinion.²⁵³ Some of them clearly pointed out the essence of the work: establishment of a new constitution rather than revision of the Meiji Constitution.²⁵⁴

Further, political parties basically welcomed the government plan. The Progressive Party and Liberal Party as conservatives, who published constitutional revision drafts based upon the idea of one line unbroken for ages eternal, favored the symbolic *tenno* institution because the direct governance of the *tenno* was the exception, not the rule, in Japanese history, and the government draft was consistent with historical reality (the Progressive Party) or because the principles of the government draft of the retention of the *tenno* system, respect for fundamental rights and adoption of thorough democracy, and denunciation of war and building peace state completely coincided with the revision plan of the Liberal Party.²⁵⁵ Although it welcomed the government plan in general, the Socialist Party was more critical than the conservatives because it proposed a more formalistic *tenno* system only with ritualistic functions than the symbolic *tenno* system of the government draft in which the *tenno* would perform some state functions. The Socialists agreed to a progressive tendency

²⁵² “Seifu no kenpo kaisei soan yoko naru (The Government Has Made Its General Outline of Draft of Constitutional Revision),” *Tokyo Shinbun*, editorial, March 8, 1946 in *Shoron Shuroku*, 218-219.

²⁵³ “Kenpo soan to sekai heiwa (The Constitutional Draft and World Peace),” *Asahi Shinbun*, editorial, March 8, 1946 in *Shoron Shuroku*, 215-216; “Minshu kenpo to shindotoku (The Democratic Constitution and New Morality),” *Mainichi Shinbun*, editorial, March 8, 1946 in *ibid.*, 217-218; “Minshushugi heiwa kokka no koso (A Conception of Democratic Peace State),” *Nihon Keizai Shinbun*, editorial, March 8, 1946 in *ibid.*, 219-220; “Jinmin no kenpo seitei (The People Establish the Constitution),” *Yomiuri Hochi Shinbun*, editorial, March 8, 1946 in *ibid.*, 221-222.

²⁵⁴ “Minshushugi heiwa kokka no koso,” *Nihon Keizai Shinbun*, editorial, March 8, 1946, in *Shoron Shuroku*, 219-220, 220. See also, Tsuneto Kyo, “Tenno no shochoteki chii nitsuite,” *Shinkenpo to minshushugi (The New Constitution and Democracy)* (Tokyo: Iwanami Shoten, 1947), 3-4; Minobe Tatsukichi, *Kihongenri*, 15-16; Minobe, *Genron*, 116-119; Kawamura Matasuke, *Shinkenpo to minshushugi (The New Constitution and Democracy)* (Tokyo: Kunitachi Shoin, 1948), 78.

²⁵⁵ See “Jijitsu ni sokushita kaisei---Shipoto (Revision Based upon the Fact---The Progressive Party),” “Jyakkan no shusei wo yosu---Jiyuto (Some Amendments Needed--- The Liberal Party),” *Asahi Shinbun*, article, March 8, 1946 in Sato, *Seiritsushi*, 3: 204-205.

of the government draft, which was similarly shown by their own draft of constitutional revision, but criticized it for too many prerogatives of the *tenno*.²⁵⁶ The Communist Party was only against the draft because it retained the *tenno* system, which they believed was the prop of the feudalistic, militaristic, and bureaucratic reactionaries and would prevent popular sovereignty from developing in postwar Japan.²⁵⁷

Intellectuals also expressed their basic support of the government draft. Royama Masamichi, a professor of public administration at the Tokyo Imperial University, pointed out as features of the draft precise provisions of rights of the people without reservation of laws, which would be highly educational for enhancing self-consciousness to protection of rights and establishment of a government responsible to the people. He continued to argue that democratic revolution would be carried out at least along the governmental plan.²⁵⁸ Kohno Mitsu, an executive committeeman of the Socialist Party, personally talked with a reporter of the *Tokyo Shinbun* about the progressiveness of the draft. However, he criticized the way of framing it as lacking public deliberation. He then proposed further democratization of the draft: succession to the throne by the consent of the Diet, immediate abolition of the peerage, and occupational representatives in the House of Councilors. He concluded his talk with saying that people's enlightened commitment to democracy would be necessary for success in the drafted constitution.²⁵⁹ Takano Iwasaburo, the chief of the *Kenpo Kenkyukai* (Constitutional Research Group) and presenter of a republican constitutional plan, also welcomed the government draft. But he believed that the draft was an outcome of GHQ's favor for peaceful and democratic reconstruction of Japan and that to reward the favor, he had to express constructive criticism on the draft. He proposed that the second, third, and

²⁵⁶ "Osugiru taiken jiko--Shinpoteki keiko ni sansei--Shakaito (Too many prerogative items--Agree to Its Progressive Tendency--The Socialist Party)," *Asahi Shinbun*, article, March 8, 1946 in Sato, *Seirtushi*, 3: 205.

²⁵⁷ See "Kenpo soan togi to haichi (The Constitutional Draft Conflicts with the Party Decision)," *Asahi Shinbun*, article, March 8, 1946 in *Shoron Shuroku*, 228-230.

²⁵⁸ See Royama Masamichi, "Hokenteki zanshi isso (Sweeping away Feudalistic Vestiges)," *Mainichi Shinbun*, March 8, 1946 in *Shoron Shuroku*, 225-226.

²⁵⁹ See Kono Hisoka, "Minkangawa yori shinpoteki daga ikanna 'himitsushituan' (The Government Draft Is More Progressive Than Private Plans, but 'a Plan That Came from the Closed Door Meeting')," *Tokyo Shinbun*, March 8, 1946 in *Shoron Shuroku*, 226-227.

fourth paragraphs of the preamble should be moved to article 1 and that this new article would be the people's pledge. The *tenno* should hold the throne with the consent of the Diet and have no function in dissolving the House of Representatives. Protection of rights should include the right to payment and to a life of a cultural standard. Peerage should be immediately abolished. He then took a pragmatic approach to constitutional problems. Because if a constitution was everlasting, various difficulties would necessarily occur, a provision should be included in the constitution that a new constitution would be established by referendum in ten years after its promulgation. As a framing procedure, further, a constitutional committee would consider the draft and then submit its conclusion to the Diet. Takano here again showed strong commitment to the democratic principle.²⁶⁰

As a whole an interesting situation emerged when people faced the government draft of constitutional revision: while parties who clung to the *kokutai* ideology somehow easily came to support the government draft, those who tried to conceive a new nation as more or less independent of a line unbroken for ages eternal were skeptical about the symbolic *tenno* system because there would be some room for manipulation.²⁶¹ More interestingly, this situation would turn around after Japan recovered its independence from the occupation. While the conservatives, who welcomed the government draft, have come to attack the basic principles of the postwar constitution, the progressives, who were critical of the proposed revision of the government, have become defenders of its liberal democratic values.

It is true that the media was under censorship by GHQ and that GHQ eliminated the nationalistic and right-wing reactionary arguments and open criticisms of GHQ from the public flow of information on constitutional writing.²⁶² Thus there were many opportunistic and sycophantic

²⁶⁰ See Takano Iwasaburo, "Daiichini 'kokumin sensei' (At First, the People's Pledge)," *Mainichi Shinbun*, March 8, 1948 in *Shoron Shuroku*, 227-228.

²⁶¹ See Koseki, *Tanjyo*, 208.

²⁶² For the censorship of the Civil Censorship Detachment of GHQ and the situation of Japanese media in the occupation period, see Yamamoto Taketoshi, *Senryoki media bunseki (An Analysis of Media during the Occupation Period)* (Tokyo: Hosei Daigaku Shuppanyoku, 1996); Ariyama Teruo, *Senryoki mediashi kenkyu: Jiyu to tosei-1945nen (A Study of History of Media during the Occupation Period: Freedom and Control the Year of 1945)* (Tokyo: Kashiwa Shobo, 1996). See Eto Jun, *Tozasareta gengokukan: Senryogun no kenetsu to Sengo nihon (The Sealed*

statements on the government draft. However, it is also true that many Japanese people were actually in favor of the text of the new constitution. They “had suffered from the arbitrary rule of the military, the police, and the bureaucracy”²⁶³ and saw their bright future with the proposed constitution of popular sovereignty and denunciation of war. To them, in fact, “[t]he new constitution symbolized a break with an oppressive past.”²⁶⁴

5. The First Public Debate: Constituting a New Political Order

An unprecedented feature of the postwar constitution is the manner of its establishment. This constitution is an outcome of public deliberation. The Meiji Constitution was established after only a few officials secretly prepared a draft.²⁶⁵ The merciful *tenno* granted to his subjects the fundamental law as a benefit. There was no public discussion between the government elite and private citizens on what was the goal of the government, which type of governmental system would properly work to attain the goal, or whatever the public welfare meant. Japanese people failed to constitute a state structure because they were not entitled to participate in state affairs as active citizens. They could play only a subordinate role in a field the *tenno* had delineated. The very framework was a *fait accompli* and far beyond their control. If a person discussed the governmental system openly, he or she was accused of a violation of the *Chian Iji Ho* (the Peace Preservation Law). Although it had an article on its amendment,²⁶⁶ open discussion about its amendability had never occurred because the Meiji Constitution was taught and indeed believed to be the immortal great code. The Meiji Constitution was, from the beginning to the end, a benefit granted by the benevolent *tenno*. There was no room whatsoever for self-determination by the people. Public deliberation was

Linguistic Space: The Censorship of the Occupation Forces and Postwar Japan (Tokyo: Bungei Shunjuu, 1989, 1994) (this has accused the United States of imposing its values upon Japan by using censorship but has been criticized by the previous two books).

²⁶³ Tanaka Hideo, “The Conflict between Two Legal Traditions in Making the Constitution of Japan,” Sakamoto & Ward, *Democratizing Japan*, 125.

²⁶⁴ Tanaka, “The Conflict between Two Legal Traditions in Making the Constitution of Japan,” *Democratizing Japan*, 126.

²⁶⁵ See Chapter 1 section 2.

²⁶⁶ See the Constitution of the Empire of Japan, art. 73.

thus excluded from its constitutional grand framework.

As discussed above,²⁶⁷ private groups and political parties presented their own proposals for constitutional reform. Although Matsumoto and company never tried to listen to what outsiders of power said, some of these private drafts had a great influence upon GHQ's draft. The most important one was made by the *Kenpo Kenkyukai* (the Constitutional Research Group).²⁶⁸ Based upon the idea of popular sovereignty, in their draft, the *tenno* was deprived of any political power and was intended to play only a ritualistic role as the head of the state. The draft also placed special emphasis upon unconditional and detailed provisions of classical human rights, particularly academic freedom and freedom of speech and religion, together with newly recognized welfare rights. Among other important proposals for constitutional reform were: *Nihon Kyowakoku Kenpo Shian Yoko* (the Gist of a Private Draft of the Constitution of the Republic of Japan) by Takano himself; the draft following the English model of the *tenno-in-the-Diet* with judicial review by *Kenpo Kondankai*; the Socialist Party's draft that provided that the *tenno* performed only ceremonial functions and for welfare rights.

Although exogenous factors were critically important, the postwar constitution is a product of interaction of the governing elites and private citizens. When the Matsumoto Committee prepared its draft, surely, there was no official interaction between the government and private citizens because Matsumoto and his colleagues clung to the *kokutai* ideology and would not listen to the outsiders.²⁶⁹ However, after the government was presented the GHQ draft, we can say that there was indirect interaction through GHQ intervention because the GHQ draft was, as discussed above, more or less influenced by the private Japanese ideas. This is critically different from the process of

²⁶⁷ See this Chapter section 2.

²⁶⁸ Charles Kades, Deputy Chief of the Government Section, GHQ, bears witness that "Japanese sources were most useful" in making the GHQ's draft. He mentions particularly two groups named *Kenpo Kenkyukai* (the Constitutional Research Group) headed by Takano Iwasaburo and *Kenpo Kondankai* (the Constitution Discussion Group) by Ozaki Yukio, who had been a liberal representative from the first general election. Kades, "The American Role in Revising Japan's Imperial Constitution," 227, 219 -220. For the details of the draft of the *Kenpo Kenkyukai* and its influence upon GHQ's work, see this Chapter sections 2 & 3.

²⁶⁹ For the work and failure of the Matsumoto Committee, see Chapter 2 sections 4 & 5.

making the Meiji Constitution, which is regarded as a determinedly negative reaction to exaltation of constitutional consciousness among private citizens in the *Jiyu Minken Undo* (the Movement for People's Rights to Participate in Politics and Civil Liberties).²⁷⁰

Furthermore, this interaction became more direct when a general election of the House of Representatives was held during the governmental preparation of a constitutional draft based upon the GHQ model and the government draft was submitted to the Diet to deliberate on it. We can say, therefore, that the postwar constitution was established as a result of public deliberation among the people, although it is also necessary to say that public deliberation existed within the limits of the occupational policy. After all, Japan had lost her independence after the defeat.

In December 1945, the election law was revised to expand suffrage to men and women who were twenty years old or older.²⁷¹ The number of eligible voters had enormously increased from 14,594,287 (20.4% of the total population) in 1942 to 36,878,417(51.2%) in 1946.²⁷² This was a part of MacArthur's reform policy for liberal democracy.²⁷³ Another crucial policy that came from GHQ was a purge of people who were undesirable for democratic politics from public office.²⁷⁴ Ultra-

²⁷⁰ See Chapter 1 section 2.

²⁷¹ At the establishment of the Law of Election of the Members of the House of Representatives in 1889, suffrage was limited to men who were 25 years old or over and paid direct taxes to the amount of not less than fifteen yen. In 1900, the tax requirement was relaxed to paying a land tax of ten yen and upward for over one year, or a direct tax other than the land tax of ten yen and upward per year, or a tax of ten yen per year consisting of land and other direct national tax for over two years. In 1919, the tax requirement was further relaxed to paying any kind of direct national tax to the amount of not less than three yen. In 1925, the tax requirement was abolished and universal manhood suffrage was established. For the history of election law, see Soma Masao, *Nihon senkyo seidoshi (A History of Japanese Electoral Systems)* (Fukuoka: Kyushu Daigaku Shuppankai, 1986), 13-40. For the postwar reform of election law, see *ibid.*, 201-222.

²⁷² See Ishikawa Masumi, *Detu Sengo Seijishi* (Tokyo: Iwanami Shoten, 1984), 3-4.

²⁷³ MacArthur's directive of five fundamental reforms, October 11, 1945. See RM041.

²⁷⁴ The following categories of people were targets of the purge: "Active exponents of militaristic nationalism and aggression", "Influential members of any Japanese ultranationalistic, terroristic, or secret patriotic society, its agencies or affiliates" or "Influential in the activities of the Imperial Rule Assistance Association, the Imperial Rule Assistance Political Society or the Political Association of Great Japan, as those terms are defined in Appendix A to this directive." SCAPIN 550---"Removal and Exclusion of Undesirable Personnel from Public Office," January 4, 1946 in RM051. See also, "Abolition of anti-democratic associations (SCAPIN 548) (1/4/46) SCAP to Japanese government" in RM052. According to the list in the appendix, 27 organizations were targets of abolition.

There was a severe controversy over the purge between the Government Section, which wanted to realize a thorough democratized political process in postwar Japan and G2, which emphasized maintenance of conservative political order. MacArthur supported the GS plan. See Mark Gayn, *Nippon Nikki (Japan Diary)*, translated by Imoto Takeo (Tokyo: Chikuma Shobo, 1963, 1998), 74-78. The controversy became more severe

nationalist and militarist leaders were excluded from the front stage of politics. Without any doubt, the purge gave the democratic forces a good advantage over reactionary groups. The Progressive Party most seriously suffered from the purge. 260 people out of 274 members at the party formation were removed from public office. The Liberal Party had 30 purged members of its first 43 members; the Socialist Party 10 of 17; and the *Kyodoto* (the Cooperation Party) 21 of 23.²⁷⁵ Because the Socialists suffered least from the purge, it was said that they might become the leading party after the forthcoming general election.²⁷⁶ The exogenous element once again worked in favor of the democratized political process. The purge brought to Japanese political parties drastic change in leadership at least during the occupation period.²⁷⁷ It marked a new beginning of a political party system in postwar Japan.

Following the new law, the first postwar general election was held on April 10, 1946. The election had revolutionary new trends: A dramatic expansion of eligible voters, the first women candidacy in history (79 women candidates; 2.85% of the total candidates 2770), virtual monopoly of first-time candidacy (2624 first-time candidates; 95%), and a small party explosion (363 parties). Voters' interest in the election was keener than people had expected.²⁷⁸ Voting rate reached 72.1 percent. No parties won a majority in the election. The Liberal Party gained 141 seats (30.3% of the total 466 seats and 24.4 % share of votes) and took a lead; the Progressive Party: 94 seats (20.2%, 18.7%); the Socialist Party: 93 seats (20.0%, 17.9%); the Cooperation Party: 14 seats (3.0%, 3.2%); the Communist Party: 5 seats (1.1%, 3.8%); other small parties 38 seats (8.2%, 11.7%); and

later when "red menace" seemed realized. For the purge, Fukunaga Fumio, *Senryoka Chudo Seiken no Keisei to Hokai (The Formation and Collapse of Centrist Administrations during the Occupation)* (Tokyo: Iwanami Shoten, 1997), 48-52 (hereinafter cited as Fukunaga, *Keisei to Hokai*); Masuda Hiroshi, *Koshoku Tsuiho (The Three Major Political Purges in Occupied Japan)* (Tokyo: Tokyodaigaku Shuppankai, 1996), Masuda Hiroshi, *Koshoku Tsuihoron (On Political Purges)* (Tokyo: Iwanami Shoten, 1998).

²⁷⁵ See Fukunaga, *Keisei to Hokai*, 51.

²⁷⁶ *Asahi Shinbun*, January 5, 1946 and February 10, 1946 in Sato, *Seiritsushi*, 2: 954-955.

²⁷⁷ See Uchida Kenzo, "Japan's Postwar Conservative Parties," Ward & Sakamoto, *Democratizing Japan*, 306-338; Takemae Eiji, "Early Postwar Reformist Parties," *ibid.*, 339-365.

²⁷⁸ The *Asahi Shinbun* reported that there was a good turnout in the balloting and that the turnout of women who had voting rights for the first time was particularly impressive. *Asahi Shinbun*, Article, April 11, 1946 in Fukunaga, *Keisei to Hokai*, 68.

independents: 80 (17.2%, 20.4%).²⁷⁹ The *Asahi Shinbun* analyzed the result of the first general election and pointed out that the abstention rate was very low, that 39 women were elected,²⁸⁰ that though conservatives were still powerful, as expected, the democratic forces steadily gained seats, and that while objective conditions of democratic revolution seemed to be satisfactory, subjective conditions were not ripe yet because of sluggish growth of socialists and communists.²⁸¹ MacArthur welcomed the results of the election to express his satisfaction that the Japanese people had chosen to take a balanced center course.²⁸² Although it was surely a salient fact that the Socialists gained more than quintuple seats, it was also undoubtedly true that conservatives dominated the House of Representatives. After a long power struggle, the Shidehara cabinet, which had no foundation of political party, resigned on April 22 and Yoshida Shigeru was appointed prime minister and finally formed a Liberal and Progressive Parties coalition cabinet on May 22.

The April 10 general election was held a week before the final governmental draft of the Constitution of Japan was completed and published. In the general election, thus, candidates argued about constitutional issues the General Outline of Draft Revision of the Constitution of March 6 had raised. As discussed above,²⁸³ political parties prepared their own plans of constitutional revision: The Progressive Party retained the principle of direct governance on the part of the *tenno*; The Liberal Party supported the *tenno* system but argued for a theory of state sovereignty; the Cooperation Party also maintained the *tenno* system but proposed a democratized system of joint governance of the *tenno* and the people in which the *tenno* would have veto power; The Socialist

²⁷⁹ See Ishikawa, *Sengo Seijishi*, 115; Fukunaga, *Keisei to Hokai*, 68 table 3.

²⁸⁰ So far, 39 has been the largest number of seats that women won in a general election. Even in the most recent general election of 2000, only 35 women were elected as representatives.

²⁸¹ *Asahi Shinbun*, April 14, 1946 in Fukunaga, *Keisei to Hokai*, 69.

²⁸² MacArthur wrote: "It was Lincoln who said the people are wiser than their rulers. The soundness of this statement is historically evident, and the Japanese people provide no exception. Given the opportunity for free expression of their popular will, they responded whole-heartedly and, rejecting leadership dedicated to the political philosophies of the two extremes both of the right and of the left, which experience has shown in practice inevitably lead to the result of regimentation of the masses and the suppression of human liberty, they took a wide central course which will permit the evolvement of a balanced program of government designed best to serve their interests as able people." Statement by General MacArthur on Election Results, April 25, 1946, *Political Reorientation of Japan*, 2: 719-720 in RM291.

²⁸³ See this Chapter section 2.

Party argued for a ritualistic *tenno* system, the idea of state sovereignty, and a parliamentary cabinet system responsible to the people; The Communist Party adopted a plan of the overthrow of the *tenno* system and of the republican form of government.²⁸⁴

In campaign, the General Outline of the Draft of Constitutional Revision itself did not necessarily occupy the center of debate. As a general trend, candidates did not mention the outline in their campaign bulletin. Only 17.4 percent of candidates argued over the governmental draft of constitutional revision.²⁸⁵ It was true that food rather than a constitution was the most serious concern for most common citizens because they severely suffered from starvation at that time. Constitutional revision seemed a secondary issue. However, 78.5 percent of candidates discussed the *tenno* institution.²⁸⁶ While an overwhelming majority of candidates argued for any kind of a *tenno* system, on the one hand, the principle of direct governance on the part of the *tenno* the Meiji Constitution had provided was supported by only 1.1 percent of candidates. On the other hand, 4.7 percent of candidates did deny the *tenno* institution.²⁸⁷ There is no dispute that the number was extremely small. However, quantity was not a real issue at that time. Rather, the very fact was of critical importance that candidates publicly argued for and against the governmental proposal of constitutional revision in the electoral campaign. Someone could openly denounce the authority of the *tenno* and energetically argue for the republican form of government in the electoral process. People who now were guaranteed the right to determine their own future as a whole did hear that a few candidates proposed abolition of the *tenno* system. Not only did a small number of them vote for the candidates but five candidates were also elected as representatives. Such a phenomenon was truly unprecedented.

Thus, the first general election in the postwar era created a unique space of public

²⁸⁴ See Fukunaga, *Keisei to Hokai*, 64.

²⁸⁵ Because of the lack of data available, this was merely random sampling. Thus we can see only a general trend. See Kenpo Seitei no Keika ni kansuru Shoiinkai ed., *Nihonkoku Kenpo Seitei no Yurai* (Tokyo: Jiji Tsushinsha, 1961), 371.

²⁸⁶ *Nihonkoku Kenpo Seitei no Yurai*, 371.

²⁸⁷ *Nihonkoku Kenpo Seitei no Yurai*, 372.

deliberation on constituting the fundamental principles of the nation. As a result of the general election, along with traditional conservatives, women and leftists were able to garner seats in the virtually final Imperial Diet,²⁸⁸ which turned out to be a constitutional convention. Public discussion on the constitutional draft by representatives of the people was also unprecedentedly new in Japanese history. The ninetieth Imperial Diet was convened on May 16, and sat on June 20, when the Japanese government presented the Draft Revision of the Constitution to the House of Representatives.²⁸⁹

On June 21, MacArthur issued a statement on the submission of the government draft of constitutional revision to the Imperial Diet. In the statement, he clarified three principles of constitutional deliberation. (1) Adequate time and opportunity should be allowed for the full discussion and consideration of the terms of the fundamental law; (2) the procedure followed should assure complete legal continuity with the Meiji Constitution now existing; and (3) the manner of adoption of the fundamental law should demonstrate that it affirmatively expresses the free will of

²⁸⁸ The Imperial Diet had ninety-two sessions before it was replaced with the Diet under the postwar constitution. The ninety-first and ninety-second sessions were more formal and less important than the ninetieth session.

²⁸⁹ Before submission to the Imperial Diet, the Privy Council reviewed the government draft according to the procedure of amending the Meiji Constitution. By rule, the Council deliberated behind closed doors. On March 20, Prime Minister Shidehara in a plenary session of the Privy Council explained the process of preparing the government draft with close contact with the Government Section because the government failed to meet a customary practice that a government draft would be published only after the Council reviewed it. On April 17, the government officially submitted the draft to the Council. On May 15, the examination committee of the Council finished its task. In response to outcomes of the committee's review, the government worked on minor revisions of the draft and then submitted the revised draft to the Council again on May 29. Yoshida Shigeru the newly appointed prime minister explained the general stance of the draft. On June 8, a plenary session of the Council was held in the presence of the tenno. Ushio, the chairman of the examination committee, explained the outcomes of the committee's 11 meetings. A few statements were made before Prince Takahito expressed his opinion about constitutional revision. A statement from the *tenno* family was indeed exceptional. He said that he was generally in favor of the draft but that the text gave him "a strong impression of being a translated constitution", that the constitution and the imperial house law should have not been treated separately, that Article 73 of the Meiji Constitution should have been amended first, that he would not oppose the draft nor approve it, and that he would be allowed to abstain from voting. After the prince withdrew, the president of the Council took a vote. All members but councilor Minobe Tatsukichi stood up for approval. For the details on deliberation in the Privy Council, see Irie, *Keii*, 320-342; Sato, *Seiritushi*, 3: 374-446; Moore & Robinson, *Partners for Democracy*, 165-174. For the translated notes of the meetings of the Privy Council, see RM287, RM288, RM293, RM295, RM296, RM298, RM299, RM300, RM304, RM305, and RM306.

the Japanese people.²⁹⁰ His statement emphasized that much public discussion had been done so far on constitutional revision in political parties, private groups, and the media as well as in the government and that it was “for the people of Japan, acting through their duly elected representatives, to determine its form and content, whether it be adopted, modified, or rejected.”²⁹¹ Actually, this statement was MacArthur’s concession to the Far Eastern Commission and the State Department, both of which were not informed beforehand of anything about the draft of constitutional revision of the Japanese government. The FEC and the State Department did not believe that the draft was adopted in a democratic enough way to satisfy the conditions of the Potsdam Declaration. The FEC even questioned MacArthur’s jurisdiction over constitutional revision. FEC thus requested MacArthur to postpone the general election and guarantee the Japanese people adequate chances to discuss the draft of the revised constitution. MacArthur’s three principles were virtually the same as those which the FEC requested from MacArthur through the U.S. government on May 13.²⁹² By his June 21 statement, MacArthur finally ceased to challenge other authorities and showed compromise.²⁹³ His concession was critical for the democratic cause because duly elected representatives in the Diet could have adequate opportunities to discuss the draft and even change it. Now public deliberation on the new constitution would be guaranteed to the Japanese people.

Kanamori Tokujiro was appointed the minister of state in charge of constitutional revision problems on June 19. Kanamori, a former chief of the cabinet legislation bureau, was also a constitutional theorist. He was forced to resign in 1936 because his theory was based upon the *tenno* organ theory, which was outrageously the target of the fanatic militaristic movement.²⁹⁴ When the

²⁹⁰ *Asahi Shinbun*, June 22, 1946 in Sato, *Seiritsushi*, 4: 495-497. For the English version, see General MacArthur’s Statement on Submission of Draft to Diet, *Political Reorientation of Japan*, 2: 660 in RM313.

²⁹¹ RM313 par. 3.

²⁹² See “Shinkenpo saitaku no sangensoku (Three Principles of Adopting the New Constitution),” article, *Mainichi Shinbun*, May 15, 1946 in *Shoron Shuroku*, 308.

²⁹³ For the conflict between MacArthur and FEC, State Department, and War Department, see Koseki, *Tanjyo*, 223-230, 233-254; Moore & Robinson, *Partners for Democracy*, 142-154.

²⁹⁴ For the *tenno* organ theory incident, see Chapter 1 section 8.

war ended, being without any public office, he worked in the fields in fine weather and read at home in wet weather. As the minister of state, Kanamori replied to interpellations and comments 1365 times in the Diet and his longest reply lasted for one hour and a half.²⁹⁵ He gave full play to his versatility when he stood to explain the draft of the revised constitution in the Diet. He eloquently defended the government position mostly for the conservative cause.

On June 21, Prime Minister Yoshida Shigeru delivered a speech on general policy in both houses. Although Yoshida only mentioned introduction of the draft bill of the new constitution in his policy speech, interpellations raised important issues over the amenability of the draft bill, the desirability of a popularly elected convention style and the status of the *tenno*. In response, Yoshida expressed the government's intention of drafting a new constitution: "The reason I would like to offer a word of caution here is that we have not presented this bill for the revision of the Constitution merely from the perspective of the Constitution as the nation's supreme law. At this moment of defeat in war, we have presented the bill having fully in mind the questions of how the nation can be saved and how the safety of the Imperial House can be assured."²⁹⁶ For conservatives, the Constitution of Japan was regarded as a guarantor of the safety of the *tenno* family.

On June 25, debates on the draft bill began in the House of Representatives. Yoshida explained the reason why the government had submitted the bill of revising the constitution. He at first pointed out the necessity of executing the terms of the Potsdam Declaration and then clarified the general trend of the proposed constitution as follows:

The draft Constitution is built upon the principle of "Sovereignty of the people's will", under which all the organs of state are to be inaugurated, fundamental human rights respected, the blessings of liberty secured, and the foundation of a democratic government laid down for all time. Moreover, the new constitution renounces war, which is unprecedented in the history of the world. The supreme law of the land will thus exemplify the ideals of mankind for freedom and peace, which are spoken of in the Preamble.²⁹⁷

²⁹⁵ See Irie Toshio et al., "Afterword," Kanamori Tokujiro, *Kenpo Igen* (A Constitutional Will) (Tokyo: Gakuyo Shobo, 1959), 221.

²⁹⁶ See Sato, *Seiritsushi*, 4: 502. For translation, see Koseki, *Birth*, 166 (translated by Moore).

²⁹⁷ Sato, *Seiritsushi*, 4: 505. For translation, see RM317.

Yoshida continued to raise as its features the symbolic *tenno* system, denunciation of war, full protection of people's rights, separation of powers, the parliamentary government system, judicial review, and colloquialism in a writing style. Interpellations by eleven representatives lasted for four days. On June 28, a special committee was established for deliberation on the proposed constitution. The committee was composed of 72 members with proportional representation of parties in the House of Representatives.²⁹⁸ Ashida Hitoshi (Liberal Party), a future prime minister, was elected chairman by mutual vote. The committee started to discuss the proposed constitution on July 1 and ended its work on July 23. For revision, an informal subcommittee was established and met 13 times. On August 21, the special committee resumed its work and voted for the modified draft bill of the constitution.

On August 24, a plenary session of the House of Representatives approved the modified draft of the constitution with 421 to 8 of total 429 votes²⁹⁹ and immediately sent it to the House of Peers. On August 26, Yoshida gave a general explanation of the bill in a plenary session and 13 members interpellated the government. On August 30, a special committee was established for deliberating on the proposed constitution. The committee consisted of 45 members and elected Abe Yoshishige chairman by mutual vote.³⁰⁰ Deliberation in the committee lasted until September 26. Then a 15-member committee was established to frame a revised draft of the proposed constitution. After receiving the report of the 15-member committee for revision, the special committee adopted the modified draft. On October 6, a plenary session of the House of Peers overwhelmingly adopted the modified draft of the constitution³⁰¹ and sent it back to the House of Representatives, which agreed to the modification without any detailed work next day. After passage in both Houses, the Draft was once again submitted to the Privy Council, which approved it on October 26. The

²⁹⁸ See RM324.

²⁹⁹ See Sato, *Seiritsushi*, 4: 869. For the modification in the House of Representatives, see *ibid.*, 4: 870-875.

³⁰⁰ See RM430.

³⁰¹ Adoption of the modified bill took the form of a rising vote in the House of Peers. In Sato Tatsuo's view, the members who opposed the revision bill were at most two or so other than Sasaki Soichi and Sawada Ushimaro who both delivered opposing addresses. Sato, *Seiritsushi*, 4: 979. For the modification in the House of Peers, see *ibid.*, 4: 979-981.

Constitution of Japan was promulgated on November 3, 1946 and was effectuated on May 3, 1947.

Public deliberation on the constitutional plan was an unprecedentedly innovative event. The Meiji Constitution, which was once believed to be the immortal great code and beyond all criticism, was now openly criticized for its weaknesses by not only leftists but also conservatives.³⁰² Kanamori himself made a comment on the Meiji Constitution that the disastrous collapse of the regime derived mostly from misinterpretations and abuses of the constitution, but partly from the very text.³⁰³ One even confidently delivered an interpellation speech from the rostrum at the plenary session hall of the House of Representatives to the effect that democratization in both political and economic areas might lead Japan to a social democracy.³⁰⁴ Such things had not happened ever before.

During the deliberations in the Diet, important issues on constituting a new political order were frankly and seriously discussed. First of all, a fundamental question was raised why the constitutional revision or the new constitution was necessary. As Minobe and Matsumoto argued,³⁰⁵ one could contend that now that the military was abolished, the Meiji Constitution would not suffer from serious misuse.³⁰⁶ Yoshida and Kanamori admitted that after the fanatic rule by the militarist clique, the text of the Meiji Constitution seemed to involve some weaknesses. To meet the terms of the Potsdam Declaration, they argued that the new constitution should include provisions for full protection of fundamental rights and development of democratic politics. The intense international circumstances required Japan to dispel doubts that an ultra-nationalistic and militaristic movement

³⁰² For example, Kita Reikichi, who was a central figure of the conservative Liberal Party, argued against the Meiji Constitution and mysterious theories of constitutional interpretations. See Kita Reikichi, Liberal Party, House of Representatives, special committee, July 1, in Shimizu Shin, *Nihonkoku Kenpo Shingiroku (Records of Deliberation on the Constitution of Japan)* (Tokyo: Hara Shobo, 1976), 1: 277-279 (hereinafter cited as Shimizu, *Shingiroku*). On the other hand, Nosaka Sanzo, who was the most popular communist, also attacked the Meiji constitutional regime for its feudalistic, undemocratic, and reactionary characters. Nosaka Sanzo, Communist Party, House of Representatives, plenary session, June 28, *ibid.*, 1: 279-282.

³⁰³ See, e.g., Kanamori Tokujiro, House of Representatives, plenary session, June 27, in Shimizu, *Shingiroku*, 1: 415.

³⁰⁴ Katayama Tetsu, Socialist Party, House of Representatives, plenary session, June 21, in Shimizu, *Shingiroku*, 1: 252-254.

³⁰⁵ See Chapter 2 sections 4 & 6.

³⁰⁶ Kita Reikichi, Liberal Party, House of Representatives, plenary session, June 25, in Shimizu, *Shingiroku*, 1: 11-12; Sawada Ushimaro, Dowakai, House of Peers, plenary session, August 2, *ibid.*, 1: 15-16.

would occur again.³⁰⁷

Nanbara Shigeru, a political philosopher and the president of the Tokyo Imperial University, keenly questioned the less enthusiastic attitude of the government toward constitutional and political reforms that had to satisfy the terms of the Potsdam Declaration. Nanbara implied that the “imposed” constitution should be attributed to the reluctant government. He thus interpellated the government about the commitment to materialize the spirit of liberal democracy by the constitution that all the more should be needed.³⁰⁸ Yoshida, Shidehara, and Kanamori replied to his questions only by stating that Japan had to execute the reforms that the Potsdam Declaration had required and that the international circumstances had rapidly changed.³⁰⁹ Nanbara clearly pointed out that if the government had taken GHQ’s directive on abolishing the national religion of Shintoism, they could have realized that the Meiji Constitution would be fundamentally reformed. For him, it was unfortunate that there was no real statesman in Japan who had the foreknowledge, wisdom, and courage to determinedly carry out reforms.

The Potsdam Declaration was surely a starting point but more positively the constitution needed be fundamentally changed. Ashida Hitoshi urged his colleagues to see things more profoundly. The new constitution was not merely a product of defeat in the war, but should express the universalistic ideals of human beings for peace, high culture, and a better life. Constitutional reform should carry more positive values.³¹⁰

Secondly, the procedure of making the Constitution of Japan was a serious issue. How could a democratic constitution with the principle of popular sovereignty be framed by amending a

³⁰⁷ Yoshida Shigeru, Prime Minister, and Kanamori Tokujiro, Minister of State, plenary session, House of Representatives, June 25, 1946 in Shimizu, *Shingiroku*, 1: 12; Yoshida and Kanamori, plenary session, House of Peers, August 2, 1946, *ibid.*, 1: 16-17.

³⁰⁸ Nanbara Shigeru, Independent, House of Peers, plenary session, August 27, in Shimizu, *Shingiroku*, 1: 43-45, 46, 52-55, 55, ; Nanbara, House of Peers, special committee, September 4, in *ibid.*, 1: 40-41, 47-48, 49-50, 50-51, 61-62, 62, 63-64, 64-65.

³⁰⁹ Yoshida Shigeru, Prime Minister, House of Peers, plenary session, August 27, in Shimizu, *Shingiroku*, 1: 55, August 28, 1: 55-56; Shidehara Kijyuro, former Prime Minister and currently Minister of State, House of Peers, plenary session, August 27, *ibid.*, 45-46, 46; special committee, September 4, *ibid.*, 48-49, 50, 51, 64; Kanamori Tokujiro, Minister of State, House of Peers, special committee, September 4, *ibid.*, 40, 62, 62-63.

³¹⁰ Ashida Hitoshi, Liberal Party, House of Representatives, chairman of special committee, July 9, in Shimizu, *Shingiroku*, 1: 14.

constitution of *tenno* sovereignty? A member did not doubt at all whether such a revision was possible.³¹¹ The government contended that Article 73 of the Meiji Constitution could be also completely applicable here. Now that the House of Representatives had been fully democratized and the House of Peers had several appointees of the learned after the purge,³¹² to the government, legal positivism should control a way of establishing the new constitution. The Diet might discuss the government draft freely and change it insofar as revisions met the terms of the Potsdam Declaration.³¹³ However, another member argued against the government's policy because Article 73 reserved all power to amend the constitution for the *tenno* alone and such a feature of the article conflicted with the idea of making a new constitution by the freely expressed will of the people. Thus he continued to argue that amending Article 73 to a more democratized process came first and then the contents of a new constitution would be established by the new rule.³¹⁴ Or since acceptance of the Potsdam Declaration, popular sovereignty had been principled in Japanese constitutional politics and thus deliberation and revision should be as free as the Diet wanted.³¹⁵ Yet another member could go further and say that since accepting the Potsdam Declaration, the existing laws and rules that were inconsistent with the Declaration had become void. To this understanding, thus, Article 73 was nothing more than an expedient measure.³¹⁶

During the deliberations, Kanamori touched upon a critical point. When he was asked whether *kintei kenpo* (a constitution the *tenno* establishes) could be legally transformed to *mintei kenpo* (a constitution the people establish), he answered that the Constitution of Japan would be legitimately established by following the procedure which Article 73 of the Meiji Constitution

³¹¹ Iwata Chuzo, Dowakai, House of Peers, special committee, September 3, Shimizu, *Shingiroku*, 1: 126-127.

³¹² See Sato, *Seiritsushi*, 3: 492.

³¹³ See, e.g., Kanamori, House of Representatives, plenary session, June 27, in Shimizu, *Shingiroku*, 1: 108; Kanamori, House of Representatives, special committee, July 5, *ibid.*, 1: 111-113, 113-114; Kanamori, House of Peers, plenary session, August 29, *ibid.*, 1: 116-118.

³¹⁴ Nosaka, Communist Party, House of Representatives, plenary session, June 28, in Shimizu, *Shingiroku*, 1: 108-109; Nosaka, House of Representatives, special committee, July 5, *ibid.*, 1: 110-111, 113.

³¹⁵ Morito Tatsuo, Socialist Party, House of Representatives, plenary session, June 27, in Shimizu, *Shingiroku*, 1: 107-108.

³¹⁶ Miyasawa Toshiyoshi, Independent, House of Peers, plenary session, August 26, in Shimizu, *Shingiroku*, 1: 100-101, 101-102. For Miyasawa's August Revolutions Thesis, see Chapter 5 section 7.

provided for. He denied that a bloodless democratic revolution occurred when Japan accepted the Potsdam Declaration. At the same time, however, he also denied the strictly binding power of Article 73 of the Meiji Constitution. Although the process should rely upon the provision of the existing constitution, the new constitution should be established by “the freely expressed will of the Japanese people” the Potsdam Declaration had required. Two elements would mix together in the process of making the Constitution of Japan.

In whatever manner it may be construed, whether or not a special principle in the shape of the principle of popular sovereignty is made a postulate, I think we can fulfill the requirements of the Potsdam Declaration if we go legitimately through the deliberation and decision of the Diet under the current Constitution. But it is obvious that this procedure for constitutional revision embodies a process in addition to that required by the Potsdam Declaration. If there arise inconsistencies and discrepancies between this additional process and the minimum process, it will give rise to a very difficult problem in actual practice. Nevertheless, if the people placed in such a difficult position act carefully, I wonder if it is not possible to settle such a problem without insurmountable difficulty by taking proper steps in actual practice. This is a prejudgment. With allowance for this prejudgment, the present procedure has been taken under Article LXXIII of the Constitution. Not only is there a single doubt about this measure under domestic law, but it also fulfills the requirements of the Potsdam Declaration.³¹⁷

Thus the Diet as representatives of the people could discuss freely the draft. Through free deliberation among representatives of the people, popular sovereignty would emerge gradually but steadily. This can be understood as a theoretical justification of a constitutional revolution in which by using the preexisting legal norms the people broke away from their past.³¹⁸

However, the government offered only an ambiguous interpretation of popular sovereignty. First of all, the government draft of the revised constitution intentionally adopted the ambiguous phrases “*kokumin no soi ga shiko de aru*”³¹⁹ and “*kono chii ha kokumin no shiko no soi ni motozuku*”.³²⁰ These phrases had survived GHQ’s careful check because their English translation clearly used the

³¹⁷ Kanamori, House of Peers, plenary session, August 28, in *Shingiroku*, 1: 123. For translation, see RM426.

³¹⁸ See Bruce Ackerman, “Revolution on a Human Scale,” 108 *Yale Law Journal* 2279 (1999).

³¹⁹ Kenpo Kaisei Soan, zenbun in Sato, *Seiritsushi*, 3: 336.

³²⁰ Kenpo Kaisei Soan, ichijo in Sato, *Seiritsushi*, 3: 336.

phrases “the sovereignty of the people’s will” and “the sovereign will of the people”.³²¹ While the conservatives, who were still captivated by the *kokutai* ideology, welcomed the government’s reluctance to straightforwardly express popular sovereignty,³²² the leftists attacked the intentional maneuver to request the government to clarify the principle of popular sovereignty in the declaration of the fundamental law.³²³

Kanamori explained the government’s position by stating that the term sovereignty has multiple meanings. In the draft, the government used the term sovereignty when the state expressed its single will to the outside. When it came to the source from which the will of the state is actually derived, the government rather used “*shiko no ishi* (the supreme will).”³²⁴ Then, interestingly enough, Kanamori alleged that this actual source of the will of the state, the supreme will, or sovereignty in Japan had, without any doubt, resided in the whole people including the *tenno* since the very beginning of the state.³²⁵ Confrontation between monarch and the people had the Western origin and it was irrelevant in Japanese history because the *tenno* had governed the state with the heart of the people and thus Japan had been a joint political community of the *tenno* and the people. Kanamori’s explanation purposefully obscured a revolutionarily new idea of popular sovereignty in postwar Japan.

Although the leftists criticized the government not for clarifying the idea of popular sovereignty, the government hesitated to take any positive action by themselves. However, GHQ once again intervened. By being informed of the situation by a small Japanese newspaper, GHQ

³²¹ See the English translation, see RM312.

³²² See, e.g., Hara Fujiro, Progressive Party, House of Representatives, plenary session, June 26, in Shimizu, *Shingiroku*, 1: 190-191; Takahashi Hidekichi, Liberal Party, House of Representatives, special committee, July 1, *ibid.*, 1: 211-214.

³²³ See, e.g., Suzuki Yoshio, Socialist Party, House of Representatives, plenary session, June 26, in Shimizu, *Shingiroku*, 1: 203-210; Nosaka Sanzo, Communist Party, House of Representatives, plenary session, June 28, *ibid.*, 1: 219-220; Kuroda Sumio, Socialist Party, House of Representatives, special committee, July 2, *ibid.*, 1: 191-193.

³²⁴ See, e.g., Kanamori Tokujiro, House of Representatives, special committee, July 13, in Shimizu, *Shingiroku*, 1: 216-218.

³²⁵ See, e.g., Kanamori Tokujiro, House of Representatives, plenary session, June 25, in Shimizu, *Shingiroku*, 1: 191.

required the Japanese government to use the term sovereignty in the Japanese text to clarify the principle of popular sovereignty.³²⁶ GHQ quickly responded to this situation because the Far Eastern Commission had had the same concerns. On July 6, SWNCC had forwarded to MacArthur the requirements of constitutional revision the FEC had adopted on July 2. They included that “The Japanese Constitution should recognize that sovereign power resides in the people.”³²⁷ After several meetings between Kades and Whitney and Irie, Sato, and Kanamori,³²⁸ the Japanese government decided to adopt the term popular sovereignty. After all, the conservative Japanese government had a common interest shared by GHQ in avoiding the FEC’s intervention. In a meeting of the informal subcommittee,³²⁹ the Liberal Party and the Progressive Party, which formed the Yoshida coalition cabinet, jointly proposed revising the government draft to clarify the principle of popular sovereignty in the Japanese text. Finally, the Japanese draft straightforwardly declared that “sovereign power resides with the people” and that the *tenno* shall derive “his position from the will of the people with whom resides sovereign power.”

Although the text was now explicit in phasing the principle of popular sovereignty and free from the intentional distortion of the core value in the new constitution, the conservatives and government still attempted to obscure the significance of the fundamental reform in the Japanese political system. When he introduced to the special committee of constitutional revision the revised draft the informal subcommittee had prepared, Ashida Hitoshi, the chairman and future prime minister, explained the intentions of the revision thus:

In short, the first chapter of the revised Constitution expressly provides that the Emperor of one line, unbroken through the ages, is assured of his position as a Monarch who, on the basis of the sovereign will of the people, unifies them coevally with Heaven and Earth, from eternity to eternity. (Cheers.) Thus, it has

³²⁶ On July 7, Matsumoto Shigeharu, the former editor-in-chief in the Domei Press and a Yale graduate, wrote an article in the *Minpo* that the idea of popular sovereignty was obscure in the Japanese text of the draft of the new constitution. GHQ had paid close attention to the newspaper *Minpo*. See Koseki, *Tanjyo*, 270.

³²⁷ “Basic Principles for a New Japanese Constitution,” JCS Directive Serial No. 54, in RM327.

In response to the directives, on July 10, GHQ asserted that the English text had explicitly affirmed the principle of popular sovereignty. See “GHQ staff responds to FEC “basic principles” (7/10/46) in RM341.

³²⁸ For the meetings, see Irie, *Keii*, 363-372; Sato, *Seiritsushi*, 4: 676-698.

³²⁹ For the deliberation in the informal subcommittee, see Sato, *Seiritsushi*, 4: 713-838.

been possible to confirm the solemn fact that the Emperor, while being in the midst of the people, stands outside of the pale of actual politics and still maintains his authority as the center of the life of the people and as the source of their spiritual guidance. This accomplishment the absolute majority of the committee have received with the utmost joy and satisfaction (Cheers.)³³⁰

Kanamori also stated that although one line of the *tenno* unbroken for ages eternal did not appear as text in the new constitution, the spirit had remained the same as in the Meiji Constitution.³³¹

The conservatives were dissatisfied with the symbolic *tenno* institution. They still argued that in the Japanese tradition, the *tenno* and the people had formed a unity together and both of them had shared common interests with each other.³³² To them, thus, the new constitutional text should have clearly declared that the sovereignty of the people included the *tenno* or that the *tenno* was not just the symbol of the unity of the people but the head of the state or the center of the unity.³³³ After the straightforward declaration of the principle of popular sovereignty, some of them still required the same things in vain.³³⁴ Or more powers should have been granted to the *tenno* as the symbol than the draft provided.³³⁵

Indeed, Kanamori stated again and again that the new constitution would not change the *kokutai* (national polity, national character, or the form of the state):

As I have frequently stated, it is the spiritual relationship among the people, with the Emperor standing as the symbol of their affection, that animates the hearts of all our people and that remains indelible and immutable in their hearts. The fact that the nation exists based on this very conception is, I think, expressed in the words “national character”. On this point, I am confident that it has never changed or shall never change, and I must positively avow here the principle of the immutability of our national character.

It may be said, of course, that within the extent of what we call the

³³⁰ Ashida Hitoshi, Liberal Party, House of Representatives, plenary session, August 24, in Shimizu, *Shingiroku*, 4: 471. For translation, see RM420.

³³¹ Kanamori Tokujiro, House of Peers, special committee, September 3, in Shimizu, *Shingiroku*, 1: 170.

³³² See, e.g., Inukai Ken, Progressive Party, House of Representatives, plenary session, August 24, in Shimizu, *Shingiroku*, 4: 522-526, 523.

³³³ See, e.g., Sakai Toshio, Cooperation Democratic Party, House of Representatives, plenary session, June 27, in Shimizu, *Shingiroku*, 1: 500-502; Oshima Tazo, Shinko-kurabu, House of Representatives, special committee, July 1, *ibid.*, 477-478.

³³⁴ See, e.g., Makino Eiichi, Independent, House of Peers, special committee, September 10, in Shimizu, *Shingiroku*, 1: 506; Yamada Mitsuyoshi, Independent, House of Peers, special committee, September 11, *ibid.*, 490-491.

³³⁵ See, e.g., Matsudaira Chikayoshi, Kenkyukai, House of Peers, special committee, September 6, in Shimizu, *Shingiroku*, 1: 494-498.

fundamental form of government, the draft Constitution greatly differs from the former Constitution. Among the phases of the State, there are some which can change and others which cannot change and although its various principles seemingly undergo change, we notice that they don't change in fact, if we penetrate deeper. And so when we see such principles of the State as do not change, we can grasp the conception of our national character, while when we mean such fundamental principles as have undergone change, we call them the fundamental form of government.³³⁶

In this way, Kanamori argued that the *kokutai* should be understood in a moral sense. In his view, the *tenno* was a moral, not a political or legal figure, and *akogare no mato* (the center of national adoration). The new constitution would only change *seitai* (the form of government). The *kokutai* had continued to be the same.

It is true that the statement of Kanamori had trivialized the revolutionary significance of the new constitution. He often used the following metaphor to claim that the people including the *tenno* had been at least potentially sovereign in Japan. “[W]hether we call it Ptolemaic theory or Copernican theory, we mean the same thing; it only follows a difference of recognition. The statement that the will of the people shall be supreme does not embody a change in substance, but a change of recognition in the same way as I have shown in those examples.”³³⁷ Whatever Kanamori might say about the *kokutai*, however, the era had already changed. In the old days, the *kokutai* was conceptualized necessarily with the prerogative of the *tenno* as the head of the state to superintend sovereign power. For example, the *Chian Iji Ho* (Peace Preservation Act) provided the idea of the *kokutai*: the fundamental principle that the empire should be ruled over and the reins of its administration held by the *tenno* in one line unbroken for ages eternal.³³⁸ A symbolic *tenno* institution with popular sovereignty, however, would inevitably alter this traditional core idea of the *kokutai*. Kanamori frankly admitted change in the central principle of the *kokutai* once the new constitution

³³⁶ See, e.g., Kanamori Tokujiro, House of Peers, plenary session, August 26, in Shimizu, *Shingiroku*, 1: 879-880. For translation, see RM421.

³³⁷ Kanamori Tokujiro, House of Peers, plenary session, August 26, in Shimizu, *Shingiroku*, 1: 880. For translation, see RM421.

³³⁸ See, e.g., Minobe Tatsukichi, *Nihon Kenpo no Kihonshugi* (Tokyo: Nihon Hyoronsha, 1934), 17.

was established.³³⁹ In addition, Kanamori also argued that the status of the *tenno* would be founded upon not a mysterious basis but the general will of the sovereign people in the new constitution.³⁴⁰ In consequence, therefore, Kanamori basically agreed that the *tenno* system in which his status was held from an authority that was situated outside the constitutional scheme would clearly cease to exist. In its central logic, the new constitution has declared the denial of the *kokutai* ideology of one line of the *tennos* unbroken for ages eternal. It is obvious that the imperial founder and other imperial ancestors to whom the Emperor Meiji swore at the establishment of the old constitution were no longer relevant to the new constitution. The symbolic *tenno* would be taken into the new constitutional framework, which was the most challenging task of creating a postwar political order. Here we can find a fundamental discontinuity between two constitutions in Japanese history. Because Yoshida, Kanamori, and the government explicitly acknowledged the principle of popular sovereignty, furthermore, they have basically accepted the idea of persuasion through mutual interaction by speech, upon which democratic politics must rely, even if they were highly reluctant to do so.

In sum, in the ninetieth Imperial Diet as a quasi-constitutional convention, representatives of the people and intellectuals and representatives of the old regime for the first time argued for and against the governmental draft to constitute a new political order collectively. Socialists and communists, coping with a majority of conservative parties, participated in deliberating about the new constitution. Although newcomers in the Diet were a definite minority, they played a very important role in the deliberative process. A relationship between the symbolic *tenno* system and popular sovereignty was a focal issue during the immediate aftermath of the war because the elite devoted themselves to retaining the *kokutai*, the national polity, the essential component of which

³³⁹ Miyasawa Toshiyoshi interrogated Kanamori about the change in the *kokutai*. Kanamori consented that the *kokutai* in the sense of the *Chian Iji Ho* would change with the new constitution. See Kanamori Tokujiro, House of Peers, plenary session, August 26, in Shimizu, *Shingiroku*, 1: 883-884. See also the discussion between Matsumura Shinichiro, Kenkyukai, House of Peers, and Kanamori, *ibid.*, 1: 884-885.

³⁴⁰ See, e.g., Kanamori Tokujiro, House of Representatives, special committee, July 9, in Shimizu, *Shingiroku*, 1: 464.

was reign and governance “by a line of Emperors unbroken for ages eternal”.³⁴¹ For them, the *tenno* was still more or less “sacred and inviolable”.³⁴² The government draft, by using a highly ambiguous term, had tried not only to conceal the change of sovereign power from the *tenno* to the people; the government and conservatives had also stated that the *kokutai* had never changed and that the *tenno* had been the center of the national admiration and affection among the Japanese people.³⁴³ In marked contrast, leftists believed that, either in a republican form of government or under a ritualistic *tenno* institution, popular sovereignty should become the fundamental principle in the new era. They therefore required the Yoshida cabinet to clearly express the principle of popular sovereignty in the constitution because they acknowledged the government’s manipulation of phrases and to explicitly explain the change in the *kokutai*.³⁴⁴

Although GHQ’s intervention was without any doubt crucial, the first public discussions were quite helpful in allowing the now sovereign Japanese people to articulate issues in the new era. The fundamental structure of the constitutional regime has been essentially transformed with the new constitution. This revolutionary transformation was heatedly discussed in open debate. The conservatives were supposed to make every effort to obscure the unprecedentedly new features of the postwar constitution. In his interpellation, Nanbara had already pointed out that a danger that the symbolic *tenno* institution might be mysteriously used once again unless the government officials explicitly acknowledge the fundamental transformation in the *kokutai* because what the government first attempted to retain as the *kokutai* was totally different from the ritualistic and ceremonial *tenno*

³⁴¹ The Constitution of the Empire of Japan, art. 1.

³⁴² The Constitution of the Empire of Japan, art. 3.

³⁴³ See, e.g., Kita Reikichi, Liberal Party, House of Representatives, plenary session, June 25, in Shimizu, *Shingiroku*, 1: 861; Yoshida Yasu, Progressive Party, House of Representatives, plenary session, June 27, *ibid.*, 1: 862-863, 864-86; Futaara Yoshitoku, Kenkyukai, House of Peers, special committee, September 13, *ibid.*, 868, 869-870; Norura Yoshiroku, Doseikai, House of Peers, special committee, September 2, *ibid.*, 1: 898-900.

³⁴⁴ See, e.g., Mori Mikiji, Socialist Party, House of Representatives, special committee, July 8, in Shimizu, *Shingiroku*, 1: 811-812; Oikawa Nori, Socialist Party, House of Representatives, special committee, July 11, *ibid.*, 1: 816, 817-818, 819-821, 821, 822; Oikawa Nori, House of Representatives, special committee, July 13, *ibid.*, 826-827, 827-828.

system the new constitution provided for.³⁴⁵ Although finally, popular sovereignty was declared straightforwardly in the text of the constitution, both the conservatives and the leftists could not be satisfied with the government position that the concept of the *kokutai* in the sense of the *tenno* as *akogare no chushin* (the center of the national adoration) had never changed even with the principle of popular sovereignty. Kanamori further stated that lese majesty would be applicable to the symbolic *tenno* institution.³⁴⁶ However, this political crime is definitely inconsistent with the idea of popular sovereignty that is closely connected to free examination of all kinds of authority. Therefore, there have remained ambiguities in the relationship between the principle of popular sovereignty and the symbolic *tenno* institution even after the new constitution was promulgated.

Whatever the limits of making the postwar constitution might be, we cannot underestimate the constitutional debate in the ninetieth Imperial Diet because for the first time in their history, the Japanese people self-consciously struggled to rationalize a relationship between themselves and the *tenno* institution. It is true that they failed to establish a republican form of government, but whatever this might mean, they confronted an intrinsic tension between the idea of popular sovereignty and the symbolic *tenno* institution. The governmental officials had to legitimize the *tenno*'s powers in a public discussion for the first time and even reluctantly admitted that the *tenno* would derive its legitimacy from the general will of the sovereign people. Under the Meiji Constitution, the government officials took the status of the emperor for granted and needed no rationalization whatsoever concerning his powers over state affairs. Thus, a public discussion on the legitimacy of political power was a revolutionarily new manner of politics in Japanese history.

From the general election to the quasi-constitutional convention, the people struggled to constitute a political order in postwar Japan. When the conservative forces criticized the new constitution for the imposition by GHQ and proposed to establish an autonomous constitution in

³⁴⁵ Nanbara Shigeru, Independent, House of Peers, plenary session, August 27, in Shimizu, *Shingiroku*, 1: 518-519.

³⁴⁶ Kanamori Tokujiro, House of Peers, special committee, September 11, in Shimizu, *Shingiroku*, 1: 473; September 10, *ibid.*, 1: 575-576. For the discussion on lese majesty, see *ibid.*, 1: 565-572.

the late 1950s, Kanamori criticized such attitudes: “People had begun to forget how serious the Japanese people were and how hard they worked at the establishment of the constitution....Under the difficult conditions, the Japanese people had made truly strenuous efforts to frame the constitution in considering the people’s future as a nation. They left a rare record of achievements in political history.”³⁴⁷ The Japanese people as a whole had truly lived a republican moment for the first time in their history. The debate in the ninetieth Imperial Diet was only the first step in the ongoing struggle of articulating or reconciling popular sovereignty and the symbolic *tenno* institution.

7. Conclusion

As the previous chapter and this one have shown, the making of the Constitution of Japan was so complicated a process that one cannot say that the constitution was imposed upon the Japanese by MacArthur and GHQ. Who were the Japanese people? The conservative governing elites cared only about the retention of the *kokutai*, the uniquely traditional governing system based upon the *tenno* sovereignty. Although most Japanese people overwhelmingly supported the *tenno* institution, they were not monolithic. Indeed, those who supported the system of the sovereign *tenno* formed a minority in the postwar situation. A more non-political and ritualistic *tenno* institution was favored by a majority of the people.³⁴⁸ There were also a few republicans who argued for abolition of the *tenno* institution itself. In coping with truly dominant men, women for the first time participated in public deliberation on constituting a fundamental political order. The conservatives attempted to japanize the GHQ’s draft as much as possible. Meanwhile, GHQ had a severe inner rivalry between the more idealistic and progressive Government Section and the more realistic and conservative G2.

³⁴⁷ Kanamori Tokujiro, in Sato, *Tanjyoki*, 184-185. Sato Tatsuo expresses his full consent to Kanamori’s statement.

³⁴⁸ A public opinion poll was suggestive. It was held in December 1945. The result was published on February 3, 1946. It was about one month before the government draft of the symbolic *tenno* system was announced. While those who supported the *tenno* system provided for in the Meiji Constitution were only 16 percent, 28 percent supported an institution of the *tenno* that would hold sovereignty joint with the Diet and 45 percent supported a non-political and moral *tenno* system. Those who supported a republican form of government were 8 percent. See “Kenpo kaisei to yoron (Constitutional Revision and Public Opinion),” article, *Mainichi Shinbun*, February 4, 1946, in *Shoron Shuroku*, 188-189.

SCAP, the Department of State, and the Far Eastern Commission complicatedly conflicted with one another in occupation policy toward Japan. Furthermore, GHQ and the conservative Japanese government jointly refused a democratic claim to hold a popular constitutional convention.

The product of the process of making the postwar constitution cannot be said to be a return to the original position in the Japanese tradition, either. One might state that the symbolic *tenno* institution is the authentic type of the *tenno*.³⁴⁹ But did popular sovereignty exist in the ancient days of Japan?³⁵⁰ Did constitutionalism prevail in Japanese history? Could common citizens read legal document by which they were regulated? The symbolic *tenno* system with the principle of popular sovereignty has been fundamentally innovative. Colloquialism with *hiragana* was revolutionary for not only Japanese legal writing but also political culture.

Rather, establishing the postwar constitution should be regarded as an unfinished constitutional revolution. Whether they might be conservative or progressive, the Japanese people were self-consciously confronted with constituting a new political order for the first time in their history. Despite many limits, public deliberation was carried out among considerably many Japanese people. Through deliberation, traditional authority was no longer authoritative as it was. It now needed justification by persuasion. The constitution ceased to be an instrument of ruling the people and become a common baseline for government shared by the people and the elites. The Japanese people with the postwar constitution partially broke away from their past. Because the retention of the *kokutai* was the paramount value for the government elites, a compromise was necessary for establishing the postwar constitutional system at the beginning. Otherwise, the formation of the new constitutional regime would have been highly doubtful. Thus, the ideals that the Constitution of Japan declared are yet to be fulfilled. Indeed, its principle of popular sovereignty always challenges the status quo.

³⁴⁹ For the details of the internal continuity theory, see Chapter 5 section 6.

³⁵⁰ See Maruyama Masao, "Sengo minshushugi no 'genten' ('The Starting Point' of Postwar Democracy)," *Kenpo no 100 nen: 3 Kenpo no saisei (100 years of the Constitutions: 3 Revival of the Constitution)* (Tokyo: Sakuhinsha, 1989), 408-416, 414-415.

Before the draft of the revised constitution was voted on in the House of Representatives, Ozaki Yukio (1859-1954), nicknamed the god of parliamentary politics because he had consecutively been a representative since the first general election of 1890, warned his fellow representatives that the new constitution would not be able to be well operated without their determined devotion to democracy.

Since the new Constitution is quite an advanced one, it will be still more difficult to understand for our fellow countrymen, who are thoroughly imbued with the evil habits of respecting the officials and slighting the civilians. This is the very reason why I, while expressing wholehearted support for the new Constitution, earnestly hope that redoubled efforts will be made in considering and investigating how to operate it.

Since the Constitution is put into operation by men, however excellent the Constitution may be, good results cannot be secured if the men are bad. The better the Constitution, the harder it is to put it into operation for the people whose culture is low.³⁵¹

What Ozaki said in August 1946 is still the case with the current situation. Making the constitution is one thing but realizing it is quite another. We always face an inevitable gap between political reality and the ideals the postwar constitution has inspired. Unlike the Meiji Constitution, the postwar constitution has provided the Japanese people with vital tools: freedoms both negative and positive. By utilizing them wisely, they could fill the gap by realizing the constitutional promise. The popular sovereignty the Japanese people were granted by the new constitution was nothing less than a serious challenge. Both the theorists of imposition and continuity fail to appreciate this new element of constitutional experience for the Japanese people as a whole. Their positive engagement in the new constitutional governmental process is required, whether one likes it or not. That is why I called making the postwar constitution an unfinished constitutional revolution in Japan.³⁵²

The next question is how revolutionarily innovative are the political principles the postwar constitution has provided for.

³⁵¹ Ozaki Yukio, Independent, House of Representatives, plenary session, August 24, 1946, in Shimizu, *Shingiroku*, 4: 483-489, 483-484. For translation, see RM420.

³⁵² For my theoretical justification for an unfinished constitutional revolution, see Chapter 5 section 7.

Chapter 4

New Constitutional Principles: Popular Sovereignty and the Liberal Democratization of Politics

1. Introduction
2. Toward a Common Basis of the Governmental Process: Colloquialization of the Constitution
3. The Liberal Democratization of Politics: An Overview
4. Protection of Rights and the Judiciary
5. The Institutional Scheme for Responsible Politics
6. The Sincere Desire for Peace and the Denunciation of War
7. Popular Sovereignty and the Amendment Process
8. Consolidation of the New Constitution: The Katayama Cabinet
9. Missing Opportunities for “We, the Japanese People”
10. Conclusion

1. Introduction

The Constitution of Japan was promulgated on November 3, 1946, and became effective six months later. This new constitution has drastically changed the political foundation of Japan. The most fundamental transformation has been found in the provisions on the *tenno* institution.¹ It is true that the Meiji Constitution and the new constitution both place “the *tenno* (emperor)” in Chapter 1 and that the thrones of the two *tennos* are hereditarily succeeded in the same line of family.² However, their contents are completely different from each other.³ First, the status of the *tenno* has been dramatically transformed. While the *tenno* held the status as sovereign and head of the state and superintended sovereign powers under the Meiji constitutional regime,⁴ the new constitution, on the one hand, has declared the principle of popular sovereignty and, on the other, has retained the *tenno* institution as the symbol of the state and the unity of the people.⁵ Second, the bases of the institutions also differ fundamentally. The *tenno* in the Meiji Constitution was entitled to

¹ For the details on the *tenno* system in the Meiji constitutional regime, see Chapter 1.

² Compare the Constitution of the Empire of Japan, art. 2 with the Constitution of Japan, art. 2.

³ See Miyasawa Toshiyoshi, *Kenpo*, 175-178.

⁴ The Constitution of the Empire of Japan, arts. 1 & 4.

⁵ The Constitution of Japan, preamble and art. 1.

reign and rule because of the will of the imperial founder and ancestors.⁶ Even the will of the *tenno* himself was irrelevant as the foundation of his sovereignty. The idea of one lineal succession unbroken for ages eternal was influential enough for most people to believe in the perpetuity of the state and the *tenno*'s governance. Thus this feature was closely connected to the concept of deification of the *tenno*'s rule and *tenno* himself because the imperial founder was, according to the founding myth, believed to be *Amaterasu Omikami* (legendary sun goddess). Unification of politics and religion was essentially presupposed to be a principle in this sense. In sharp contrast, the new symbolic *tenno* was founded upon the sovereign will of the people. The *tenno* declared himself as a human before the new constitution was established. Separation of state from religion has been importantly characteristic of the new constitution.⁷

With respect of powers vested in the *tenno*, accordingly, there are substantial differences between the two institutions. In the Meiji constitutional system, the *tenno* as sovereign held and exercised the prerogatives to govern the state. In fact, legislative, administrative and judicial powers were all vested in the *tenno* himself. With support of governmental institutions, further, the *tenno* was generally planned to exert such powers by himself. The legislative power the *tenno* held was exercised with the consent of the Imperial Diet.⁸ The *tenno* enjoyed considerable leeway when he was allowed to make legislation without the consent of the Diet as independent orders and emergency orders.⁹ The administrative power all belonged to the *tenno*, who had the prerogatives on administrative appointment and organization, diplomacy, military command and organization, state of siege, honors, and pardon.¹⁰ These prerogatives were exercised upon the advice of ministers of state.¹¹ The courts of laws exerted the judicature in the name of the *tenno*.¹² Meanwhile, the new constitution has

⁶ See *Tsugebumi* (Imperial Oath Sworn in the Sanctuary in the Imperial Palace); Imperial Rescript on the Promulgation of the Constitution.

⁷ The Constitution of Japan, arts. 20 & 89.

⁸ The Constitution of the Empire of Japan, art. 5.

⁹ The Constitution of the Empire of Japan, arts. 9 & 8.

¹⁰ The Constitution of the Empire of Japan, arts. 10, 11, 12, 13, 14, 15, & 16.

¹¹ The Constitution of the Empire of Japan, art. 55.

¹² The Constitution of the Empire of Japan, art. 57.

deprived the *tenno* of all political powers. It has clearly denied the prerogative-oriented governmental system. The *tenno* shall have no powers related to government and perform only functions in matters of state provided for in the constitution.¹³ Moreover, the *tenno* cannot act by himself but only upon the advice and approval of the cabinet.¹⁴ The constitution enumerates rather formal and ceremonial functions as matters of state: Appointments of the prime minister and the chief justice of the Supreme Court upon designation by the Diet and the cabinet, respectively; promulgation of legal norms; convocation of the Diet; proclamation of election for the Diet; attestation of appointment and dismissal of public officials provided for by law and of full powers and credentials of diplomats; attestation of pardon; granting honors; attestation of diplomatic documents provided for by law; receiving foreign diplomats; performing ceremonial functions.¹⁵ The *tenno* as the symbol is supposed to play no positive role in the political process.

Unlike the Meiji Constitution in which the *tenno* by himself superintended sovereignty, furthermore, the postwar constitution adopts separation of powers as a fundamental governmental principle. The legislative, administrative, and judicial powers are vested in the Diet, the cabinet, and the Supreme Court and inferior courts, respectively.¹⁶ The Diet has become “the highest organ of state power” and “the sole law-making organ”,¹⁷ while the Imperial Diet was only a body of giving the consent to the *tenno*’s prerogative to legislation.¹⁸ The Diet also controls national finances.¹⁹ The parliamentary government system has been officially adopted in the postwar constitutional scheme. The prime minister, now a constitutional institution, is the head of the cabinet and must have a seat in the Diet and may appoint and remove ministers of state.²⁰ The cabinet is collectively responsible

¹³ The Constitution of Japan, art. 4 par. 1.

¹⁴ The Constitution of Japan, art. 3.

¹⁵ The Constitution of Japan, arts. 6 & 7.

¹⁶ The Constitution of Japan, arts. 41, 65, & 76.

¹⁷ The Constitution of Japan, art. 41.

¹⁸ The Constitution of the Empire of Japan, art. 5.

¹⁹ The Constitution of Japan, arts. 83 through 91.

²⁰ The Constitution of Japan, arts. 66, 67 par. 1, & 68.

to the Diet for its exercise of executive power.²¹ The cabinet relies upon the confidence of the Diet, particularly of the House of Representatives, which has the power to vote a resolution of non-confidence. The cabinet may counter a non-confidence resolution by dissolving the House of Representatives.²² Further, the judiciary now enjoys its independence from the cabinet. The administrative court system has been replaced by a unified judiciary system.²³ The Supreme Court has been vested with the power of judicial review.²⁴ Closely related to the system, rights and liberties are no longer subject to preservation of laws. Protection of fundamental rights is regarded as a central feature of the constitution. In addition, local autonomy has been guaranteed for the first time in history. Local residents now participate in governing and operating local organizations.²⁵ In this way, the new constitution has presented an extremely different picture of the governmental process in postwar Japan.

This chapter will explore the alternation of the nature of politics from a vertical relation of order and subject to a more horizontal relation among equals. The external imposition theory and the internal continuity theory fail to realize the distinctive features of the postwar constitution. These two theories do not pay much attention to the efforts of the Japanese people to internalize the values constitutional revolution. The postwar constitution has been more accessible for common citizens than the predecessor because of the Japanese initiative. Under the postwar constitution, moreover, the Socialists became the leading party and formed the first left-centered coalition cabinet. The two theories are unable to present a perspective from which we can evaluate the postwar constitutional experience of the Japanese people. Liberal democratization of politics, which was the international obligation of Japan after the defeat in the war, has formed a baseline for evaluating constitutional success. Along the baseline, the third way theorizes the struggles of the Japanese people to materialize liberal democracy.

²¹ The Constitution of Japan, art. 66 par. 3.

²² The Constitution of Japan, art. 69.

²³ The Constitution of Japan, art. 76.

²⁴ The Constitution of Japan, art. 81.

²⁵ The Constitution of Japan, arts. 92 through 95.

First in this chapter, we will examine the process of creating a revolutionary new style of writing the constitution. The Japanese initiatives led to a colloquial constitutional text. It has made the constitution much easier for common citizens to access. Constitutional law can be a common baseline shared by both citizens, who are more or less objects of government, and the governing elite. This reform in wording has been revolutionary for political culture. Then, after an overview of its conspicuous features, we will precisely examine the new constitutional government system. Protection of fundamental human rights and the judiciary, the institutional scheme of responsible politics and positive pacifism will be discussed in detail in separate sections. We will find that the new constitution has liberally democratized the political process in principle. Further, the amending process under the new constitution will be carefully examined. One of the most important new characteristics of the postwar constitution is the principle of popular sovereignty. This is fully expressed in the amending provision, which allows people's direct participation in the process. In relation to this topic, we will look at the missed opportunities for the Japanese people to participate in constitutional politics. Finally, we will consider the consolidating function that the Katayama cabinet, the first cabinet under the new constitution, performed. This left-central coalition government tried to consolidate constitutional revolution, however limited it might have been because of its weak foundation.

2. Toward a Common Basis of the Governmental Process: Colloquialization of the Constitution

The English translation of the Meiji Constitution and the Constitution of Japan obscures fundamental changes in Japanese wording. The postwar constitution has adopted colloquialism, which has made the constitutional text much easier for citizens to read than the Meiji Constitution.²⁶ If constitutional law means something positive, that happens when citizens themselves can actively engage in constitutional values. To do so, it is necessary for them at least to understand what is

²⁶ See Miyasawa Toshiyoshi, "Shinkenpo no gaikan (An Overview of the New Constitution)," Kokka Gakkai, ed., *Shinkenpo no kenkyu (Studies on the New Constitution)* (Tokyo: Yuhikaku, 1947), 1-17, 6-8.

written in the text. The Meiji Constitution with its literary style kept common citizens away. Thus the postwar constitution has presented a revolutionary new character. This section will explore how such a revolution in wording occurred.

On April 17, 1946, the Japanese government announced its final draft of the revised constitution. This draft would be submitted to the Privy Council following the revising process of the Meiji Constitution and to the Imperial Diet, the House of Representatives of which had had its first general election by universal suffrage just one week before. This government draft once again surprised people because of its style of wording. The proposed draft constitution was written in a much more colloquial way than the Meiji Constitution.

This colloquialization is one of distinctive features of the new constitution that are fundamentally unprecedented. At the beginning of the modernization of Japan, the government had to abandon its traditional laws that derived from old China and to establish a new legal system in order to catch up with the advanced Western countries. After an intensified debate among the legal elites,²⁷ the government decided to create a new legal frame following the German system.²⁸ In this nation-rebuilding process, new words were coined to express western legal concepts in Japanese. Newly coined terms were difficult for common citizens to understand. It was partly because there are two steps to understand what a new word means: the original western legal concepts are translated into traditionally used Chinese characters each of which carries not only sound but also meaning. It was also partly because the elites attempted to keep common citizens away from the governmental and legal processes. Thus, the prewar legal documents were written in a strictly literary manner (*bungotai*) with Chinese characters and *katakana*. People did not use such a style in daily life.

In sharp contrast, the proposed governmental final draft of the Constitution of Japan was

²⁷ There was a heated debate on which model Japan would follow. First the school of French law was predominant. However, criticism that French law is too individualistic to be suitable to a communitarian society like Japan acquired momentum when a codification of family law became an important issue later.

²⁸ For influences of foreign laws in Japan, see Noda Yoshiyuki, "Nihon ni okeru hikaku-ho no hatten to genjo," in Tanaka Hideo ed., *The Japanese Legal Systems: Introductory Cases and Materials* (Tokyo: University of Tokyo Press, 1976), 194-229.

written in a colloquial style (*kogotai*) with Chinese characters and *hiragana*.²⁹ Writing statutes and legal documents in colloquial Japanese has thereafter been a common practice. The imperial rescripts have been also colloquialized.³⁰ Thus, legal materials have become more easily accessible to ordinary people than ever before. This is decisively important in terms of a democratic foundation of the governmental process. Reading and understanding the fundamental law of the state is the most rudimentary way of participating in politics democratically.

Furthermore, this change in wording style came totally from the leadership of a group of private citizens on the Japanese side. Soon after the government's "General Outline of Draft Revision of the Constitution" was published on March 6, an important petition occurred in the late March from outside the main Japanese political power. The *Kokumin no Kokugo Undo* (the People's National Language Movement League) that was composed of about thirty groups and eighty individuals proposed to follow a style in which common citizens could easily understand legal documents. The movement shared a belief that language was for all the people, that language should be easy for everyone to understand and use and that easy language would enhance the culture of the people, spread democracy widely and fortify the foundation of Japanese culture.³¹ On March 26, its representatives, including Ando Masaji, a Japanese linguist, Yamamoto Yuzo, a famous novelist, Miyake Shotaro, a judge who had argued for the simple writing of judgments,³² and Yokota Kisaburo, a professor of international law at the Tokyo Imperial University, visited the prime minister's office to make a petition for colloquialism and simplification of the constitution, laws, and other legal documents. The petition established a general principle in a democracy that "any written material that is important to the people must be written in a manner that is easily understood by

²⁹ The administrative order of the Ministry of the Interior on April 23, 1946 is the first official legal document written in colloquial Japanese.

³⁰ The first colloquial imperial rescript was issued on May 7, 1946 when a special session of the Imperial Diet was convoked. See Irie, *Keii*, 273.

³¹ See Irie Toshio, "Kenpo soan yoroku (The Anecdote of the Constitutional Draft) 3," *Hoso*, no. 56 (1955), 7-10, 7.

³² See Miyake Shotaro, "Horei to kokugo (Laws and Regulations and Japanese)," and "Shinkenpo ni nozomukoto (What I Expect in the New Constitution)," *Miyake Shotaro Zenshu* (Tokyo: Kogakusha, 1950), vol.3.

them.” However, it criticized the fact that “on this score the laws and other public documents have until now been remiss.” It then emphasized the importance of popular commitment to democratized legal documents by stating “that there is little chance for success in trying to mobilize the strength of all the people to build a new Japan if we leave this absurd situation as it is.”³³

Members of the movement concretely requested the government that writing all laws and legal documents should be changed in the following manners: that they be written in colloquial Japanese; that, if at all possible, they not use difficult *kanji* (Chinese characters); that they avoid obscure and difficult words and expressions; that the number of *kanji* used be reduced; and that standard marks be used to indicate sound changes in the phonetic script, such as voiced consonants.³⁴

In sum, their petition was to use the colloquial style rather than the archaic literary style, and to avoid esoteric phrases. At the beginning of the new nation, to the members, the style of laws and public documents should be completely reformed in order to make them accessible to all the Japanese people and to muster up their courage as a sovereign power.

Some bureaucrats in the cabinet legislation bureau responded to the petition positively. In fact, they themselves recognized the necessity to reform legal writings to make them more easily treatable. Irie Toshio, the chief of the bureau, was one of them.³⁵ Watanabe Yoshihide, a young legal bureaucrat, also thought that reform was needed in a new era.³⁶ Irie and Watanabe independently discussed the possibility that the forthcoming constitution and other legal documents would be written in a colloquial style. They jointly prepared the constitutional draft in colloquial Japanese. Watanabe asked help of Yamamoto, who was a popular writer and eager reformer in Japanese

³³ “Write constitution in colloquial Japanese (petition) (3/26/46) People’s Language Reform Movement,” in RM233 par. 1.

³⁴ “Write constitution in colloquial Japanese (petition) (3/26/46) People’s Language Reform Movement,” in RM233 par. 2.

³⁵ See Irie, *Keii*, 269-273, 289-291.

³⁶ See Watanabe Yoshihide, “Shin kenpo to kogotai (The New Constitution and Colloquialism),” in Sato, *Seiritsushi*, 3: 278-279; Watanabe Yoshihide, “Hoseikyoku Kaiso (Recollections of the Legislation Bureau)” in Naikaku Hoseikyoku Hyakunenshi Henshuiinkai ed., *Shogen Kindaiho no Kiseki (Traces of Modern Law: Testimonies)* (Tokyo: Gyosei, 1985), 95-105, 98-102. See also Sato, *Tanjyoki*, 82-85.

language to frame a provisional colloquial draft.³⁷ Yokota, a future chief justice of the Supreme Court, who lived nearby, joined Yamamoto to write a colloquial draft.³⁸

At the March 26 meeting of representatives of the People's National Language Movement League, the minister of state Matsumoto Joji was unenthusiastic about colloquialism in the constitution, because he believed that the fundamental law of the nation must be solemn in style. Matsumoto thought, however, that colloquialism in this case might be helpful in disguising the importation of the constitution from the United States.³⁹ Irie, on the contrary, was enthusiastic about it and positively acted to gain the consent on colloquialization from the cabinet members. He finally persuaded Matsumoto to agree to make a decision on a colloquial draft in a cabinet meeting.⁴⁰

Irie and Sato perseveringly negotiated with the Government Section. GHQ could not understand the significance of colloquialism in writing the constitution because they suspected that by manipulating words, the Japanese government was trying to obscure the meanings of the text the origin of which was their draft.⁴¹ The Japanese bureaucrats eventually succeeded in persuading GHQ to grant permission on the changes in the Japanese text.⁴² As a result, on April 17, the Japanese government published "the Draft of Revision of the Imperial Constitution" in the colloquial style with *hiragana* rather than *katakana*, which was and is more familiar to common citizens than the old and authoritative manner. On April 18, newspapers in a welcoming tone reported the new government draft written in a colloquial style.⁴³ Editorials pointed out colloquialism as epoch-making for a newly democratized political culture. They then insisted that

³⁷ The process of initiating colloquialization of the constitutional draft was not totally clear. The interested parties told slightly different stories. For this point, see Takami Katsutoshi, "Irie Toshio to Kenpo Jyobun no Kogoka," Nakamura Mutsuo and Maeda Hideaki, eds., *Rippo Katei no Kenkyu* (Tokyo: Shinzansha, 1997), 218-251.

³⁸ See Yokota Kisaburo, "Kenpo no kogoka," *Pari no kiseki* (Tokyo: Keso Shobo, 1952).

³⁹ Matsumoto's testimony in Sato, *Seiritsushi*, 3: 274.

⁴⁰ See Irie, *Keii*, 270.

⁴¹ See Sato, *Seiritsushi*, 3: 299. GHQ's record showed that colloquialization derived from GHQ's suggestion. See Political Reorientation. This is clearly false. The efforts to write the constitutional text in colloquial Japanese came completely from the Japanese initiative. See Irie, *Keii*, 271; Sato, *Seiritsushi*, 3: 300; Dower, *Embracing Defeat*, 392-393. See also, Moore & Robinson, *Partners for Democracy*, 155-158.

⁴² There were no changes in the English text of the new constitution.

⁴³ See e.g., "Shugiin kaisan chu no rinjisochi Sangiin ga kinkyushukai," *Asahi Shinbun*, article, April 18, 1946 in *Shoron Shuroku*, 290-291.

the government should make the constitutional text even simpler, clearer, and easier to comprehend than the April 17 draft, which sounded stiff as Japanese.⁴⁴

Among the private activists, Yamamoto Yuzo most enthusiastically devoted himself to lobbying to make legal documents easier.⁴⁵ In the Gettysburg Address, Yamamoto said, Abraham Lincoln used 203 words of one syllable in a total of 272 words. This shows how plainly Lincoln spoke and even so his address has moved people profoundly and become an immortal passage.⁴⁶ To Yamamoto, usage of plain words and simple characters does not necessarily lead to worthless writings, but to prosperity and expansion of a culture. When he saw the draft of constitutional revision, Yamamoto praised the government's decision and said that all kinds of public documents would be written in a colloquial style as the constitution, that colloquialism would make public documents much more accessible and bureaucrats who write them psychologically gentler, and that the preamble of the revised constitution should be written in shorter and clearer sentences.⁴⁷

The leadership Yamamoto and his colleagues took in the movement and the enthusiasm they showed moved flexible legal bureaucrats to frame a vernacularized constitution. This has been a revolution in the political and legal culture of Japan. With colloquialism, the fundamental law of the nation has for the first time become a common baseline for the governmental process between the people and the governing elites. After all, the Meiji Constitution, as the great code of eternity, was nothing but an instrument for the elites to rule the people. If the principle of popular sovereignty means anything at all, it is only when the people who more or less tend to be the subject of governance in the ordinary political process can understand what the fundamental charter guarantees to them. Without any doubt, the Constitution of Japan has become much more accessible for common citizens than the Meiji Constitution and thus far more democratized. Good

⁴⁴ See "Kenpo jyobun no heiika (Simplification of the Constitutional Provisions)," *Asahi Shinbun*, editorial, April 18, 1948 in *Shoron Shuroku*, 288-289; "Kogo cho no kaisei kenpo soan (The Colloquial Draft of Revision of the Constitution)," *Nihon Keizai Shinbun*, editorial, April 18, 1946 in *ibid.*, 289-290.

⁴⁵ See Yokota Kisaburo, "Kenpo no Hiragana Kogo," *Pari no Kiseki* (Tokyo: Keiso Shobo, 1952), 175-184.

⁴⁶ Yamamoto Yuzo, "Moji to nihonjin (Characters and Japanese People)," *Sekai*, April 1946.

⁴⁷ Yamamoto Yuzo, "Kanari Omoikitta Shochi," *Mainichi Shinbun*, April 18, 1946 in *Shoron Shuroku*, 293-294.

opportunities have been opened for the people to exercise their sovereign power by actively participating in politics. Whatever the framers might intend,⁴⁸ the consequence of colloquialism has been enormous and decisive for the Japanese people. Colloquialism is one of the most fundamental and revolutionary features of the postwar constitution. In particular, the principle of popular sovereignty the new constitution has solemnly declared has a positive significance only with the newly introduced colloquial style.

3. The Liberal Democratization of Politics: An Overview

The Constitution of Japan has solemnly declared that sovereignty resides in the people.⁴⁹ Unlike the Meiji constitutional system in which the *tenno* held and exercised sovereign powers, the people have become the sole source of political legitimacy. As a result, the new regime has got rid of dualism between the Constitution and the *Koshitsu Tenpan* (the Imperial House Law) and created a unified system in which the constitution is superior to the new Imperial House Law.⁵⁰

The first sentence of preamble of the constitution well clarifies the basic structure of the postwar constitutional system: “We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution.”⁵¹ First of all, this constitution has been a product of the exertion of constitutional power on the part of the people. This fact is in marked contrast to the Meiji Constitution, which was a *kintei kenpo* (constitution established by the *tenno*). Then the preamble declares the fundamental

⁴⁸ Sato Tatsuo frankly admits that an expectation that colloquialism would obscure the tone of translation in the constitutional text prompted the governing elite to adopt the draft in a colloquial style. See Sato, *Seiritsushi*, 3: 274-275.

⁴⁹ The Constitution of Japan, preamble par. 1 & art. 1.

⁵⁰ The Constitution of Japan, art. 2.

⁵¹ The Constitution of Japan, preamble par. 1.

ideals upon which the constitution is based: above all, popular sovereignty, and representation, liberalism or constitutionalism, pacifism, and international cooperation. Importantly, the purpose of establishing the constitution is to secure “the blessings of liberty”. Namely, the constitution has placed in the center liberalism or the principle of respecting fundamental human rights, the kernel of which is respect as individuals.⁵² To achieve this purpose, thus, the constitution has adopted the principle of popular sovereignty and pacifism.⁵³

The fundamental political principle in the postwar constitutional system is simple and universalistic: “Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representation of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which the Constitution is founded.”⁵⁴ On the one hand, declaration of popular sovereignty, as a result, leads to the status of the *tenno* deriving from “the will of the people with whom resides sovereign power.”⁵⁵ On the other, representative democracy has been adopted as the main manner of the governmental process.⁵⁶ Thus the Diet is regarded as “the highest organ of state power” and has become the true and sole legislative institution.⁵⁷ Because a parliamentary system has been introduced, moreover, responsible politics has been more secure than in the Meiji constitutional system.⁵⁸

Liberalism or constitutionalism is saliently prevalent in the constitution. First of all, the essence of fundamental human rights is especially placed in the Chapter of Supreme Law.⁵⁹ The

⁵² See the Constitution of Japan, art. 13.

⁵³ See Sato Koji, *Kenpo*, 3rd ed., (Tokyo: Seirin Shoin, 1995), 79, 83.

⁵⁴ The Constitution of Japan, preamble par. 1.

⁵⁵ The Constitution of Japan, art. 1.

⁵⁶ However, the constitution has partially adopted direct democracy. They are cases for a special law applicable only to one local public entity and for amendment to the constitution. See the Constitution of Japan, arts. 95 & 96. See also, *ibid.* art. 79 par. 2 (popular examination of the Supreme Court justices). On the local level, moreover, there are several direct democratic institutions. See *Chiho Jichi Ho* (Local Autonomy Law), arts. 74-88.

⁵⁷ The Constitution of Japan, art. 41. In the Meiji constitutional system, the Imperial Diet was not a legislative body but an institution that only gave consent to the *tenno*'s legislative prerogative. See Chapter 1 section 3.

⁵⁸ See the Constitution of Japan, arts. 67-69.

⁵⁹ Article 96 of the Constitution of Japan reads: “The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all

postwar constitution is understood as the supreme law of land.⁶⁰ While the constitution provides for public officials' obligation to respect and uphold the constitution, it does not include the people as a whole.⁶¹ This essentially shows that the postwar constitution tries to limit the political power of the government, not the liberties of common citizens, which is the core spirit of modern constitutionalism. Further, the constitution has a detailed catalogue of civil rights and civil liberties.⁶² The catalogue includes not only traditional negative rights but also recently developed positive rights such as the right to maintain the minimum standards of wholesome and cultured living, the right to receive an equal education correspondent to one's ability, and the right to work.⁶³ As importantly, the postwar constitutional system has introduced judicial review, which is a completely new institution for Japanese legal practices.⁶⁴ The mechanism of controlling the constitutionality of governmental actions would be helpful for enhancing the idea of constitutionalism. The Meiji constitutional system had nothing to do with constitutional review. Indeed, it had reservation of laws with rights and liberties.⁶⁵ The postwar constitutional system has dramatically strengthened protection of people's rights.

Moreover, governmental powers are clearly separated in three different branches. The Diet, the cabinet, and the Supreme Court and inferior courts are vested with legislative, administrative, and judicial powers, respectively.⁶⁶ Rather than concentrating political power upon one institution as the Meiji Constitution did, the postwar constitution has built a scheme of checks and balances, in which major governmental institutions are supposed to interact with one another. Such a scheme is

time inviolate.”

⁶⁰ The Constitution of Japan, art. 98.

⁶¹ Article 99 of the Constitution of Japan reads: “The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.”

⁶² See the Constitution of Japan, Chapter 3, arts. 13-40. Article 13 is regarded as a general principle of fundamental rights. It reads: “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”

⁶³ See the Constitution of Japan, arts. 25- 27.

⁶⁴ See Article 81 of the Constitution of Japan reads: “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”

⁶⁵ See Chapter 1 section 6.

⁶⁶ See the Constitution of Japan, arts. 41, 65, & 76.

of course good for protecting people's freedom and what constitutionalism aims at. Further, it makes the way of doing politics more reason-oriented because each institution that has its own independent policy judgment has to justify its decision in a way that other institutions can at least understand what it have tried to do. Politics is planned to be more articulated it than used to be. In addition, the constitution has introduced a system of local autonomy for the first time in history.⁶⁷ This also helps limiting governmental power.

Another instrument for securing the blessings of liberty is pacifism and international cooperation. "We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationships, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world...We recognize that all peoples of the world have the right to live in peace, free from fear and want."⁶⁸ The constitution materializes this ideal in Articles 9 and 98.⁶⁹

The postwar constitution has the aim of realizing constitutional politics much more steadily than the Meiji Constitution, which is perceivably situated between absolutism and constitutionalism. The ideas and institutions the Constitution of Japan has adopted are intended to advance liberal democratization of politics. Now we turn our attention to more detailed matters in the principles of the postwar governmental system. We will here examine protection of rights, the institutional scheme of government, and a sincere desire for peace.

4. Protection of Rights and the Judiciary

In the Meiji constitutional system, rights were understood as benefits from the benevolent

⁶⁷ See the Constitution of Japan, Chapter 8, arts. 92-95.

⁶⁸ The Constitution of Japan, preamble, par. 2.

⁶⁹ Article 9 of the Constitution of Japan reads: "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. (2) 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. The right of belligerency of the state will not be recognized." Article 98 paragraph 2 reads: "The treaties concluded by Japan and established laws of nations shall be faithfully observed."

tenno to his subjects.⁷⁰ The Meiji Constitution was indeed a negative answer to claims for natural rights. Thus the *tenno* might have made whatever decision on the contents of rights. Because reservation of laws was added to the declaration of rights, indeed, the legislative power could regulate rights as it liked. Thus, protection of rights had some effect on administrative abuses but offered the Japanese subjects no real fortress against legislative power in particular and political power in general. The majoritarian defense for rights was not applicable because subjects themselves never had had legislative power. Further, the Meiji constitutional system was based upon a monopolization of value judgments by the *kokutai* ideology of one line unbroken for ages eternal. Unification of the state and Shinto was in fact a distinctive feature of the Meiji regime.⁷¹

In sharp contrast, the postwar constitutional system has rejected the concept of reservation of laws. Natural law thought is influential in the new constitution: “The people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”⁷² Thus basic rights are regarded as setting limits upon all kinds of power of the state, particularly legislative power. The core idea of rights guaranteed in the constitution is due respect for human dignity as individuals.⁷³ This concept of individual dignity had been radically innovative in Japanese political and legal practices because the Meiji constitutional system was founded upon a family view of the state and the heads of family and the state were recognized as powerful enough to control members of the group. Indeed, respect for individuals was once condemned as immoral.⁷⁴

⁷⁰ Suzuki Yasuzo, “Kihonteki jinken (Fundamental Human Rights),” Kenpo Fukyukai, ed., *Shinkenpo kowa*, 149-174, 159; Kawamura Matasuke, *Shinkenpo to minshushugi (The New Constitution and Democracy)* (Tokyo: Kunitachi Shoin, 1948), 185-186.

⁷¹ See Chapter 1, sections 3 & 9.

⁷² The Constitution of Japan, art. 11. See also, *ibid.*, art. 97.

⁷³ See the Constitution of Japan, art. 13.

⁷⁴ See Tsuneto Kyo, “Kihonteki jinken ni suite (On Fundamental Human Rights),” *Shinkenpo to minshushugi (The New Constitution and Democracy)* (Tokyo: Iwanami Shoten, 1947), 193-205, 200. See also, Noda Yoshiyuki, “Shiko, kyoiku, gakumon (Faith, Education, Scholarship),” Kokka Gakkai, ed., *Shinkenpo no kenkyu (Studies on the New Constitution)* (Tokyo: Yuhikaku, 1947), 91-107.

Respect for individual dignity leads to protection of inner spiritual freedoms.⁷⁵ Freedom of thought and conscience and academic freedom have been constitutionally guaranteed for the first time in Japanese history.⁷⁶ Full protection of freedom of religion is crucially important against the background of the Meiji constitutional system.⁷⁷ The *tenno* was believed to be a living god as a descendant of *Amaterasu Omikami* (legendary sun goddess) and the highest priest of Shintoism. Thus Shinto was established in the Meiji regime but understood as non-religion.⁷⁸ Thus the constitutional guarantee of religious freedom tended to become meaningless.⁷⁹ Without any doubt, the Meiji constitution could not offer an inner fortress to people who did not share an orthodox thought. On the contrary, the postwar system has adopted the principle of separation between the state and religion.⁸⁰ Shinto has become the private religion of the *tenno* family.⁸¹ It is true that there is a serious question of how strict the separation is and later the Supreme Court has adopted a rather loose approach to the separation by using something resembling but different from the Lemon test its U.S. counterpart has formulated.⁸² Even so, however, the postwar constitutional system is a completely different system that assumes the unification between the state and religion from the very beginning.

⁷⁵ As explanation of the outline of the new constitution, Kanamori Tokujiro especially emphasizes thorough protection of inner spiritual freedoms. Kanamori Tokujiro, "Shinkenpo no seishin (The Sprits of the New Constitution)," Jiji Tsushinsha, ed., *Nihonkoku kenpo: Kaisetsu to shiryō* (*The Constitution of Japan: Explanations and Materials*) (Tokyo: Jiji Tsushinsha, 1946), 16-30, 29-30 (hereinafter cited as Jiji Tsushinsha, *Kaisetsu to shiryō*).

⁷⁶ See the Constitution of Japan, arts. 19 & 23.

⁷⁷ Article 20 of the Constitution of Japan reads: "Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority. (2) No person shall be compelled to take part in any religious acts, celebration, rite or practice. (3) The State and its organs shall refrain from religious education or any other religious activity." In contrast, Article 28 of the Constitution of the Empire of Japan read: "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief."

⁷⁸ See Minobe Tatsukichi, *Shinkenpo no kihongenri* (*The Fundamental Principles of the New Constitution*) (Tokyo: Kunitachi Shoin, 1947), 113-116 (hereinafter cited as Minobe, *Kihongenri*).

⁷⁹ See Miyasawa Toshiyoshi, "Shinkenpo no seikaku (Characters of the New Constitution)," Jiji Tsushinsha, *Kaisetsu to shiryō*, 31-45, 36.

⁸⁰ See the Constitution of Japan, arts. 20 & 89. The latter reads: "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."

⁸¹ See Minobe, *Kihongenri*, 116.

⁸² The Shinto Groundbreaking Ceremony Case, *Kakunaga v. Sekiguchi*, Saikosai Hanketsu (Supreme Court Judgment), July 13, 1977, *Minshu* vol. 31, no. 4, 533 in Lawrence W. Beer & Hiroshi Ito, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle: University of Washington Press, 1996), Case 34, 478-491. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Secularization of politics was a starting point of liberalism in human history.⁸³ The postwar constitution has for the first time made the Japanese people reach this point. Both guarantee of freedom of religion and institutionalizing separation of the state and religion are revolutionarily innovative for a way of doing politics in postwar Japan.

Further, respect for human dignity also requires protection of equality among people. The Meiji Constitution guaranteed only a limited form of equality: “Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military or any other public offices equally.”⁸⁴ In fact, Meiji society was full of discrimination. First of all, the *tenno* and his family were treated in a way essentially different from common citizens. The *Koshitsu Tenpan* (the Imperial House Law) was an autonomous legal rule for the *tenno* family, which was interpreted as equivalent to the Meiji Constitution. Around them, in addition, there was the nobility, from whom most of the members of the House of Peers were selected.⁸⁵ Above all, discrimination against women was rampant. They were not only denied the right to participate in politics but also mostly the right to legal transactions and inheritance because of their subjection to the control of the head of the *ie*, the family or household, in private life. The Meiji constitutional system excluded women from political community and severely limited their legal competence in the private sphere as well.

The postwar constitution has provided for equality in a more general way: “All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”⁸⁶ Although the *tenno* and his family are still constitutional exceptions, there have been no more nobles.⁸⁷ In this respect, the postwar constitution is more thorough than the governmental draft because while the latter admitted that those who held a peerage on the day when the constitution would be effective could keep their

⁸³ See Kawamura, *Shinkenpo to minshushugi*, 14-19.

⁸⁴ The Constitution of the Empire of Japan, art. 19.

⁸⁵ The Constitution of the Empire of Japan, art. 34.

⁸⁶ The Constitution of Japan, art. 14 par. 1.

⁸⁷ See the Constitution of Japan, art. 14 pars. 2 & 3.

status only for their generation,⁸⁸ the former has no such a reservation and has simply abolished the peerage as a whole.⁸⁹ Women are now full members of the political and social community. Universal suffrage was introduced before the framing of the Constitution of Japan.⁹⁰ Indeed, women's participation in the first general election in the postwar period and in deliberating on the government draft has greatly enhanced the legitimacy of the postwar constitution. In addition, family life is regarded as an important place to realize equality between man and woman because the concept of *ie* was a miniature of the state in analogy to family and a base of absolutistic rule. Thus the constitution has a rather detailed provision on family: "Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. (2) With regard of choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."⁹¹ The impact of this clause is potentially enormous because a horizontal rather than vertical human relationship becomes normal and standard.⁹² Transformation of social and political structure could occur, thus, if the provision were fully implemented.⁹³

Another pivotal right for liberal democracy is freedom of expression. The new constitution protects this precious right in a broad manner: "Freedom of assembly and association as well as speech, press and all others of expression are guaranteed. (2) No censorship shall be maintained, nor

⁸⁸ Article 97 of the government draft of constitutional revision of April 17, 1946 reads: "As regards those who hold peerage on the effective date of this Constitution, their title shall remain valid for their lives, but no right of peerage shall from this time forth embody within itself any power of government."

⁸⁹ Kanamori stresses this point as a reflection of thorough democratization in the new constitution. Kanamori, "Shinkenpo no seishin," Jiji Tsushinsha, *Kaisetsu to shiryō*, 30.

⁹⁰ See Chapter 3 section 5.

⁹¹ The Constitution of Japan, art. 24.

⁹² Kanamori emphasizes the significance of recognizing the essential equality of gender. Kanamori, "Shinkenpo no seishin," Jiji Tsushinsha, *Kaisetsu to shiryō*, 30. For explanations of a new image of family life under the postwar constitution, see Miyasawa, "Shinkenpo no seikaku," *ibid.*, 37-38; Kawashima Takeyoshi, "Kazoku seido (The Institution of Family)," Kokka Gakkai, ed., *Shinkepo no kenkyū*, 108-133; Minobe, *Kihongenri*, 100-102; Wagatsuma Sakae, "Kazoku seido to fujin (The Institution of Family and Women)," Kenpo Fukyukai, *Shinkenpo kowa*, 175-221; Wagatsuma Sakae, *Shinkenpo to kihontekijinken (The New Constitution and Fundamental Human Rights)* (Tokyo: Kunitachi Shoin, 1948), 174, 178; Nakagawa Zennosuke, *Shinkenpo to kazoku seido (The New Constitution and the Institution of Family)* (Tokyo: Kunitachi Shoin, 1948).

⁹³ For the revision of Civil Code, see this Chapter section 8.

shall the secrecy of any means of communication be violated.”⁹⁴ Free expression is crucial from the perspectives of individuals’ realization of themselves and of democratic decision-making.⁹⁵ It is intrinsically and instrumentally valuable for people to express themselves. By fully protecting free expression, thus, the postwar constitutional system intends to develop liberal democratization of society. Freedom of expression is all the more important because the principle of popular sovereignty has been declared. Without the free flow of information and opinions, the power of the people to make a final decision would be pie in the sky.⁹⁶

Along with these negative rights, moreover, the postwar constitution has declared positive rights, which are completely new for constitutionalism in Japan. On the one hand, the right to own property and freedom of business, which were traditionally believed absolute and sacred, are understood as no longer so but relative and practical because the development of capitalism has incurred some necessary arrangement of these rights to social problems. Public welfare is supposed to control the contents of these rights.⁹⁷ On the other hand, social rights are constitutionally guaranteed. The right to maintain the minimum standards of wholesome and cultured living is understood as their representative.⁹⁸ The postwar constitution is placed in the international trend of

⁹⁴ The Constitution of Japan, art. 21.

⁹⁵ For the values freedom of expression advances, see Thomas I. Emerson, “Toward a General Theory of the First Amendment,” 72 Yale L.J. 877, 878-886 (1963); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982); C. Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press, 1989); Martin H. Redish, *Freedom of Expression: A Critical Analysis* (Charlottesville, Va.: Michie Co., 1984).

⁹⁶ See Minobe, *Kihongenri*, 118. However, explanations on the new constitution do not pay much attention to the significance of free expression. It might be because many scholars assume a close connection of free expression to democracy, because the Meiji Constitution guaranteed free speech anyway and because scholars were interested in newly introduced positive rights around the establishment of the new constitution.

⁹⁷ Article 29 of the Constitution of Japan reads: “The right to own or to hold property is inviolable. (2) Property rights shall be defined by law, in conformity with the public welfare. (3) Private property may be taken for public use upon just compensation therefore.” Article 22 reads: “Every person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare. (2) Freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate.” Technically, there is no mention about freedom of business in Article 22. But freedom to choose one’s occupation is interpreted as including freedom of business. See Hogaku Kyokai, ed., *Chukai nihonkoku kenpo (The Constitution of Japan Annotated)* (Tokyo: Yuhikaku, 1953), 2nd ed., 1: 442.

⁹⁸ The Constitution of Japan, art. 25 par. 1. Other than that, the right to education, the right to work and the right to organize and to bargain and act collectively

socialization of rights in the twentieth century.⁹⁹ Morito Tatsuo, an important member of the Socialist Party that has modified the government draft to include the right to a decent life and the first Minister of Education under the new constitution, triumphantly advocated, at the lecture meeting for popularizing the new constitution, the possibility of a peaceful social revolution with the democratic postwar constitution.¹⁰⁰ Immediately after their enactment, however, these social rights were interpreted as not real rights but programs.¹⁰¹ This general understanding of these rights does not recognize their effect as an adjudicative norm and thus a character of concrete rights. Even so interpreted, without any doubt, people's social, economic and cultural existence has become the matter the state has to take care of. Social rights give the government important policy guidance when it exercises its discretionary powers on policy judgment. Therefore public welfare has transformed its meaning from a statist slogan to a standard of individual-oriented arrangements.

In this way, the new constitution has established a sphere where both negative and positive freedoms are fully guaranteed. The core concept of protecting rights is to respect human dignity as individuals. However, there is a serious fear that the concept of the public welfare might be abused as the idea of reservation of laws was in the Meiji constitutional system. That would make the constitutional guarantee of detailed freedoms and rights meaningless. In fact, the most fundamental

⁹⁹ The first constitutionalization of the welfare principle was the Weimar Constitution of 1919 in Germany. It included a famous formula that "Property imposes duties. Its use should also serve the public weal". See the Constitution of the Weimar Republic, Article 153(3). In the aftermath of World War II, this idea of constitutionalizing the welfare state disseminated among the countries that had to reestablish a structure of the state for whatever reason they did. The French People declared several political, economic, and *social principles* as particularly necessary in their time in the Constitution of the French Fourth Republic of 1946. See, the Constitution of the French Fourth Republic, Preamble (emphasis added). Such principles consist of parts of the current Fifth Republic Constitution of 1958. See the Constitution of the French Fifth Republic, Preamble. The Italian Constitution of 1947 declares as one of fundamental principles that "Italy is a democratic Republic *founded on labor*". See the Constitution of Republic of Italy, Article 1(3) (emphasis added). It enumerates thorough rights of citizens in both ethical and social relations and economic relations. See *ibid.* Title II and III of the Part I; Article 29-40. According to the Bonn Basic Law of 1949, "The Federal Republic of Germany is a democratic and *social* federal state". See the Basic Law of the Federal Republic of Germany, Article 20(1) (emphasis added). It inherits the social principle on private property from the Weimar Constitution. See the Constitution of the Weimar Republic, Article 14(2).

¹⁰⁰ Morito Tatsuo, "Shinkenpo to shakaishugi (The New Constitution and Socialism)," *Kenpo Fukyukai, Kenpo kowa*, 287-324, 320-323.

¹⁰¹ See Wagatsuma, "Kihonteki jinken," *Kokka Gakkai, Shinkenpo no kenkyu*, 86-89; Kawamura, *Shinkenpo to minshushugi*, 210; Hogaku Kyokai, *Chukai nihonkoku kenpo*, 1: 487-489.

right might be subject to a comprehensive idea of the public welfare: “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”¹⁰² The constitution has also provided for a warning that “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.”¹⁰³ And many scholars emphasize that it is freedom, not license, that the new constitution guarantees. It is often said that freedom and right accompany responsibility and obligation.¹⁰⁴ Communitarian claims are also developed on a relationship between freedoms and rights and public welfare.¹⁰⁵ To be sure, these claims are not necessarily conservative altogether. Indeed, an excessive individualistic approach cannot materialize potentials of rights in some context.¹⁰⁶ However, a real problem at that time in postwar Japan was not to warn citizens against abuse of their freedoms and rights but to offer full protection for them against abuse of political power. The Japanese people as a whole had never experienced license because they had never sufficiently enjoyed freedoms and rights they could abuse. Here we can see the difficult situation postwar Japan has faced: the people had to respond to the new complication of liberal democracy in the world that had to be confronted before they were completely liberated from despotic political power.

Whatever the public welfare might mean, it is crystal-clear that the postwar constitution has established an innovative framework for liberal democratization of politics based upon respect for

¹⁰² The Constitution of Japan, art. 13.

¹⁰³ The Constitution of Japan, art. 12.

¹⁰⁴ For example, Minobe Tatsukichi stresses obligations of rights for the interests of the state and society and explains three obligations the constitution provides for regarding fundamental human rights: (1) to maintain fundamental rights with constant endeavor, (2) not to abuse them, and (3) to use them for the public welfare. Minobe, *Kihongenri*, 93-95.

¹⁰⁵ See Wagatsuma, “Kihonteki jinken,” *Kokka Gakkai, Shinkenpo no kenkyu*, 88-89; Wagatsuma, *Shinkenpo to kihonteki jinken*, 219-224; Kawamura, *Shinkenpo to minshushugi*, 211-224.

¹⁰⁶ For example, Alexander Meiklejohn has criticized Justice Holmes for excessive individualism he believed in antagonism to a republican project of self-government by the people. See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948), 57-91.

human dignity as individuals. The concept of the public welfare should be understood according to the new constitutional ideal, not an authoritarian spirit.

When we discuss the protection of freedoms and rights, we cannot forget the importance of the judiciary. In the Meiji constitutional system, judicial power was exercised in the name of the *tenno*¹⁰⁷ and the judicature was under the supervision of the Ministry of Justice. The court heard only civil and criminal cases and administrative cases had to be presented to the administrative court, which was an administrative organ.¹⁰⁸ Although rights with reservation of laws had to be protective against administrative abuse, standing to sue was narrowly defined in the *Gyosei Saiban Ho* (Administrative Justice Act) and thus rights were seldom recovered in the administrative court.¹⁰⁹

In marked contrast, the postwar constitution has fortified and expanded the judiciary to a remarkable extent.¹¹⁰ The entire judicial power is vested in the Supreme Court and inferior courts.¹¹¹ The judiciary now enjoys independence.¹¹² The Supreme Court may make a rule on judicial affairs, which is an exception to the monopoly of legislative power on the part of the Diet.¹¹³ Judges may hold office barring impeachment¹¹⁴ or mental or physical incompetence. Further, no disciplinary action shall be taken by any administrative organ.¹¹⁵ Because the administrative court system was abolished,¹¹⁶ courts hear not only civil and criminal but also administrative cases. This alternation would advance the protection of citizens' rights and freedoms because the administrative court after

¹⁰⁷ See the Constitution of the Empire of Japan, art. 57 par. 1.

¹⁰⁸ See the Constitution of the Empire of Japan, art. 61.

¹⁰⁹ See Chapter 1 section 6.

¹¹⁰ For the judiciary in the postwar constitution, see Kanamori, "Shinkenpo no seishin," *Jiji Tsushin, Kaisetsu to shiryō*, 27-28; Miyasawa, "Shinkenpo no seikaku," *ibid.*, 41-43; Tanaka Jiro, "Shiho, chihojichi," Kenpo Fukyukai, *Shinkenpo kowa*, 257-285, 258-270; Kaneko Hajime, "Shihoseido (The Judicial Institution)," Hogaku Kyokai, *Shinkenpo no kenkyū*, 229-243; Suenobu Sanji, "Iken ripo shinsaseido (Judicial Review)," *ibid.*, 244-271.

¹¹¹ See the Constitution of Japan, art. 76 par. 1.

¹¹² Article 76 Paragraph 3 of the Constitution of Japan reads: "All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws."

¹¹³ See the Constitution of Japan, art. 77.

¹¹⁴ Impeachment is applicable only to judges. See the Constitution of Japan, art. 64.

¹¹⁵ See the Constitution of Japan, art. 78.

¹¹⁶ Article 76 Paragraph 2 of the Constitution of Japan reads: "No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power." For the reform of the administrative adjudication system, see Alfred C. Oppler, *Legal Reform in Occupied Japan*, 83-84, 115-117(translation).

all was not an independent adjudicative organ.

Above all, what is important from a liberal democratic point of view is the introduction of a judicial review system: “The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.”¹¹⁷ The constitution is the supreme law of the land¹¹⁸ and the Supreme Court is now vested with the final power to determine what the constitution means. In the Meiji constitutional system, the highest court was denied the power to have the final word on interpretation of the constitution and the legislative and administrative branches were equal to the judicial branch in terms of constitutional interpretation. Liberals were rather interested in promoting parliamentary government, which judicial review was commonly believed to prevent from developing.¹¹⁹ In the postwar constitutional system, instead, constitutional justice has become its essential element.¹²⁰ The concept of constitutionality beyond legality would lead to strengthen the constitutional norm, the core of which positivist parliamentarism once eroded. The judicial control of constitutionality of government actions means not only that citizens’ freedoms and rights are more sufficiently protected than the older system but also that it would change the quality of politics.¹²¹ Namely, a majority does not automatically win political legitimacy under a system with judicial review. Postwar Japan has had a political regime based upon the justification of governmental decisions from reasons the decision-makers give. The fundamental value of protecting respect for human dignity as individuals in the new constitution would be enhanced through the institutional exchange of reasons. Introduction of judicial review into the constitutional system would radically transform the manner of doing politics. Liberal democracy

¹¹⁷ The Constitution of Japan, art. 81.

¹¹⁸ Article 98 paragraph 1 of the Constitution of Japan reads: “This Constitution shall be the supreme law of the land and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.”

¹¹⁹ See Chapter 1 sections 6 & 8.

¹²⁰ For the idea of constitutional justice, see Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971).

¹²¹ Tanaka Jiro has pointed out that from the lesson of American experience, the Supreme Court with judicial review would play a critically important role in Japan’s development not only legal but also political, economic, social and cultural. Tanaka, “Shiho, chihojichi,” *Kenpo Fukyukai, Kenpo kowa*, 267.

finally has a good opportunity to develop even with difficulty in arranging the realization of majority will and the protection of minority will.¹²²

5. The Institutional Scheme for Responsible Politics

In the Meiji constitutional regime, the *tenno* governed the state directly as a matter of principle but mostly behaved himself as a constitutional monarch. A serious problem the regime had was that there was no unification of advisory institutions, which led to non-responsible politics. First of all, the cabinet was not a constitutional institution. A prime minister could not legally control his cabinet members and was nothing but *primus inter pares*. Ministers of state were respectively responsible to *tenno* for their advice.¹²³ However, they could not monopolize the position of supporting the *tenno*. Military matters were out of reach on the part of the government because *tosui-ken*, the power to command the military forces, was interpreted as independent.¹²⁴ Other than the cabinet, there were various advisory institutions, constitutional and non-constitutional, such as the Minister of the Imperial Household, the Lord Keeper of the Privy Seal, *genro* (a group of senior statesmen), the Privy Council and the General Staff Office and the Naval Staff Board in peacetime and the Imperial Headquarters in wartime.¹²⁵ Although all these institutions played an active role in making policy decisions, they had obscured location of political responsibility for a specific policy judgment.

The postwar constitution that declared the principle of popular sovereignty changed the

¹²² It is true that the Supreme Court has stingily exercised the power of judicial review and that it has often adopted a comprehensive concept of the public welfare to uphold legal limitation upon freedoms. For example, the Public Offices Election Law prohibits those who engage in political campaign from door-to-door canvassing with criminal sanction. When the accused attacked constitutionality of the provision on the basis of freedom of speech, the Supreme Court rejected the allegation because it believed that free speech was not absolute and subject to rational limitations of time, place, and manner and so on for the public welfare. The judgment had no substantial analysis on the public welfare. See Supreme Court Judgment, September 27, 1950, *Keishu*, vol. 4, no. 9, 1799. However, as a matter of principle, undoubtedly, the introduction of judicial review has enormous impact upon public discourse on politics. Even on the premise of its poor function, it is undeniable that this system has promoted institutional dialogue.

¹²³ See the Constitution of the Empire of Japan, art. 55 par. 1.

¹²⁴ See the Constitution of the Empire of Japan, art. 11. There was no explicit ground of independence of *tosui-ken* in the Meiji Constitution. See Chapter 1 section 2 (4).

¹²⁵ See Chapter 1 section 5.

political structure dramatically. Because political legitimacy all derives from the sovereign will of the people, political institutions are directly or indirectly responsible to the people for their decisions. The constitution has clarified a simple principle that “Government is a sacred trust of the people, the authority for which is derives from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.”¹²⁶ To materialize this universal principle, the constitution has thoroughly democratized political institutions in terms of popular control.

First, there have been no advisory institutions in the postwar constitutional system. The position of the Lord Keeper of the Privy Seal was abolished after its failed enterprise of constitutional revision.¹²⁷ Technically, the *genro* (a group of senior statesmen) ceased to exist when Prince Saionji Kinmochi, the last *genro*, died in November 1940. But the new constitution has given the Diet the most important function the *genro* had assumed. As an extra-constitutional institution, the *genro* was once powerful in the political process in prewar Japan because it recommended a candidate for next prime minister to the *tenno*. The power to designate a prime minister now belongs to the Diet and the *tenno* has no substantial power to appoint a prime minister.¹²⁸ Imperial Household Agency has been established as an independent organ under the cabinet. It takes care of the *tenno*'s matters of state and his family matters and thus can have no political influence as the Ministry of the Imperial Household did in prewar Japan. The postwar constitution has also abolished the Privy Council, which as the self-esteemed constitutional watchdog formidably confronted political party cabinets and sometimes blocked the realization of their policies.¹²⁹ There has been no independent institution of prior review system the Privy Council had adopted. Instead, as discussed just before,¹³⁰ the Supreme Court has become the ultimate interpreter of the constitution.

¹²⁶ See the Constitution of Japan, preamble par. 1.

¹²⁷ See Chapter 2 section 3.

¹²⁸ See the Constitution of Japan, art. 67 & art. 6 par. 1.

¹²⁹ See Chapter 1 section 5.

¹³⁰ See this Chapter section 4.

Finally, because the new constitution has denounced war and the military forces,¹³¹ military advisory institutions are no longer relevant, whereas the General Staff Office and the Naval Staff Board in peacetime and the Imperial Headquarters in wartime had had the greatest influence upon the political process in pre- and mid-war Japan.

Next, the Diet has greatly expanded and strengthened its power in the postwar constitutional regime. The Diet is now the highest organ of state power.¹³² The meaning of “the highest organ” is commonly understood as political, not legal. The Diet has a direct relation to the sovereign people because it is representative of all the people.¹³³ In the normal way of things, the people are supposed to act “through duly elected representatives in the National Diet.”¹³⁴ This close connection to the people makes the Diet the most important institution in the postwar constitutional system.¹³⁵ In addition, the Diet as a legislative body makes laws to which other organs are bound.¹³⁶ In consideration of the said position, thus, the constitution calls the Diet the highest organ.

More importantly, the Diet is the sole law-making organ of the state. Unlike the Imperial Diet in the Meiji constitution, which was vested with nothing but the power to give consent to the *tenno*'s legislative prerogative, the Diet itself has become not only an authentic legislative institution but also a monopolist of legislative power. The Meiji constitutional system allowed the government to evade getting consent from the Imperial Diet because emergency orders and independent orders were legislation equivalent to law without the consent of the Imperial Diet.¹³⁷ In sharp contrast, the postwar constitution has denied this expediency. All laws must be enacted in the Diet¹³⁸ and by

¹³¹ See this Chapter section 6.

¹³² The Constitution of Japan, art. 41.

¹³³ See the Constitution of Japan, art. 42.

¹³⁴ The Constitution of Japan, preamble par. 1.

¹³⁵ See Miyasawa Toshiyoshi, “Kokkai to naikaku (The Diet and the Cabinet),” Kenpo Fukyukai, *Shinkenpo kowa*, 223-256, 234; Kawamura, *Shinkenpo to minshushugi*, 153.

¹³⁶ See Minobe, *Kihongenri*, 143; Kawamura, *Shinkenpo to minshushugi*, 153.

¹³⁷ See the Constitution of the Empire of Japan, arts. 8 & 9.

¹³⁸ Constitutional exceptions are (1) both houses have rule-making power (art. 58 par. 2), (2) the Supreme Court has rule-making power (art. 77), (3) the cabinet has the power to enact orders to execute the provisions of the law (art. 73 (vi)), and local public entities have the power to enact their own regulations within law (art. 94).

itself.¹³⁹ Although the new constitution provides for the *tenno*'s matters of state to promulgate laws,¹⁴⁰ this requirement is interpreted as not necessary for laws to take effect.¹⁴¹ Namely, laws are completely established before the *tenno* promulgates them. This is essentially different from the *tenno*'s sanction to laws, which was an official and indispensable part of the process of legislation in the Meiji constitutional system.¹⁴²

In addition, the Diet has strengthened control over the general administration of matters of state. The Diet receives reports on general national affairs and foreign relations from the prime minister, who represents the cabinet.¹⁴³ The Diet's control over the budget has been particularly fortified. Administration of national finance is exercised as the Diet has determined.¹⁴⁴ The Diet authorizes national expenses and debts.¹⁴⁵ The cabinet has to submit a budget to the Diet for consideration and decision each fiscal year.¹⁴⁶ The cabinet also has to submit final accounts of the national expenditures and revenues to the Diet after having an annual audit by the Board of Audit.¹⁴⁷ These provisions are not exactly new. They are more or less the same as those in the old constitution.¹⁴⁸ However, the Meiji constitutional system had several exceptional institutions. The government executed the budget of the preceding year if the government could not gain the consent of the Imperial Diet.¹⁴⁹ The government had the power to take all necessary financial measures without the consent of the Imperial Diet in case of urgent need for public safety.¹⁵⁰ But the postwar constitution has abolished such loopholes.¹⁵¹ Further, each House now has the power to conduct

¹³⁹ Constitutional exception is a special law applicable only to one local public entity (art. 95). In this case, the consent of the majority of voters of the local public entity concerned is necessary to enact the law.

¹⁴⁰ See the Constitution of Japan, art. 7 (i).

¹⁴¹ See Keibe So, "Ryoinsei (Bicameralism)," *Kokka Gakkai, Shinkenpo no kenkyu*, 175-210, 176.

¹⁴² See the Constitution of the Empire of Japan, art. 6.

¹⁴³ See the Constitution of Japan, art. 72.

¹⁴⁴ See the Constitution of Japan, art. 83.

¹⁴⁵ See the Constitution of Japan, art. 85.

¹⁴⁶ See the Constitution of Japan, art. 86. See also *ibid.*, art. 72 & art. 73 (v).

¹⁴⁷ See the Constitution of Japan, art. 90.

¹⁴⁸ See the Constitution of the Empire of Japan, arts. 64, 62 par. 3, 72.

¹⁴⁹ See the Constitution of the Empire of Japan, art. 71.

¹⁵⁰ See the Constitution of the Empire of Japan, art. 70 par. 1. Such measures were required to gain the consent of the Imperial Diet afterward. See *ibid.*, par. 2.

¹⁵¹ See Kawamura, *Shinkenpo to minshushugi*, 158-160.

investigations in relation to the government.¹⁵² With this power, each House can make contact with outsiders to enrich its activities of legislation and supervision of state affairs.¹⁵³

Further, the Diet has fortified its basis of operation. It can now convene by itself. The Meiji Constitution vested the *tenno* with the prerogative to convoke, open, close and prorogue the Imperial Diet and to dissolve the House of Representatives.¹⁵⁴ In the postwar constitutional system, the *tenno* still convokes the Diet. But this is a formal matter of state with the advice and approval of the cabinet¹⁵⁵ and thus a substantial decision-maker is the cabinet.¹⁵⁶ Because the cabinet is parliamentary, as will be discussed shortly, sessions of the Diet are determined in a more interactive manner. Further, the demand of a quarter or more of the total members of either House forces the cabinet to convoke the Diet.¹⁵⁷ This means that the Diet may always open session and thus the Diet dramatically expands room for its activities.¹⁵⁸

The Diet is much more democratic in its organization than the Imperial Diet. Although the former adopts bicameralism as the latter did, its quality is essentially different. In the Meiji constitutional system, absolutism and constitutionalism conflicted with each other, which was well reflected in the organization of the Imperial Diet. It was true that the House of Representative was popularly elected, even though suffrage was limited.¹⁵⁹ However, the framers' intention to prevent the Diet from being fully democratized is crystal-clear when the upper house is examined.¹⁶⁰ The House of Peers was composed of the *tenno* family, the orders of nobility and those who were nominated by the *tenno*.¹⁶¹ Organization of the House of Peers was a matter of ordinance, not law, which meant that the House of Representatives could not participate in creating a rule of organization. Quite the

¹⁵² See the Constitution of Japan, art. 62.

¹⁵³ See Minobe, *Kihongenri*, 158.

¹⁵⁴ See the Constitution of the Empire of Japan, art. 7.

¹⁵⁵ See the Constitution of Japan, art. 3 & art. 7 (ii).

¹⁵⁶ See the Constitution of Japan, art. 53, first sentence.

¹⁵⁷ See the Constitution of Japan, art. 53, second sentence.

¹⁵⁸ See Miyasawa, "Kokkai to naikaku," Kenpo Fukyukai, *Shinkenpo kowa*, 229-232.

¹⁵⁹ See the Constitution of the Empire of Japan, art. 35.

¹⁶⁰ See Chapter 1 section 4.

¹⁶¹ The Constitution of the Empire of Japan, art. 34.

reverse, in fact: the House of Peers could engage in making law organizing the House of Representatives.¹⁶² Further, the powers both houses were vested with were equal except for the budget case in which a budget bill was first submitted to the House of Representatives.¹⁶³

The new bicameralism the postwar constitution has provided for consists of the Houses of Representatives and of Councillors. The upper house is also composed of publicly elected members, representative of all the people as the lower house is.¹⁶⁴ The terms of office for Representatives and Councillors are for four and six years, respectively. But if the House of Representatives is dissolved, the term immediately ends for Representatives before the full term.¹⁶⁵ For Councillors, a half of the members are elected every three years.¹⁶⁶

Superiority of the House of Representatives over the House of Councillors is eminently characteristic of this new bicameralism. First, the lower house has a wider range of powers than the upper house. The House of Representatives alone can pass a resolution of non-confidence in a cabinet or reject a confidence resolution.¹⁶⁷ In addition, the budget must be still first submitted to the lower house.¹⁶⁸ However, its superiority becomes more salient when it comes to the effect of a resolution a house passes. The postwar constitution has admitted four exceptions to the rule that the Diet's will is formed based upon agreement by both houses.¹⁶⁹ (1) A bill on which each house disagrees becomes a law when the House of Representatives passes it once again by a majority of two-thirds or more of the present members.¹⁷⁰ (2) In the case of designation of the prime minister, the effect of a resolution by the House of Representatives is the most powerful. In this case, disagreement between both houses is solved within ten days in that the decision of the House of

¹⁶² Compare arts. 34 & 35 of the Constitution of the Empire of Japan.

¹⁶³ The Constitution of the Empire of Japan, art. 65.

¹⁶⁴ The Constitution of Japan, art. 43.

¹⁶⁵ The Constitution of Japan, art. 45.

¹⁶⁶ The Constitution of Japan, art. 46.

¹⁶⁷ The Constitution of Japan, art. 69.

¹⁶⁸ The Constitution of Japan, art. 60 par. 1.

¹⁶⁹ The Constitution of Japan, art. 59 par. 1.

¹⁷⁰ The Constitution of Japan, art. 59 par. 2. Anyway, a final decision of the Diet is made within sixty days. "Failure by the House of Councillors to take final action within sixty days after receipt of a bill passed by the House of Representatives, time in recess excepted, may be determined by the House of Representatives to constitute a rejection of the said bill by the House of Councillors." *Ibid.*, par. 4.

Representatives constitutes the decision of the Diet.¹⁷¹ (3) In the case of the budget, superiority of the lower house is situated between the previous two cases. Disagreement over the budget leads to a situation within thirty days that the decision of the House of Representatives is regarded as the decision of the Diet.¹⁷² (4) The same rule as the budget case applies to the case of approval of the Diet of the conclusion of treaties.¹⁷³ According to the Diet Law, in addition, disagreement over duration of a session is solved by granting priority to a decision of the House of Representatives without any negotiation.¹⁷⁴

Therefore, the postwar constitution gives priority to the House of Representatives in forming the will of the Diet over important matters. This derives from reflection on the fact that the powerful House of Peers prevented the popular will from being expressed in the legislative process. Because the House of Councillors is also representative of the people, however, superiority of the lower house does not make strictly sense.

The constitution has regulated the election process from a viewpoint of equality.¹⁷⁵ Thus substantial distinction between two houses is difficult. While eligibility for candidacy for councillors is the age of thirty or over, for one thing, that for representatives is twenty-five or over.¹⁷⁶

¹⁷¹ Article 67 paragraph 2 of the Constitution of Japan reads: "If the House of Representatives and the House of Councillors disagrees and if no agreement can be reached even through a joint committee of both Houses, provided for by law, or the House of Councillors fails 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 the Diet." There have been two cases so far in which the House of Representatives and the House of Councillors designated different persons as prime minister and the decision of the former constitutes designation of the Diet.

¹⁷² Article 60 paragraph 2 of the Constitution of Japan reads: "Upon consideration of the budget, 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 Houses, provided for by law, or in the case of failure by the House of Representatives to take final action within thirty days, the period of recess excluded, after the receipt of the budget passed by the House of Representatives, the decision of the House of Representatives shall be the decision of the Diet."

¹⁷³ See the Constitution of Japan, art. 61.

¹⁷⁴ *Kokkai Ho* (Diet Law), art. 13.

¹⁷⁵ Article 44 of the Constitution of Japan reads: "The qualifications of members of both Houses and their electors shall be fixed by law. However, there shall be no discrimination because of race, creed, sex, social status, family origin, education, property or income."

¹⁷⁶ See *Koshoku Senkyo Ho* (Public Offices Election Law), art. 10 par. 1 & 2.

Representatives were elected from a so-called medium-sized district system.¹⁷⁷ Councillors were elected from a nation-wide district and local districts. Among 250 Councillors, 100 were from the former and 150 from the latter based upon prefecture.¹⁷⁸ A question is whether these election methods were sufficiently different to justify the new bicameralism. There may be a serious doubt about differentiation. Thus, the place of a second house in the democratic institutional design has been an important problem from the very beginning.¹⁷⁹

To avoid tyranny of majority and to make a judicious decision are often mentioned as reasons why a second house is needed in a democratic unitary state.¹⁸⁰ Under the parliamentary government system, another channel of public opinion is more needed than under the presidential government system. The longer term without dissolution serves for continuity, resistance to radical change and long sight. However, the very weak second house cannot stop the determined will of the first house. Thus, the House of Councillors can only make a contribution to enriching deliberation by presenting different views deriving from the feature of its longer term without dissolution. Because both representatives and councillors are not the people themselves, their main task is to offer the people options on important issues. In this sense, the House of Councillors as an institution makes some contribution to furthering deliberation in the whole political process.

We now turn our attention to the cabinet. First of all, the cabinet has become a constitutional institution that is vested with administrative power in the postwar constitution.¹⁸¹

¹⁷⁷ Each voter casts only one vote. Three to five candidates are elected in one district. 24 general elections were held under this medium-sized district system from the first in 1925 to the fortieth in 1993. The first general election in postwar was held under multi-member district system in which one prefecture formed one district. Since the forty-first general election in 1996, general elections have been held under single-member district system plus proportional representation system. See Muchida Mitsuru, ed., *Gendai nihon seiji shojiten (Dictionary of Contemporary Japanese Government and Politics)* (Tokyo: Burensa, 2001).

¹⁷⁸ For the establishment of the election system for the House of Councillors, see Soma Masao, *Nihon senkyo seidoshi*, 226-230.

¹⁷⁹ See Miyasawa, "Kokkai to naikaku," Kenpo Fukyukai, *Shinkenpo kowa*, 224-229; Kawamura, *Shinkenpo to minshushugi*, 175-178. To strengthen the power of the upper house, Kawamura, for example, proposed a system in which the House of Councillors would be vested with the right to submit a bill to national referendum. *Ibid.*, 129.

¹⁸⁰ For the general discussion on reasons for bicameralism, see Keibe, "Niinsei," Kokka Gakkai, *Shinkenpo no kenkyu*, 180-189.

¹⁸¹ See the Constitution of Japan, art 65. Although the official translation uses the term executive power

Under the Meiji constitutional regime, there was also the cabinet as an institution. However, as a matter of principle, its collectiveness was denied and each minister of state respectively supported the *tenno*.¹⁸² In addition, the prime minister is also constitutionalized.¹⁸³ In the new constitutional system, the prime minister is more than *primus inter pares*. The Meiji Constitution vested the *tenno* with the power to appoint and remove ministers of state as his prerogative.¹⁸⁴ In contrast, the prime minister not only appoints but also may remove ministers of state.¹⁸⁵ This means that the leadership of the prime minister is tremendous. Thus, it is now possible under the leadership that the cabinet is collectively responsible for the exercise of administrative power.¹⁸⁶ In this sense, when the post of prime minister becomes vacant, the cabinet has to resign en masse.¹⁸⁷

The activities of the cabinet have greatly changed as well as its nature. The most important task the old cabinet assumed was to give the *tenno* advice on his wide range of prerogatives. The old cabinet executed only trivial administrative functions in its name.¹⁸⁸ However, the new constitutional cabinet by itself performs administrative functions that used to belong to the prerogatives of the *tenno*.¹⁸⁹ Thus the activities of the cabinet have expanded enormously.

One of the most distinctive features of the postwar constitution is to adopt a parliamentary government system to realize responsible politics. The prime minister and a majority of cabinet members are selected from members of the Diet.¹⁹⁰ They have to be civilians,¹⁹¹ which strengthens

instead of administrative power, the Japanese text of the constitution adopts the term *gyosei-ken* rather than *shikkou-ken*.

¹⁸² See the Constitution of the Empire of Japan, art. 55 par. 1.

¹⁸³ See the Constitution of Japan, art. 66 par. 1.

¹⁸⁴ See the Constitution of the Empire of Japan, art. 10.

¹⁸⁵ See the Constitution of Japan, art. 68 pars. 1 & 2.

¹⁸⁶ See the Constitution of Japan, art. 66 par. 3.

¹⁸⁷ See the Constitution of Japan, art. 70.

¹⁸⁸ See Miyasawa, "Kokkai to naikaku," Kenpo Fukyukai, *Shinkenpo kowa*, 247; Sugimura Shozaburo, "Naikaku seido (The Cabinet System)," Kokka Gakkai, *Shinkenpo no kenkyu*, 211-228.

¹⁸⁹ See the Constitution of Japan, art. 73. The functions include: to "(i) Administer the law faithfully; conduct affairs of state; (ii) Manage foreign affairs; (iii) Conclude treaties...(iv) Administer the civil service, in accordance with standards established by law; (v) Prepare the budget, and present it to the Diet; (vi) Enact cabinet orders in order to execute the provisions of this Constitution and of the law...(vii) Decide on general amnesty, special amnesty, commutation of punishment, reprieve, and restoration of rights."

¹⁹⁰ See the Constitution of Japan, art. 67 par. 1 and art. 68 par. 1.

¹⁹¹ See the Constitution of Japan, art. 66 par. 2.

the democratic nature of politics. The prime minister is designated by a resolution of the Diet and appointed by the *tenno*.¹⁹² Because he has no substantial power over governmental matters,¹⁹³ the *tenno* cannot reject a person designated by the Diet and his appointment is merely formal. Thus, no institution other than the Diet can intervene regarding who will be a prime minister. Further, not only formation but also maintenance of a cabinet depends upon the confidence of the Diet in general and the House of Representatives in particular. The cabinet is responsible for its exertion of administrative power to the Diet.¹⁹⁴ The House of Representative may pass a resolution of non-confidence in the cabinet or reject a confidence resolution. In response to a non-confidence resolution, the cabinet either resigns en masse or dissolves the House of Representatives within ten days.¹⁹⁵ The House of Representatives can introduce a non-confidence resolution for whatever reasons related to the cabinet's whole performance of administrative functions. The responsibility the House of Representatives questions is political in nature. To pass the resolution, reasons of non-confidence have to be shared with a majority of the representatives, who are faced with a counter-attack of dissolution by the cabinet. Or the cabinet appeals to dissolution to enhance its position by taking the risk of losing popular support.¹⁹⁶ The cabinet also needs good reasons to justify its decision. Thus interaction of the two organs promotes competition of justifications of political decisions. There is a good chance for politics to be more deliberative in the new governmental

¹⁹² See the Constitution of Japan, art. 67 par. 1 and art. 6 par. 1.

¹⁹³ See the Constitution of Japan, art. 4.

¹⁹⁴ See the Constitution of Japan, art. 66 par. 3.

¹⁹⁵ See the Constitution of Japan, art. 69. The House of Councillors may pass a resolution of censure on the cabinet but the resolution has no legal effect though is expected to have political influence.

¹⁹⁶ There is a controversy over the power to dissolve the House of Representatives. The postwar constitution substantially provides for dissolution as counteraction to a non-confidence resolution. See the Constitution of Japan, art. 69. However, it also provides that the *tenno* dissolves the House of Representatives. See *ibid.*, art. 7 (iii). If this provision is available for cabinet that has the substantial power to make a decision, the cabinet can dissolve the lower house at will by using it. Many scholars agree with this interpretation. However, there are severe criticisms on this interpretation because it after all leads to using the *tenno* politically. See Sato Isao, "Kaisan wo meguru kenpo ronso (A Constitutional Controversy over Dissolution)," *Kenpo kaishaku no shomondai (Problems in Constitutional Interpretation)* (Tokyo: Yuhikaku, 1953), 143-194; Hasegawa Masayasu, "Kaisanken ryonso no moten (A Blind Spot in the Constitutional Controversy over Dissolution)," *Horitsu Jiho*, July 1952; Kojima Kazushi, "Tenno no kenno nitsuite (On the Powers of the *Tenno*)," *Horitsu Jiho*, October 1952; Kojima Kazushi, "Futatabi tenno no kenno ni tsuite (The Powers of the *Tenno* Revisited)," *Koho Kenkyu*, no. 10, 1954, 37-44.

system.

Introduction of the parliamentary government system has created a close relationship between the Diet and the cabinet. Because the cabinet is formed and maintained upon the confidence of the Diet, the cabinet has to have the majoritarian support in the Diet, particularly the House of Representatives. The people can connect to the cabinet through a majority in the lower house. The political party mediates between the two institutions, although the postwar constitution is silent on this issue. However, when the parliamentary cabinet system was established, the constitution clearly expected political parties to play a positive role in the actual political process.¹⁹⁷ Thus a key to success in this system lies in the healthy development of party politics. Prewar Japan once experienced a quasi-parliamentary government system based upon party politics. But it was brief and half-hearted.¹⁹⁸ Frequent corruption around political parties incurred popular distrust in party in particular and democratic politics in general.¹⁹⁹ The collapse of the Meiji constitutional regime has indicated that constitutional interpretation cannot entirely overcome institutional limits. Commitment to liberal democratic values has to spread so widely among the common citizens that political party politics prevails.

In any event, the most serious defect the Meiji constitutional system involved was to obscure the place of ultimate responsibility for political decisions in the whole government structure.²⁰⁰ The postwar constitution has overcome this difficulty because the cabinet assumes political responsibility to the Diet in general and the House of Representatives in particular. The Diet is regarded as the highest organ due to its representativeness of the sovereign people and thus the cabinet is indirectly accountable to the people. The secret of operating the new constitutional

¹⁹⁷ The Supreme Court has taken the same position. "Because parliamentary democracy the constitution has provided cannot be expected to be operated smoothly with disregarding political parties, the constitution has naturally assumed existence of political parties." See Yahata Seitesu Kenkin Jiken, Supreme Court Judgment, June 24, 1970, *Minshu*, vol. 24, no. 6, 625.

¹⁹⁸ See Chapter 1 sections 7-8.

¹⁹⁹ See Minobe Tatsukichi, "Senkyo kakuseiron (An Essay on Electoral Reform)," *Gendai kensei hyoron (Commentaries on Contemporary Constitutional Government)* (Tokyo: Iwanami Shoten, 1930), 1-59. See also, Chapter 2 section 6.

²⁰⁰ See Chapter 1 section 9.

government scheme comes down to the people, who are sovereign after all.

6. The Sincere Desire for Peace and the Denunciation of War

The Constitution of Japan has brought liberal democratization of politics to postwar Japan. This is certainly revolutionary. However, political liberal democratization is not uncommon in the world. Rather, renunciation of all kinds of war and military forces is unique in comparative constitutional law. The idea of renunciation of wars of aggression is found in the French Constitutions of 1791 and of 1848, the Brazilian Constitution of 1891, the Spanish Constitution of 1931, and the Philippine Constitution of 1935.²⁰¹ But they recognize wars of self-defense as just. In this respect, thus, the postwar constitution is indeed unprecedented.²⁰² How did people understand the epoch-making concept around its establishment? What does it potentially mean to liberal democracy in Japan?

The preamble of the postwar constitution declared high ideals.

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justices and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and the obedience to such is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations.²⁰³

To realize these high ideals, the constitution introduced the provision of renunciation of war and military forces. Its Article 9 reads: "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

²⁰¹ For the details of renunciation of war in foreign constitutions, see Yokota Kisaburo, *Senso no hoki (Renunciation of War)* (Tokyo: Kunitachi Shoin, 1947), 86-99.

²⁰² See Kanamori, "Shinkenpo no seishin," Jiji Tsushinsha, *Kaisetsu to shiryō*, 20-21.

²⁰³ The Constitution of Japan, preamble, pars. 2 & 3.

use of force as a means of settling international disputes. (2) 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. The right of belligerency of the state will not be recognized.”²⁰⁴

The general idea of the renunciation of war and of armed forces was prevalently welcomed when a draft of the constitutional revision was announced.²⁰⁵ The people had suffered severely from the reckless war and were tired of austerity. They felt that something was wrong with the state and social life in the past decade. Peace rather than war was desperately sought and a culture state instead of a military one was sincerely desired. Ashida Hitoshi, the chairman of the special committee for constitutional revision in the House of Representatives and a future prime minister, well summarized an idealistic position widely shared among even politicians immediately after the war.

At the beginning of the statement of the reason why the bill for revising the Constitution was presented to the Diet, the Prime Minister referred to the Potsdam Declaration and said that respect of fundamental human rights and establishment of a democratic form of government are required by it. That is quite true, but I do not think it is possible to explain the motive of this revision of the Constitution merely by diplomatic records, such as acceptance of the terms of surrender. I think the motive lies far deeper. When we look out of the windows of this Diet building, we see nothing but a great and desolate stretch of debris. Tens of thousands of corpses which were lying there and tears shed morning and night by orphans and widows who live in the temporary huts built on the ashes! Out of these is the Japanese Constitution destined to be born. Do not the Cabinet members think so? Not only in Japan, but also in England, in the fields of the Ukraine, and under the shade of willows along the Yangtze River, similar cries of misery are to be heard. When we contemplate this lamentation of mankind and ravage of society, we come to realize that herein lies the fundamental problem common to mankind. There is no doubt that fervent hopes common to mankind for renunciation of war, aspirations for higher culture, and wishes for a better life, combined with the defeat, forced a way to a great change. I should like to know if my interpretation of the

²⁰⁴ The Constitution of Japan, art. 9.

²⁰⁵ Puzzled over its essential difference from the reported Matsumoto plan, major newspapers highly evaluated the proposal of a peace constitution. See “Kakkitekina heiwa kenpo,” *Asahi Shinbun*, editorial, March 7, 1946 in *Shoron Shuroku*, 213-214; “Kenpo soan to sekai heiwa,” editorial, *Asahi Shinbun*, March 8, *ibid.*, 215-216; “Minshu kenpo to shindotoku,” editorial, *Mainichi Shinbun*, March 8, *ibid.*, 217-218; “Seifu no kenpo kaiseian yoko naru,” *Tokyo Shinbun*, editorial, March 8, *ibid.*, 218-219; “Minshushugi heiwa kokka no koso,” *Nihon Keizai Shinbun*, editorial, March 8, *ibid.*, 219-220. The *Yomiuri Shinbun* had a different tone. It made a distinction between wars of aggression and wars of self-defense and stated that life and independence of the nation should be maintained even by bloody war. See “Jinmin kenpo no seitei,” *Yomiuri Hochi Shinbun*, editorial, March 8, 1946, *ibid.*, 221-222.

reason for revising the Constitution is shared by the Government.²⁰⁶

Article 9 of the constitution expresses the motivation to denounce war: “Aspiring sincerely to an international peace based on justice and order”. This indicates a positive and highly idealistic attitude for the denunciation of war. When Ashida as the chairman reported discussions of the special committee to the House of Representatives, he enthusiastically admitted their positive and idealistic nature:

It is true it is not without precedent that the idea of repudiating aggressive war has been legislated into the French Constitution of 1791 and the Brazilian Constitution of 1891. But perhaps this is the first time in the world that a Constitution, as our new Constitution proposes to do, has provided for the abolition of the whole range of armaments and for the repudiation of all war. (Cheers.) Now that modern science has brought the atomic bomb into being, all will agree that horrors to mankind would be unpredictable, if by any possible chance war should in future break out among the Great Powers. The reason why we choose to urge the repudiation of war is not merely because the horrors of war in the past have brought home to us how abominable war is. It is also because, I need hardly say, we are prompted by the ideal of saving the world from the ruination of civilization.

The greatest characteristic of the new Constitution is the fact that it proclaims, boldly and straightforwardly, the renunciation of war. This is the very thing hankered after by all and everybody who have experienced a sanguinary war victimizing tens of millions of human lives. It also constitutes the road to world peace. Under the banner of this ideal, we are going forth to make a call to the whole world. (Cheers.)²⁰⁷

At that time, truly, there was an atmosphere in which the Japanese people could accept these words naturally and frankly.²⁰⁸

Even under such circumstances, the text of Article 9 of the postwar constitution seems extremely radical. The first paragraph provides for the renunciation of a wide range of exercises of military force. It can be understood as renouncing all kinds of war with a highly idealistic

²⁰⁶ Ashida Hitoshi, Liberal Party, Special Committee, House of Representatives, July 9, 1946 in Shimizu, *Shingiroku*, 1: 14. For the English translation, see RM337.

²⁰⁷ Ashida Hitoshi, Liberal Party, Plenary Session, House of Representatives, August 24, 1946 in Shimizu, *Shingiroku*, 4: 468-483, 471-472, 482.

²⁰⁸ See Sato Isao, “Senso hoki to anzen hoshō (Renunciation of War and National Security),” *Nihonkoku kenpo jyuniko* (Twelve Lessons on the Constitution of Japan) (Tokyo: Gakuyo Shobo, 1951), 130-155, 139-140.

preamble.²⁰⁹ And it broadly prohibits not only war itself but also the threat or use of force, which do not reach the level of war.²¹⁰ Renunciation of the threat or use of force is crucially important from a historical perspective. Aggression of the Kwantung Army upon China took the form of the use of military force. The Japanese government had never declared war against China. The Manchurian Incident from September 1931 and the China Incident from July 1937 were wars in reality. Thus the distinction between war and the use of forces did not make much sense in this historical context. In addition, more importantly the government justified such military actions as self-defense.²¹¹

However, the first paragraph can be read in a way that constitutional renunciation of war is limited to such only as a means of settling international disputes. War “as a means of settling international disputes” is generally understood as an illegal war of aggression.²¹² War other than a means of settling international disputes commonly means a war of self-defense.²¹³ This interpretation could thus allow Japan to fight a war for self-defense.²¹⁴ However, the second paragraph declares the repudiation of military forces and war potential and the right of belligerency. Thus even a war of self-defense is actually denied because the state neither has any kind of armed forces nor the right to fight a war.²¹⁵ This means that even though a war of self-defense is theoretically permissible, the physical ban on armed forces and the legal ban on the right to wage war make it impossible as a matter of fact. The constitutional denial of the right of belligerency

²⁰⁹ See Miyasawa Toshiyoshi, *Kenpo*, 75.

²¹⁰ See Yokota, *Senso no hoki*, 47.

²¹¹ See Yokota, *Senso no hoki*, 52-53.

²¹² See Sato Isao, “Dai kyūjo kaishaku no shomondai (Problems in Interpretation of Article 9),” *Kenpo kaishakuno shomondai (Problems in Constitutional Interpretation)* (Tokyo: Yuhikaku, 1953), 55-77, 57 (hereinafter cited as Sato, “Dai kyūjo”).

²¹³ See Sato, “Dai kyūjo,” 57.

²¹⁴ There is a minor interpretation that even the first paragraph of Article 9 prohibits a self-defense war.

²¹⁵ See Sato, “Dai kyūjo,” 58-59. Precisely, there is a controversy over the meaning of “the right of belligerency of the state”. It is commonly understood as the right of the state to fight a war. See Yokota, *Senso no hoki*, 60-62; Hogaku Kyokai, *Chukai*, 216-220. See also, Minobe Tatsukichi, *Nihonkoku kenpo genron* (Tokyo: Yuhikaku, 1948), 231 (hereinafter cited as Minobe, *Genron*). However, there is another minor interpretation that it means what a state that fights a war has as its rights in international law. See Sasaki Soichi, *Nihonkoku kenporon* (Tokyo: Yuhikaku, 1952), 235-236 (hereinafter cited as Sasaki, *Kenporon*); Sato, “Dai kyūjo,” 64. Kanamori Tokujiro as the minister of state in charge of constitutional revision stated in the Imperial Diet that he understood the right as the right in international law of a state fighting a war. See Kanamori Tokujiro, Special Committee, House of Peers, September 13, 1946 in Shimizu, *Shingiroku*, 2: 73.

especially is without any reservation. Therefore, the postwar constitution is so radically innovative that there is ample room to understand that all kinds of war and threats or use of force and armed forces are completely renounced on the highly idealistic premise of “trusting in justice and faith of the peace-loving peoples of the world”.²¹⁶ Eminent scholars such as Minobe Tatsukichi,²¹⁷ Miyasawa Toshiyoshi,²¹⁸ and Yokota Kisaburo²¹⁹ denied any kind of war under the postwar constitution after all.²²⁰ Therefore, the new constitution was widely understood as proposing thorough pacifism.

Surprisingly enough, the Japanese government seemed to take the same position: even a self-defense war is renounced in the postwar constitutional system. The Cabinet Legislation Bureau prepared a “Collection of Expected Questions and Answers” before deliberation on constitutional revision in the Imperial Diet. It provided that “the provision concerning the renunciation of war does not directly deny the right of self-defense, but since it does not recognize Japan’s right to maintain any military forces or the right of the county to engage in war, in actual fact Japan cannot undertake a real war as an exercise of its right of self-defense.”²²¹ The government thought that Japan could not actually fight a war of self-defense under the new constitution. Yoshida Shigeru, the prime minister, answered questions in this line of thought:

The provisions concerning the renunciation of war in the draft Constitution do not directly deny the right of self-defense. But because the second Paragraph of Article 9 does not recognize all war potential and the country’s belligerency, both war as a manifestation of the right of self-defense and the right of belligerency are renounced. Of late years, most wars have been waged in the name of self-defense. This is the case with the Manchurian Incident, and so is the War of Greater East Asia. The suspicion concerning Japan today is that she is a warlike nation, and that there is no knowing when she may re-arm herself, wage a war of

²¹⁶ The Constitution of Japan, preamble par. 2.

²¹⁷ See Minobe, *Kihongenri*, 81-82; Mionbe, *Genron*, 228-231.

²¹⁸ See Miyasawa, “Shinkenpo no seikaku,” *Jiji Tsushinsha, Kaisetsu to shiryō*, 35; Miyasawa, “Shinkenpo no gaikan,” *Kokka Gakkai, Shinkenpo no kenkyū*, 8. Miyasawa understands that the first paragraph of Article 9 renounces not only wars of aggression but also wars of self-defense. Miyasawa, *Kenpo*, 75.

²¹⁹ See Yokota, “Senso hoki,” *Kenpo Fukyukai, Kenpo kōwa*, 115-122; Yokota, “Senso no hoki,” *Kokka Gakkai, Shinkenpo no kenkyū*, 44-62; Yokota, *Senso no hoki*, 41-84. Yokota as a scholar of international law argues that while the first paragraph of Article 9 does not renounce wars of self-defense, the second paragraph repudiates even wars of self-defense. See Yokota, *Senso no hoki*, 48, 62-63.

²²⁰ Sasaki Soichi exceptionally recognizes wars of self-defense under the postwar constitution. See Sasaki, *Nihonkoku kenporon*, 231-238.

²²¹ Sato Tatsuo, *Seiritsushi*, 3: 468. For the English translation, see Koseki, *Birth*, 192-193, translated by Moore.

reprisal and threaten the peace of the world. This is the most serious suspicion and misunderstanding respecting Japan. I think that the first thing we should do today is to set right this misunderstanding. The suspicion I have spoken of is a misunderstanding, it is true, but there are not a few instances in the past history, in the light of which it cannot be said that there is no foundation for that suspicion. Therefore, we should like to demonstrate in the proposed Constitution our determination, first of all, to renounce voluntarily the right of belligerency in whatever case it may be, to make that renunciation the basis of establishing the peace of the whole world, to march forward in the vanguard of the world's peace-loving nations, and thus to contribute to the establishment of world peace. (Cheers.) In this way, I think, we should endeavor to promote a just understanding concerning Japan. If, in the event that an international peace organization has been established, any country initiates a war of aggression, attacks Japan with the intention of aggression, that country is a violator of the peace, and it should be said to be the enemy of the world. All the peace-loving nations of the world should get together and assist each other in tackling this violator and in vanquishing this enemy. (Cheers.) Here, I think, international obligations respecting peace arise automatically as among the peace-loving nations or international organizations. (Cheers.)²²²

Although he did not deny the right of Japan to self-defense, Yoshida clearly repudiated wars of self-defense. The tone of his answer sounds uncharacteristically idealistic and universalistic.²²³ Yoshida once raised a subtler issue when he replied to Nosaka Sanzo, the communist leader, who attacked the government for denying the right of self-defense war he believed is indispensable for an independent state:

With regard to the provisions of the draft Constitution relating to the renunciation of war, the Honorable Member seems to think that it is just for a State to wage war in legitimate self-defense, but I think that the very recognition of such a thing is harmful. (Cheers.) It is an outstanding fact that most modern wars have been waged in the name of the self-defense of States. It seems to me, therefore, that the recognition of the right of self-defense gives cause for the provocation of war. The purpose kept in view in the provisions relating to the renunciation of the right of belligerency under the draft Constitution is the establishment of an international peace organization. The purpose is to prevent all wars aimed at aggression through the establishment of an international peace organization.

If there is to be a war in self-defense, this presupposes the existence of a State bent upon a war with the object of aggression. Therefore, the proposition to recognize the legitimacy of a war made in legitimate self-defense by way of exercising the right of self-defense of a State is a harmful idea, involving, as it does,

²²² Yoshida Shigeru, Prime Minister, plenary session, House of Representative, June 26, 1946 in Shimizu, *Shingiroku*, 2: 82-83. For the English translation, see RM319.

²²³ The cabinet reiterated the same position. See Kanamori Tokujiro, Minister of State, special committee, House of Representatives, July 9, 1946 in Shimizu, *Shingiroku*, 2: 90; Kanamori, special committee, House of Peers, September 13, *ibid.*, 2: 80; Kanamori, special committee, House of Peers, September 13, *ibid.*, 2: 74-75; Kanamori, special committee, House of Peers, September 13, *ibid.*, 2: 72.

the provocation of war. Not only that, but I also think that the very idea of recognizing the right of legitimate self-defense in the event that a peace organization has been established is, in itself, harmful. I fear that the opinion expressed by the Honorable Member would do more harm than good. (Cheers.)²²⁴

Here his answer conveys an impression that the very right of self-defense was denied. Sato Tatsuo, the chief of the first division of the Cabinet Legislation Bureau, believed his feeling at that moment that the prime minister went too far.²²⁵ In avoiding clarifying the right of self-defense, Yoshida later explained what he really meant in the reply.

Perhaps the words were insufficient last time to express my idea. What I wanted to say is this: It is not only useless but harmful to distinguish a war of defense from a war of aggression. It is the past fact that wars were started for the most part in the name of defensive war. As it is by reason of this distinction, made in belligerency, between a war of self-defense and a war of aggression that war is often induced, I hold that it is rather harmful. If there is a war of defense, on one hand, we have to assume that there is, on the other hand, a war of aggression. What I have in mind is the establishment of an international peace organization. In view of the fact that if such organization has been established, a nation who makes a war of aggression will become an enemy, rebel and traitor to the organization and all its member nations would join in war against this treacherous nation, I am of the opinion that such discrimination in belligerency is superfluous. A war of defense ceases to exist as a corollary to the extermination of a war of aggression. Recognition of wars of two categories is therefore useless.²²⁶

After Yoshida's reply of June 28, Sato wrote, Kanamori indirectly corrected it so as not to deny the right of self-defense itself.²²⁷ Nonetheless, it should be emphasized that the government clearly maintained the position on repudiation of war of self-defense as a matter of fact.

Ashida Hitoshi opposed the majoritarian interpretation of Article 9. He maintained that the new constitution allowed Japan to engage in a war of self-defense. Ashida's contention well deserves special attention because he was the chairman of the special committee for constitutional revision in the House of Representatives and there proposed modification of the words of Article 9.

²²⁴ Yoshida Shigeru, Prime Minister, plenary session, House of Representatives, June 28, 1946 in Shimizu, *Shingiroku*, 2: 42. For the English translation, see RM322.

²²⁵ Sato Tatsuo, *Tanjyoki*, 130.

²²⁶ Yoshida Higeru, Prime Minister, special committee, House of Representatives, July 4, 1946 in Shimizu, *Shingiroku*, 2: 15. For the English translation, see RM330.

²²⁷ Sato Tatsuo, *Tanjyoki*, 130-131.

Ashida wrote that renunciation of war and the threat or use of force was limited to the case of a means of settling international disputes and that it meant that the constitution denied wars of aggression alone and admitted wars of self-defense and wars of sanction against aggression.²²⁸ Behind this contention, however, there was a trick. The current text of Article 9 has reflected the so-called Ashida modification as he introduced it. The original government draft of constitutional revision on Article 9 and the subcommittee's proposal for modification read:

War, as a sovereign right of the nation, and the threat or use of force, is forever renounced as a means of settling disputes with other nations. The maintenance of land, sea, and air forces, as well as other war potential, will never be authorized. The right of belligerency of the state will not be recognized.²²⁹

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. 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. The right of belligerency of the state will not be recognized.²³⁰

Comparison between the two provisions clarifies the positive nature of the latter. But the issue here concerned the phrase that "In order to accomplish the aim of the preceding paragraph". Ashida came to assert that this phrase meant renunciation of war as a means of settling international disputes. Thus he maintained that a war of self-defense was not prohibited and that Japan could hold and use armed forces to wage a war of self-defense. Further, he stated that he had never changed his position on the constitutional maintenance of military forces for self-defense since the special committee for constitutional revision in the House of Representatives.²³¹

The sessions of the subcommittee were held in the form of secret free talking.²³² What

²²⁸ Ashida Hitoshi, *Shinkenpo kaishaku (Interpretations of the New Constitution)* (Tokyo: Daiamondosha, 1946), 36. His book was published for popularization of the new constitution with its promulgation on November 3, 1946.

²²⁹ The April 17 Draft of the Constitution of Japan, art. 9. See Sato Tatsuo, *Seiritsushi*, 3: 337. For the English translation, see RM280.

²³⁰ Sato Tatsuo, *Seiritsushi*, 4: 784.

²³¹ *Mainich Shinbun*, January 14, 1951 in Koseki Shoichi, *'Heiwa kokka' nihon no saikento (Reconsideration of 'Peace State' Japan)* (Tokyo: Iwanami Shoten, 2002), 37.

²³² See Sato Tatsuo, *Seiritsushi*, 4: 713. Basically the government was absent unless the subcommittee wanted to ask it questions. Sato Tatsuo exceptionally attended almost all meetings as an assistant for legal and technical details.

Ashida said had been regarded as authoritative because he was the very person who was responsible for administration of the committee and subcommittee and proposed modification by himself. He was perhaps the most appropriate for representing the framers to show their intention. His contention has very much helped the conservatives to argue for the establishment of self-defense forces and theoretically justify it. However, his contention had lacked credibility. Ashida's report of the discussions and modifications to the House of Representatives described the motivation of modifying Article 9 as the following:

In Article 9, the phrase "aspiring to an international peace based on justice and order" has been placed at the beginning of the first paragraph, while the phrase "for the above purpose" comes at the head of the second paragraph. These amendments have been made for the purpose of making it clear that the resolve to renounce war and to abolish armaments is motivated solely by aspirations for the concord and cooperation of mankind and for the peace of the world. (Cheers.) The spirit underlying the provisions of Article 9 marks obviously a new epoch in the process of human advancement. In proclaiming them internally and externally, we are prompted by the purpose of pointedly demonstrating that the Japanese people, going ahead of other Powers, are actuated by an aspiration to create a world peace based on justice and order. (Cheers.)²³³

Ashida was silent about the intention of the modification.²³⁴ Sato Tatsuo, in addition, has mentioned nothing about the framers' intention Ashida had contended.²³⁵ Indeed, he wrote that he never thought the modification would be the basis for Ashida's theory that "In order to achieve the purpose of the preceding paragraph" means "In order not to wage war of aggression" and that thus Article 9 does not prohibit Japan from keeping armed forces for the purpose of self-defense.²³⁶ Finally, stenographic records became available in September 1995. It has turned out that there was no such theory as Ashida's. He simply explained there that his intention to add "In order to achieve the purpose of the preceding paragraph" to the original text resided in avoiding repeating aspiration

²³³ Ashida Hitoshi, chairman of the special committee, plenary session, House of Representatives, August 24, 1946 in Shimizu, *Shingiroku*, 4: 478. For the English translation, see RM420.

²³⁴ See Shindo Eiichi & Shimogawara Motoharu, eds., *Ashida Hitoshi Nikki (Diary of Ashida Hitoshi)* (Tokyo: Iwanami Shoten, 1986), 1: 126-129.

²³⁵ According to Sato Tatsuo, discussions on Article 9 were held on July 29 when Ashida introduced his plan of modification and August 1 when the subcommittee adopted the modification. There is no record of Ashida's intention. See Sato Tatsuo, *Seiritsuhi*, 4: 748-749, 774-775.

²³⁶ Sato Tatsuo, *Tanjyoki*, 138-139. Sato recognized that the modification would open a possibility that armed forces could be maintained for the purpose of self-defense. See *ibid.*, 137-139.

for international peace.²³⁷

Therefore, people cannot argue for constitutional armed forces for self-defense by relying upon the framers' intention. The people in the ninetieth Imperial Diet were more or less idealistic. The sincere aspiration for international peace based upon justice and order was real enough for them to write it down in the fundamental law of the land. With a touch of uneasiness, most Japanese people welcomed Article 9 because even a war of self-defense should be banned in the light of the disaster the recent war brought.²³⁸

The idealistic mood on domestic and international peace was in this way ubiquitous in the deliberations on the postwar constitution. However, a question that should be asked is how seriously the government believed in positive pacifism and wanted to execute concrete policies based upon renunciation of war. Yoshida's replies we have seen above also indicated that there was a strategic judgment about the international circumstances around Japan. It seemed wise for the governmental officials to express no intention to become a military power in the world in order to recover independence sooner. More importantly, as Koseki Shoichi has pointed out, the governing elite self-consciously or instinctively realized that renunciation of war was necessary to protect the *tenno* from harsh international opinion.²³⁹

National security was of course discussed but as Yoshida's reply showed, vague trust in the United Nations was prevalently shared by many people. Interestingly enough, even a world federation was seriously discussed:

²³⁷ Dai kyujuyukai teikoku gikai shugiin teikoku kenpo kaisei shoiinkai sokkiroku (The Stenographic Records of the Subcommittee for the Revision of the Imperial Constitution in the House of Representatives in the ninetieth Imperial Diet), 194 in Koseki, *Heiwa kokka*, 38.

²³⁸ The *Mainichi Shinbun* carried an opinion poll on the published governmental draft of constitutional revision. 70 percent of people agreed on renunciation of war and 28 percent disagreed. The reasons why they disagreed were that it was unnecessary to deny self-defense and that it was doubtful that the United Nations would function well. Meanwhile, 85 percent supported the symbolic tenno system but 13 percent opposed it. See "Shinkenpo soan heno yoron (Public Opinion toward the Draft of the New Constitution)," article, *Mainichi Shinbun*, May 27, 1946 in *Shoron Shuroku*, 308-311. See also, Kawashima Takamine, "Shinkenpo kofu zengo no kokumin no ishikijyokyo (The Situation of the People's Consciousness around the Promulgation of the New Constitution)," *Rekishi Kyoikusha Kyokai*, ed., *Nihonkou kenpo wo kokumin ha domukaetaka* (How did the People Receive the Constitution of Japan?) (Tokyo: Kobunken, 1997), 122-150.

²³⁹ See Koseki, *Tanjyo*, bunkoban heno atogaki (Afterword to the Bunko Edition), 442-450; Koseki, *Heiwa kokka*, 9-17. See also, Chapter 3 section 3.

Defence against an external enemy and the maintenance of internal peace have hitherto been universally regarded as minimum functions of the State. Whatever international treaties designed for the maintenance of peace may be entered into, a community of armed nations has within itself the danger of an explosion. The atomic bomb appeared toward the close of the late war. This invention will no doubt be perfected with the progress of science. Another world war may therefore imply not merely the annihilation of particular nations, but extermination of the human species. Is not the time overdue for the creation of a world federation? Political thought always lags behind science. Meanwhile, will not mankind be destroyed by the weapon of its own making? This must surely be a serious concern for all men and women. Should a world state in the form of a federation come into being, the members of such a world state of federation will have to renounce not only war, but scrap all their armaments, a condition prescribed for this nation by Article 9 of the new Constitution. All disputes, no matter of what kind, will then be settled in accordance with reason, without the backing of armament. In such a state of international society, an international police force will be the only force that remains a force, however, always serving as the handmaid of human reason. Article 9 is reasonable, on the hypothesis that such a state of human society comes into existence. It presupposes a world federation. The United Nations Organization is of course but an embryo of a world federation, if it is so destined. How the organization will develop or how the organization should be made to develop is a question for the future. If Article 9 of the new Constitution is adopted, as it will be, is it not necessary for Japan to take steps to join the United Nations Organization at an early opportunity, so that she may have her security assured and that she may cooperate in building a world federation?²⁴⁰

Yoshida agreed with the interrogator.²⁴¹ However, the government postponed answering the most serious question:

Mr. Takayanagi Kenzô: The United Nations Charter recognizes two kinds of war, war of self-defense and war for purposes of collective sanction. This draft Constitution, however, wants to suppress both of them; so in respect of the underlying philosophy of world peace, the draft Constitution and the United Nations Charter differ fundamentally. Is the Government of the same opinion?

The Minister of State Dr. Kanamori: As to the difference in basic conception between this draft Constitution and the United Nations Charter, no summary judgment can be made. This draft does not necessarily represent a criticism of the individual points of the United Nations Charter, but contains a provision which this country considers necessary and proper. In this regard, questions were asked in the House of Representatives, questions in which doubts were expressed as to other discrepancies between the two. As to the questions arising in this connection, there is room enough for study.

Mr. Takayanagi Kenzô: Switzerland, it is said, has decided not to join the United Nations because of its position as a permanently neutral state. Considering the basic difference in philosophy between the United Nations Charter and this draft

²⁴⁰ Takayanagi Kenzo, Kenkyukai, plenary session, House of Peers, August 26, 1946 in Shimizu, *Shingiroku*, 3: 91-92. For the English translation, see RM421.

²⁴¹ Yoshida Shigeru, Prime Minister, plenary session, House of Peers, August 26, 1946 in Shimizu, *Shingiroku*, 2: 92.

Constitution, will this country stand aloof from the United Nations, in order to be faithful to the principles of the new Constitution, or will it desire to join the United Nations in order to propagate new principles?

The Minister of State Dr. Kanamori: In their Constitutions, there are points of difference between the United Nations and this country, as the learned member has pointed out. However, considered from a broad [view]point and from various angles, there is room enough for adjustment, but the time has not yet come to consider the matter as a practical question.²⁴²

Relief from the long war and complete disarmament under the occupation made it possible to evade confrontation with the discrepancy between Article 9 and international politics.²⁴³ Article 9 of the postwar constitution later became tossed by the waves of real politics and has been a main target of the conservative attack for amendment.²⁴⁴ In the time of establishing the postwar constitution, however, idealistic arguments really appealed to many people including the governing elites. Their preoccupation lay in retention of the *tenno* system, not international peace.

So, what is a meaning of renunciation of war and armed forces for liberal democracy in Japan? It is an experiment of separation of citizenship from soldiership. In the ancient Greek poleis, only citizens who defended their homeland with arms could participate in politics. Since then to be a citizen had meant more or less to be a soldier. That was partly why women had been excluded from the political sphere. However, because modern war has become total war and the home front has come to gain a real sense, the connection between citizenship and soldiership has loosened.²⁴⁵ A comparison between the two constitutional systems would be helpful. In the Meiji constitutional

²⁴² Takayanagi Kenzo & Kanamori Tokujiro, special committee, House of Peers, September 13, 1946 in Shimizu, *Shingiroku*, 2: 97. For the English translation, see RM455.

²⁴³ As cold war intensified, the government started a series of campaigns of rearmament. When the Korean War broke out, in July 1950, GHQ ordered the Japanese government to establish the Keisatsu Yobitai (the National Police Reserve), which was reorganized to the Hoantai (the Security Forces) in October 1952. Then, the Boeicho (the Defense Agency) and the Jieitai (the Self-Defense Forces) were established in July 1954. The Self-Defense Forces have since expanded continuously. The government's constitutional interpretation has changed. It explains that Article 9 does not repudiate the right of self-defense and wars of self-defense and that its second paragraph prohibits Japan from keeping more armed forces than she can perform a modern war. See Koseki, *Heiwa kokka*. For the government interpretation, see Nakamura Akira, *Sengo seiji niyureta kenpo kyujyo (Article 9 of the Constitution that Has Been Swayed by Postwar Politics)* (Tokyo: Chuo Keizaisha, 2001, 2nd ed.).

²⁴⁴ For the conservative attacks on Article 9, see Watanabe Osamu, *Kenpo 'kaisei'shi (A History of Constitutional Amendments)* (Tokyo: Nihon Hyoronsha, 1987).

²⁴⁵ In the United States, woman's suffrage was constitutionalized after World War I. See Amendment XIX to the Constitution of the United States of America (1920). In Japan, as mentioned above, women have enjoyed the right to vote since December 1945, four months after the end of World War II.

system, the *tenno* was the supreme commander of the Army and Navy²⁴⁶ and vested with the prerogative concerning military strategies and tactics, which was interpreted as independent of the government. The rule that the ministers of the War and Navy should be respectively appointed from higher officers in active service made civilian control extremely difficult. The militaristic features caused the collapse of the whole constitutional system.²⁴⁷ In sharp contrast, the postwar constitution has denounced war and armed forces. An ideal that has inspired postwar Japan is that “all peoples of the world have the right to live in peace, free from fear and want.”²⁴⁸ In “an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth,” “the justice and faith of the peace-loving peoples of the world” constitutes “universal” “laws of political morality”.²⁴⁹ Newly reborn Japan commits herself to such political morality. The concept of peace non-dependent upon armed forces in fact has released citizenship from its close connection to solidership.

Renunciation of war and armed forces without any doubt favors liberal democracy. Civilian control is one of its most rudimentary elements.²⁵⁰ But there is more than that. How can citizenship without solidership function in a liberal democracy? How can the state draw commitment to the public from the people? This should be a great experiment in world history. Unfortunately, however, a new concept of citizenship has not been well theorized yet.

7. Popular Sovereignty and the Amendment Process

One of the most conspicuous features of the postwar constitution is to adopt the principle of

²⁴⁶ See the Constitution of the Empire of Japan, art. 11.

²⁴⁷ See Chapter 1 section 3 (4) and section 7.

²⁴⁸ The Constitution of Japan, preamble par. 2.

²⁴⁹ The Constitution of Japan, preamble pars. 2 & 3.

²⁵⁰ The prime minister and ministers of state have to be civilians. The Constitution of Japan, art. 66 par. 2. This clause was added at the very last moment of deliberation in the House of Peers because the Far Eastern Commission seriously feared that Japan would be rearmed soon due to modification of Article 9 in the House of Representatives. For the negotiation between the Japanese government and the Government Section of GHQ, see Irie, *Keij*, 419-421; Sato Tatsuo, *Seiritsushi*, 4: 918-931. For the FEC's response to the so-called Ashida modification, see Koseki, *Tanjyo*, 309-319.

popular sovereignty.²⁵¹ No matter what the principle might mean, nothing can more straightforwardly express its essence than a popular vote in the constitutional amendment process.²⁵² The people are vested with the power to amend the constitution, which directly derives from their sovereign power to create a constitution. A comparison with the Meiji Constitution clarifies the innovation of the new constitution.²⁵³ The prerogative to project amendments was reserved for the *tenno* alone.²⁵⁴ This was a reflection of the logic of *kintei kenpo shugi* (the principle of a constitution the *tenno* establishes). Although ministers of state supported the *tenno* in this issue as general matters of state,²⁵⁵ petitions for amendment were repudiated because popular commitment to constitutional revision was believed to be against *kintei kenpo shugi*.²⁵⁶ While there was a dispute of whether the Imperial Diet could modify the *tenno*'s project of constitutional amendment, rather rigid requirements were imposed upon deliberation and resolution of the Diet: presence of two-thirds of the whole members of both Houses and a majority of not less than two-thirds of the present members.²⁵⁷ The *tenno* had to consult the Privy Council on constitutional amendment.²⁵⁸ In the Meiji regime, the constitution was regarded as codification of the traditional instructions bequeathed by the imperial founder and ancestors and thus the process of constitutional amendment was centered upon the *tenno*'s will.

The postwar constitution, in marked contrast, has made the amending process more democratic. The whole process consists of three steps: initiative, popular ratification, and

²⁵¹ See the Constitution of Japan, preamble & art. 1.

²⁵² Article 96 of the Constitution of Japan reads: "Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify. (2) Amendment when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution."

²⁵³ For the process of amendment in the Meiji Constitution, see Minobe Tatsukichi, *Kihonshugi*, 60-66; Minobe Tatsukichi, *Kenpo satsuyo*, 102-104, Miyasawa Toshiyoshi, "Kenpo kaisei (Constitutional Amendment)," *Kokka Gakkai, Shinkenpo no kenkyu*, 334-340, 335-337.

²⁵⁴ See the Constitution of the Empire of Japan, art. 73.

²⁵⁵ See the Constitution of the Empire of Japan, art. 55.

²⁵⁶ See Miyasawa, "Kenpo kaisei," *Kokka Gakkai, Shinkenpo no kenkyu*, 336-337.

²⁵⁷ See the Constitution of the Empire of Japan, art. 73 par. 2.

²⁵⁸ See the Constitution of the Empire of Japan, art. 56.

promulgation.²⁵⁹ As the old one did, the new constitution imposes rather rigid requirements upon those who want to change the rules of the game. First, the Diet initiates a bill of constitutional amendment by passing a vote on it. Because of severe confrontation over constitutional amendments in postwar politics, no legislation has been enacted yet over detailed proceedings. The proceeding on a general bill provided for in the Diet Law is analogically applicable.²⁶⁰ The power to propose a bill of amendment undoubtedly belongs to members of both Houses.²⁶¹ There is a sharp controversy over the cabinet's power to propose a bill of amendment. It related to the question of whether the cabinet can submit a bill of legislation to the Diet, about which the constitution has no specific provision. A majority of scholars agree on the cabinet's power to submit a bill because submission is only a threshold of legislation the Diet has to monopolize and the prime minister's power to submit a bill to the Diet can be understood as including the power to submit a bill of legislation.²⁶² In fact, the Cabinet Law provides for the power.²⁶³ Even if the cabinet is vested with the power to submit a bill of legislation, one can think that it has no power to submit a bill of amendment because constitutional amendment is so critically important that such a power should be limited to the Diet alone. However, there is no substantial reason to deny the cabinet the power to submit a bill of amendment.²⁶⁴ A majority of the Diet members and the cabinet members usually belong to the same party under the parliamentary government system. The cabinet may enrich deliberation on constitutional amendment. An introduced bill of amendment is deliberated and voted on in each House as a general bill is.²⁶⁵ A quorum for resolution is understood as two-thirds of all the members of each House. The meaning of "all the members" is disputable between the fixed number and the fixed number minus vacancies. The former is desirable because careful deliberation is required in this

²⁵⁹ For the process of amending the constitution, see Kawagishi Norikazu et al., *Kenpo (Constitutional Law)* (Tokyo: Seirin Shoin, 2002), 11-13.

²⁶⁰ See Hogaku Kyokai, *Chukai kenpo*, 2: 1441-1442.

²⁶¹ See Miyasawa, "Kenpo kaisei," *Kokka Gakkai, Shinkenpo no kenkyu*, 338; Hogaku Kyokai, *Chukai kenpo*, 2: 1442.

²⁶² See the Constitution of Japan, art. 72.

²⁶³ See the Cabinet Law, art. 5.

²⁶⁴ See Hogaku Kyokai, *Chukai kenpo*, 2: 1443.

²⁶⁵ See Hogaku Kyokai, *Chukai kenpo*, 2: 1443.

case. A quorum for deliberation can be one-third of all the members as the general principle.²⁶⁶ However, consideration for careful deliberation leads the matter to be treated as happens in the case of a resolution.²⁶⁷ Resolution on a bill of amendment has to be passed with two-thirds or more of all the members in each House. The House of Representatives and the House of Councillors are equal in this capacity. The amending procedure thus constitutes an important exception to the superiority of the House of Representatives.²⁶⁸ Conversely, one-third of the members of each House can block a transformative proposal. Such a requirement indicates a value judgment that deliberation is much needed for constitutional amendment.

The second step is the popular ratification of a bill of constitutional amendment initiated by the Diet. A popular vote is held “at a special referendum or at such election as the Diet shall specify.” In the case of the latter, as the nature of the matter, the Diet has to specify a national election such as a general election for Representatives or a regular election for Councillors. Specific proceedings have not been decided yet in the process of popular ratification for constitutional amendment.²⁶⁹ The bill of amendment is ratified by a majority of all cast votes. The meaning of “a majority” is also controversial. A majority of all eligible voters, all cast ballots, or all valid ballots are possible interpretations. The first interpretation would deny the right to abstain. The third one would open the possibility that the constitution would be amended with a minority of the all voters many of whom abstain from voting. Although the second one would turn invalid ballots into nays, this is most desirable because the people who visit polling places and positively give consent to amendment should form a majority of the people. The strict interpretation secures a carefully deliberated

²⁶⁶ See the Constitution of Japan, art. 56 par. 1.

²⁶⁷ See Hogaku Kyokai, *Chukai kenpo*, 2: 1444.

²⁶⁸ For superiority of the House of Representatives over the House of Councillors, see this Chapter section 7.

²⁶⁹ On December 2, 1952, Senkyo Seido Chosakai (Election System Investigation Committee) reported the gist of a system of popular vote on constitutional amendment. Based upon the report, Home Affairs Agency prepared the bill of popular vote for amendment to the Constitution of Japan. Because the Yoshida cabinet did not intend to amend the constitution, the bill was never submitted to the Diet. For the details of the bill, see Sato Isao, “Dai 96 jyo no shomondai (Various Problems in Article 96),” *Kenpo kaishaku no shomondai II (Problems in Constitutional Interpretation)* (Tokyo: Yuhikaku, 1962), 267-285, 274-276 (hereinafter cited as Sato Isao, “Dai 96 jyo”); Hogaku Kyokai, *Chukai kenpo*, 2: 1446-1450.

decision when the amendment is approved.²⁷⁰

This referendum system truly reflects the principle of popular sovereignty. From a comparative perspective of postwar constitutional law, the Constitution of Japan conspicuously shows thorough commitment to the principle. The Bonn Basic Law for the Federal Republic of Germany (1949) excludes the popular vote from the constitutional amendment process. The constitutional amending statute requires “the consent of two-thirds of the members of the House of Representatives (Bundestag) and two-thirds of the votes of the Senate (Bundesrat).”²⁷¹ The French and Italian Constitutions partially admit popular participation in the constitutional amendment process. The French Fifth Republic Constitution of 1958 supposes that constitutional amendment is popularly ratified but provides for an exception that when the president adopts a Congress manner (joint parliament of the National Assembly and the Senate), a referendum can be omitted with three-fifths concurring votes there.²⁷² Similarly, the Italian Constitution of 1947 provides for a conditional referendum.²⁷³ Among postwar liberal democratic constitutions, the Constitution of Japan uniquely requires a mandatory referendum.²⁷⁴

²⁷⁰ See Tsujimura Miyoko, *Kenpo (Constitutional Law)* (Tokyo: Nihon Hyoronsha, 2000), 562; Takahashi Kazuyuki, *Rikkenshugi to nihonkoku kenpo (Constitutionalism and the Constitution of Japan)* (Tokyo: Hoso Daigaku Kyoiku Shinkokai, 2001), 292.

²⁷¹ See the Basic Law of the Federal Republic of Germany, art 79 par. 2.

²⁷² The French Constitution of 1958, art. 89. The whole text reads: “(1) The initiative for amending the Constitution shall belong both to the President of the Republic on the proposal of the Prime Minister and to the members of Parliament. (2) A Government or private member’s bill for amendment must be passed by the two Assemblies in identical terms. The amendment shall become definitive after approval by referendum. (3) Nevertheless, the proposed amendment shall not be submitted to a referendum when the President of the Republic decides to submit it to Parliament convened in Congress; in this case, the proposed amendment shall be approved only if it is accepted by a three-fifths majority of the votes cast. The Bureau of the Congress shall be that of the National Assembly. (4) No amendment procedure may be undertaken or followed when the integrity of the territory is in jeopardy. (5) The republican form of government shall not be subject to amendment.” The French Fourth Republic Constitution had an exceptionally unnecessary referendum system. See the French Constitution of 1946, art. 90.

²⁷³ Article 138 of the Italian Constitution reads: “(1) Amendments to the Constitution and other constitutional acts shall be adopted by each of the two Chambers twice with an interval between the votes of not less than three months, and shall be approved by a majority of the members of each Chamber in the second voting. (2) Such laws shall be submitted to popular referendum when, within three months of their publication, a request is made by one fifth of the members of either Chamber or by 500,000 electors or by five regional Councils. The law submitted to referendum shall not be promulgated unless approved by a majority of valid votes. (3) No referendum may be held if the law has been approved by each Chamber, in the second vote, with a majority of two thirds of its members.”

²⁷⁴ See Sato Isao, “Dai 96 jyo,” 281. For comparative views on constitutional amendment, see *ibid.*, 277-281;

Thirdly, the *tenno* promulgates a popularly ratified amendment “in the name of the people”.²⁷⁵ The requirement of “in the name of the people” makes clear the principle that it is the people who have the power to amend the constitution. The *tenno*’s promulgation is merely formal. The amendment becomes an integral part of the constitution, which constitutes the supreme law of the land.²⁷⁶

Public discourse on constitutional amendment has centered upon the constitutional limitations on amendment. Popular sovereignty and the symbolic *tenno* system, thorough pacifism, and fundamental human rights and the public welfare have been main issues since the immediate aftermath of the establishment. The new constitutional principles were under nostalgic attack.²⁷⁷ This popular vote requirement has also been a target of criticisms. Removals or relaxations of this requirement have been proposed.²⁷⁸ It is obvious that their aim lies in mitigating the burdensome hurdles for amendment to the constitution.

However, a national referendum is profoundly connected to the idea of popular sovereignty,

Hogaku Kyokai, *Chukai Kenpo*, 2: 1438-1441.

²⁷⁵ See the Constitution of Japan, art. 96 par. 2, & art. 7 (i).

²⁷⁶ See the Constitution of Japan, art. 98.

²⁷⁷ For the details of issues over attempts to amend the postwar constitution, see Sato Isao, “Knepo kaisei giron no kihon mondai (Basic Problems of Constitutional Amendment),” *Nihonkoku kenpo jyuni ko*, 323-350; Sato Isao, “Kenpo kaiseiron no haikai (The Backgrounds of Arguments for Constitutional Amendment),” *Kenpo kaishaku no shomondai*, 336-352; Sato Isao, “Dai 96 jyo,” 268-270; Ashibe, Nobuyoshi, *Kenpo seitei kenryoku (The Power to Create a Constitution)* (Tokyo: Tokyo Daigaku Shuppankai, 1983), 62-125, 217-311. See also, Watanabe Osamu, *Nihonkoku kenpo 'kaisei'shi*.

²⁷⁸ For the concrete proposals for constitutional amendment in 1950s, see Sato Isao, “Dai 96 jyo,” 281-283. More recently, in 1994, the *Yomiuri Shinbun* published its plan of constitutional amendment. In the plan, hurdles for amendment would become much lower than the current ones. “Article 108 (Amendment procedure; promulgation of amendments) 1) Amendments to this Constitution shall require to be approved by the concurrence of the majority valid votes cast by the members of each House present and voting, and shall be submitted to the people for ratification. Such amendments shall be considered at a meeting of the Diet at which two-thirds or more of all current registered members are in attendance. 2) Notwithstanding the terms of paragraph 1 of this Article, if, at a meeting of the Diet at which two-thirds or more of all current registered members are in attendance, a majority of two-thirds or more of the members of each House present and voting vote in favor of the amendment under consideration, such amendment shall be passed. 3) Such ratification as it mentioned in paragraph 1 of this Article shall require a concurring majority of the valid votes cast either at a national referendum held specially for the purpose, or at a special voting held concurrently with such election as the Diet may specify. 4) Amendment to this Constitution may be proposed by members either of the Diet or of the Cabinet. 5) An amendment ratified under paragraph 1, or passed under paragraph 2, of this Article shall be immediately be promulgated by the Emperor in the name of the people.” *Yomiuri Shinbun*, ‘A proposal for the revision of the text of the Constitution of Japan’ (1994), in Glenn D. Hook & Gavan McCormack, *Japan’s Contested Constitution: Documents and Analysis* (London & New York: Routledge, 2001), 55-85, 84-85.

the people who have the power to create the constitution.²⁷⁹ It is true that the power to amend the constitution is not necessarily the same as the power to create the constitution. The former is organized in the constitution the latter has created. The latter is situated outside the constitution. It is a dynamic concept and its attribute resides in direct exercise.²⁸⁰ However, so long as the constitution that has already been created is premised, the power to amend the constitution is the most fundamental political power. If popular sovereignty means something positive in an established political order, the power to change the order should be vested in the people. Thus popular vote in the constitutional amending process is regarded as an indispensable component of the principle of popular sovereignty. Constitutional amendment to omit national referendum from the amending process leads to self-contradiction of sovereign power that now belongs to the people.²⁸¹ Theoretically, a popular vote in the amending process is a reflection of the principle of popular sovereignty and thus should not be excluded. It is especially noteworthy that the Japanese people have had no chance to exercise their sovereign power because no constitutional amendment has succeeded so far. The innovative experiment of popular sovereignty has not yet displayed its own real worth. The amendment provision has well indicated that the people are now sovereign and that if a sufficient number of them really wish, the people can abolish even the *tenno* institution, which was once situated outside the constitution because of the *kokutai* ideology based upon the concept of one line unbroken for ages eternal. It is this provision that is the practical symbol of the novelty of the postwar constitution.

8. Consolidation of the New Constitution: The Katayama Coalition Cabinet

The Constitution of Japan was promulgated on November 3, 1946, and entered into force on May 3, 1947. Between the two dates, the government prepared bills of important organizational laws.

²⁷⁹ Kawamura pointed out that the mandatory referendum in the constitutional amendment process well expressed the spirit of democracy and that power of norm would be strengthened with popular commitment. Kawamura, *Shinkenpo to minshushugi*, 127-128.

²⁸⁰ See Ashibe, *Kenpo seitei kenryoku*, 105.

²⁸¹ See Sato Isao, "Dai 96 jyo," 283-284; Ashibe, *Kenpo seitei kenryoku*, 111.

The Imperial House Law was enacted on January 16, 1946. Because it argued and believed no change in the *kokutai*, the government used the same name of *Koshitsu Tenpan*, not the new name of *Koshitsu Ho*. Unlike the old law, which was totally beyond the control of the Imperial Diet, however, the new law has been normal legislation. The Diet can now control the composition of *tenno* family matters. The dualism between the Meiji Constitution and the Imperial House Law that featured in the prewar constitutional system has been abolished under the postwar constitutional regime to make the constitution the supreme law of the land.²⁸² Even in the new Imperial House Law, however, there has been no provision to require the Diet to give consent to succession to the throne. Although many people point out an analogy between the British king and the *tenno*, they tend to ignore this decisive difference in succession. If the people are sovereign at all, their representatives should be entitled to control succession to the throne, the legitimacy of which derives from the general will of the sovereign people.²⁸³

As we discussed above,²⁸⁴ the postwar constitutional system is founded upon three fundamental principles: To protect human dignity as individual, the new constitution has adopted the principle of popular sovereignty and thorough pacifism. The new political principles in the constitution have been materialized as organizing laws. The Cabinet Law, Finance Law, Court Organization Law, Local Autonomy Law, and Board of Audit Law, Diet Law were enacted respectively on January 16, March 31, April 16, April 17, April 19, and April 30, 1947.

The spirits of the constitution are realized in the normal political process. In this sense, election has a great impact upon the execution of constitutional values. April of 1947 was a month of elections for public officials just before the new constitution took effect. Elections for governors and other chiefs of local organizations were held on the 5th, elections for the House of Councilors and positions created by postwar reforms on the 20th, a general election for the House of Representatives on the 25th, and finally an election for local assemblies on the 30th. Most

²⁸² See the Constitution of Japan, art. 98.

²⁸³ See the Constitution of Japan, art. 1.

²⁸⁴ See this Chapter sections 4-7.

remarkably, the Socialist Party became the leading party in the House of Representatives as a result of the general election. The Socialist Party gained 143 seats (30.7% of the total 466 seats and 26.2 % share of votes) and took a lead; the Liberal Party: 131 seats (28.1% and 26.7%); the Democratic Party: 124 seats (26.6% and 25.4%); the National Cooperation Party 31 seats (6.7% and 7.0%),²⁸⁵ the Communist Party 4 seats (3.3% and 3.7%) ; small parties: 21 seats; and independents: 12 seats.²⁸⁶ No parties again won a majority of seats in the House of Representatives but even a plurality of the left was regarded as revolutionary. This fully announced that a new era had come in postwar Japan.

On May 23, Katayama Tetsu, the chairman of the Socialist Party, was elected in the Diet as the prime minister of the coalition cabinet government composed of the Socialist, Democratic, and National Corporation Parties. The Katayama cabinet struggled to strengthen democratization and realize constitutional values. Generally this cabinet, which lasted for only eight months, developed a poor reputation. However, the Socialists occupied only about one third of the seats of the House of Representatives and 47 percent of the seats of the coalition parties. They had to make many compromises with the dominant conservatives. They also suffered from a severe inner conflict between the right and left factions. Under these unfavorable circumstances, however, we can point to very important achievements to consolidate constitutional values in the early stage of a nation reborn.

Katayama was a lawyer for people who are socially weak. He was most concerned with problems over women, tenant farmers, and laborers. In the prewar period, he was selected as the secretary-general of the *Shakai Minshuto* (Social People's Party), which was placed at the right wing of proletarian parties. He firmly believed that social reforms had to be done only through legal parliamentary activities. Thus, direct mass movement was not his policy. Although as it was the case

²⁸⁵ On March 8, 1947, the *Kokumin Kyodoto* (the National Cooperation Party) was formed as the result of a merger of the *Kyodo Minshuto* (the Cooperative Democratic Party) and the *Kokuminto* (the Nation Party). The members were moderate conservatives who were critical of the Liberal Party and the Progressive Party. The Cooperation Party was originally formed on December 18, 1945 to promote "cooperativism based on service, autonomy, and fraternity". See Uchida Kenzo, "Japan's Postwar Conservative Parties," Ward & Sakamoto, *Democratizing Japan*, 306-338, 317-320, 327-333.

²⁸⁶ See Ishikawa, *Sengo Seijishi*, 116.

with right leftists, he was never seriously confronted with the *tenno* institution, which essentially conflicted with the idea leftists inspired, Katayama refused to cooperate for the *yokusan* (imperial rule assistance) regime during the war time, unlike many other leftists who approached power in aiming at state socialism. This uncompromising attitude helped him become a central figure of movements for recreating a leftist party in the postwar period.

When the Socialist Party was formed in November 1945, Katayama became its secretary-general and later elected its first chairman. At the very beginning of the postwar period, Katayama believed that popular sovereignty would be inconsistent with the *tenno* institution and that the theory of state sovereignty was the most appropriate in the Japanese tradition.²⁸⁷ He supported a more democratized *tenno* system in which its prerogatives would be largely reduced, having in mind the British model where the king reigns but does not govern. Then Katayama faced the draft of the new constitution, which came to have a great influence upon his political career. He now understood how the principle of popular sovereignty was reconciled with the *tenno* institution. He as representative of the Socialist Party in the ninetieth Imperial Diet proposed revising the government draft to the effect that the provisions on the *tenno* should be placed after a declaration of fundamental principles and that state affairs the *tenno* was supposed to perform should be largely reduced.²⁸⁸ Although these proposals were denied in the House of Representatives,²⁸⁹ Katayama and his party now became more progressive than ever before in respect to clarifying the principle of popular sovereignty.

After the origin of the postwar constitution took shape, interestingly enough, Katayama cherished popular sovereignty more than anything else. In his view, renunciation of war, respect for human rights and equality between man and woman all derive from this principle.²⁹⁰ Katayama took

²⁸⁷ See Katayama Tetsu, *Minshushugi Seiji no Daido (The Main Road of Democratic Politics)* (Tokyo: Dainihon Yubenkai Kodansha, 1946), 34, 35.

²⁸⁸ See Sato, *Sieitsushi*, 4: 497-498.

²⁸⁹ For the proposal to revise the draft by the Socialist Party and discussion on it in the plenary session of the House of Representatives on August 24, 1946, see Shimizu, *Shingiroku*, 4: 490-508.

²⁹⁰ See Katayama Tetsu, *Minshushugi no Minamoto wo Saguru* (Nihon Kurisuchan Akademi, 1966) in Arakawa Shoji, "Katayama Tetsu," *Haisen Zengo: Showa Tenno to Gonin no Shidosha (Around the Defeated War: Emperor Hirohito and Five Leaders)* (Tokyo: Aoki Shoten, 1995), 168.

the postwar constitution seriously. In 1954, he formed an association to defend the peace constitution when the conservatives started to attack it to seek the remilitarization of Japan. Such an activity is uncharacteristic of members of the right faction of leftists. Katayama can be regarded as a statesman growing from the impact of the postwar constitution.

Before the draft was voted on in the plenary session on August 24, 1946, Katayama delivered a speech in favor of the draft to express a view and hope on the new constitution. Katayama first pointed out that the Socialist proposal would have made explicit a fundamental principle that sovereignty derives from the people. Despite the denial of the proposal, he argued for a democratized *tenno* system. To him, next, renunciation of war, which is one of the most important provisions in the constitution, should be interpreted as not only a negative denial of war but also a positive dedication to world peace. A peace and culture state should be a goal Japan had to pursue from now onwards. The peace that the constitution solemnly has declared as a paramount value became his life long problem to solve. Thirdly, now that the idea of popular sovereignty was clearly declared, Katayama stated that the constitution itself should necessarily internalize the idea. On the one hand, popular sovereignty had been declared, but on the other hand, there remained feudalistic elements to overcome. Fourth, the constitution should lead the time and give people guiding hopes. Finally, the constitution must be a social law in the contemporary world and thus the state has to arrange guarantees of the people's life and labor at the statute level. His Socialist Party has successfully placed in the constitution the right to maintain minimum standards of wholesome and cultured living,²⁹¹ which would become a general principle for the welfare state.²⁹²

On July 1, 1947, Katayama as prime minister delivered a policy address. He emphasized the government's belief in the constitution. His position was that of a trinitarian theory of political

²⁹¹ See the Constitution of Japan, art. 25 par. 1. For the process of introducing the right to a decent life into the postwar constitution by the Socialist leadership, see Takahashi Hikohiro, "Kenpo gikai niokeru 'waimaru moderu' ('The Weimar Model' in the Constitutional Convention)," *Keisei*, 104-146.

²⁹² Katayama Tetsu, Socialist Party, House of Representatives, plenary session, August 24, 1946, in Shimizu, *Shingiroku*, 4: 527-530.

democracy, economic socialism, and international pacifism.²⁹³ His policy speech involved defense of the constitution, active practice of its spirits, and unification of the nation by the constitutional spirits. There has been no prime minister who showed a more positive commitment to the postwar constitution than Katayama Tetsu did. Despite the unstable and short term of the cabinet, Katayama and his colleagues tried hard to escape from a food crisis, overcome inflation, and realize the state management of coal. Concretely, legal reforms such as family law and penal code, dissolution of the Ministry of the Interior, liquidation of the Ministry of Justice, personnel of the Supreme Court, and establishment of the Ministry of Labor were important achievements under the Katayama cabinet.

Among the reforms the Katayama government executed, legal ones were crucial from a perspective of consolidating the constitutional revolution. Although restructuring the existing legal system had been already prepared in the Provisional Legislative Investigating Committee (PLIC) when the constitution needed to be revised, the Katayama cabinet carried out amendment of the Civil Code on family and succession, which was one of the most important works of statutory revision.

The former family law was enacted to maintain a feudalistic patriarchal family system. This patrilineal unit was called the *ie*. The head of the *ie*, who was usually the oldest man, represented the entire *ie*. While he took care of interests and welfare of his family members, the head had powerful rights to control the members on all domestic matters. The members' individual interests were often placed inferior to the whole household interest. Women usually occupied only subordinate status. For example, married women were legally incapable. The whole assets of the *ie* were succeeded with the headship only to the eldest son. This *ie* system was an everyday basis of maintaining the *tenno* institution. As discussed early, the Meiji constitutional system was based upon a family view of the state.²⁹⁴ The *koshu* as the head of the *ie* or household well paralleled the *tenno* as the head of the state. *Chu*, loyalty and *ko*, filial piety were in complete harmony as morality forced upon subjects in the

²⁹³ See Arakawa, "Katayama Tetsu," 162-163, 168-169.

²⁹⁴ See Chapter 1.

Meiji regime as the Imperial Rescript on Education of 1890 vividly showed.²⁹⁵

In sharp contrast, Article 24 of the postwar constitution declares that family law shall be enacted “from the standpoint of individual dignity and the essential equality of the sexes.”²⁹⁶ According to this spirit, family law and succession law, which form Books 4 and 5 of the Civil Code, were completely changed to bring the family under more modernized regulation. The old family system, which centered on the head of the *ie*, has been transformed to a system in which married couple and children occupy its core. The concept of the head of the *ie* has been abolished. Husband and wife are now equally responsible for household matters. They jointly exercise parental rights over their children. The wife is fully entitled to succeed. Provisions of legal incapacity of married women have been omitted. The principle of single succession by the eldest son has been replaced with equality in succession among children. Thus under the postwar constitution, the traditional *ie* system has been abolished and a new family system has emerged that is based upon individual dignity and the essential equality of men and women.²⁹⁷

When the government draft was introduced in the Imperial Diet, the government officials insisted that even the new provision on family in the proposed constitution would never change the *ie* system. The conservatives well acknowledged that the *ie* system had essentially served the *kokutai* ideology. In the House of Peers, for example, Sawada Ushimaro criticized the more modernized family system in the proposed constitution for destroying the *kokutai* along with the symbolic *tenno* institution.²⁹⁸ However, the government gradually changed its position. The government came to say nothing about the *ie* system and mention only the necessity to change family law because of Article 24 of the new constitution. The members in the PLIC emphasized that the progressive reform did not derive from the wartime defeat and occupation but from modernization of society. According to

²⁹⁵ For the prewar family law system, see Kurt Steiner, “The Occupation and the Reform of the Japanese Civil Code,” Ward & Sakamoto, *Democratizing Japan*, 188-191.

²⁹⁶ See the Constitution of Japan, art. 24.

²⁹⁷ For the new family system under the postwar constitution, see Nakagawa Zennosuke, *Shinkenpo to kazoku seido*.

²⁹⁸ Sawada Ushimaro, Dowakai, House of Peers, plenary session, August 26, 1946 in Shimizu, *Shingiroku*, 1: 897-898.

them, the postwar reform was materialization of the proposals in the 1920s.²⁹⁹ Because the conservatives powerfully argued against revision of the old family law, the progressive members in the PLIC decided not to propose the abolition of the *ie* system directly. In fact, modernization of society had required a readjustment of family law to the partially industrialized situation, whether the conservatives liked it or not.

The Katayama cabinet adopted a bill to amending parts of the Civil Code on July 15, 1947 and submitted it to the first Diet on July 25. Public hearings, which were then an innovative procedure of legislation, were held on August 20 and 21. To democratize the bill further, the *Kazokuho Minshuka Kisei Domei* (League for Realizing the Democratization of Family Law), a coalition of various positions for a democratized family law, submitted a statement that provisions on the family name should be removed because they were feudalistic remnants of the *ie* system. The bill was passed in the both houses of the Diet and a new family law written in colloquial Japanese was promulgated on December 22 becoming effective on January 1, 1948. More than sixty laws including the Family Registration Law, the Law concerning Fire Arms and Explosives, the Electric Industrial Law had to be rewritten because they more or less presupposed the *ie* system.³⁰⁰

Importantly, it is the Japanese leadership that carried out the reform of family law.³⁰¹ GHQ did not once order the Japanese government to change the *ie* system because the officials in the Legislative and Justice Division of the Government Section knew that this issue was very sensitive and that it was unwise to impose an Western style of family upon a people who had developed a totally different family relationship. They gave the Japanese government only guidance when they

²⁹⁹ For the proposals of PLIC in 1920s, see Nakagawa, *Shinkenpo to kazoku seido*, 5-12.

³⁰⁰ Steiner, "The Occupation and the Reform of the Japanese Civil Code," *Democratizing Japan*, 204.

³⁰¹ For the process of revising family law, see Wagatsuma Sakae, *Sengoniokeru Minpo Kaisei no Kei (The Process of Revising the Civil Code in Postwar Japan)* (Tokyo: Nihon Hyoronsha, 1956); Nakagawa, *Shinkenpo to kazoku seido*, 20-25; Yoda Seiichi, "Sengo Kazoku Seido Kaikaku to Shinkazokukan no Seiritsu (The Postwar Reform of Family System and Birth of a New View on Family)," Tokyo Daigaku Shakaikagaku Kenkyusho, ed., *Sengo Kaikaku (Postwar Reforms)* (Tokyo: Tokyo Daigaku Shuppankai, 1974), 1: 271-317; Steiner, "The Occupation and the Reform of the Japanese Civil Code".

were asked.³⁰² Japanese officials also witnessed leadership on the Japanese side.³⁰³

The replacement of the traditional *ie* system with a system based upon a nuclear family has been crucial from a democratic perspective. The *ie* system was formed in a vertical relationship: the head at the top of the *ie* controlled the members. This structure was an exact miniature of the prewar Japan as a state, in which the *tenno* occupied the zenith of political power. The new family system, however, has an essentially different structure: the human relationships becomes horizontal, based upon the equality of husband and wife. By liberating people from the *kokutai* ideology, the new family system provides a solid foundation for much needed democracy. Democracy after all requires equality among members of a political community.³⁰⁴

It is true that once the new constitution was established, family law was necessarily revised to conform to its ideal, whoever might be the prime minister. But it is fair to say that Katayama and the Socialist Party promoted the transition. Katayama had argued for abolition of the *ie* system and of discrimination against women since the prewar period. He himself later recollected that the revision of family law was one of the most important achievements of his cabinet.³⁰⁵ Kato Shizue as a woman Socialist participated in deliberation on the draft constitution in the special committee of the House of Representatives and played a critical role there from a women's point of view. She had devoted herself to the advancement of women for a long time. She and her husband Kato Kanjyu, who refused to cooperate with the pre-and mid-war *yokusan* regime, were often asked by GHQ for informal advice on women and labor problems in Japan.³⁰⁶ In the special committee she pointed out the necessity to separate ethics and legal institutions in the matter of revising family law. The

³⁰² Alfred C. Oppler, *Legal Reform in Occupied Japan* (Princeton: Princeton University Press, 1976), 116-117.

³⁰³ Wagatsuma Sakae and Nakagawa Zennosuke, who led the work of revision of family law as academic authorities, denied GHQ's intervention. Okuno Kenichi replied to an interview of *Asahi Evening News* with stating that there was no coercion by GHQ. See Steiner, "The Occupation and the Reform of the Japanese Civil Code," *Democratizing Japan*, 212.

³⁰⁴ See, e.g., Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998).

³⁰⁵ See Katayama Tetsu, *Kaiko to Tenbo (Retrospectives and Perspectives)* (Tokyo: Fukumura Shuppan, 1967).

³⁰⁶ Kato Shizue herself witnessed her and her husband's close relationship to MacArthur and GHQ's officials. Interview, "GHQ no Fujin Komon," Nishi Kiyoko, *Senryoka no Nihon Fujin Seisaku (Policy of Women Problems in Occupied Japan)* (Tokyo: Domesu Shuppan, 1985), 56-69.

government and conservatives attempted to preserve the *ie* system under the name of beautiful custom. Kato sharply criticized such an attitude by stating that law and ethics should not be confused and that the family as a legal institution must be a place for all family members to develop their personalities fully.

Family life should include the conduct of a lawful and well-ordered sexual life of men and women and should have the function of maintaining and adjusting the population of the race. Family life should also be a wholesome place of rest for mind and body, so that the adult members of a family can recreate the motive power of work for the morrow. The home should fulfill the functions of protecting children until they grow up into adults, of giving them consolation, and of affording them the benefits of moral and emotional cultures. The home should be a place where all the members of a family can live freely and pleasantly, develop their individuality, and perfect their personality. I understand that such a mission is expected of family life. In order that such functions can be fully achieved, I think it necessary that the life of family members should be correctly understood and sufficiently protected.³⁰⁷

Kato's interrogation drew a clear reply from Kimura Tokutaro, the minister of justice, that while traditional beautiful customs and good manners should be duly respected, the respect was a matter of ethics and that a legal system of family must be framed by the new constitutional principle of individual dignity and essential equality between men and women.³⁰⁸ Kato further stated that equality between man and woman would be guaranteed in the written document but that did not necessarily mean equality would be realized in a real life. Kato raised many issues concerning women, children, married couples, and family by pointing to problems that still remained in family law. She argued that social welfare programs should be enriched for realizing real equality of men and women.³⁰⁹ In this context, the Katayama cabinet had credit for the leadership in creating a new family system and clarifying the problems that women in Japan then faced. Furthermore, the Katayama cabinet established the Ministry of Labor in general and department of women and

³⁰⁷ Kato Shizue, Socialist Party, special committee, House of Representatives, July 6, 1946 in Shimizu, *Shingiroku*, 2: 504-506. For translation, see RM333.

³⁰⁸ Kimura Tokutaro, Minister of Justice, special committee, House of Representatives, July 6, 1946 in Shimizu, *Shingiroku*, 2: 508.

³⁰⁹ Kato Shizue, Socialist Party, special committee, House of Representatives, July 6, 1946 in Shimizu, *Shingiroku*, 2: 484-485, 492-493.

juveniles in particular. The Ministry of Labor was founded to deal with, among other things, the newly enacted Unemployment Insurance Law, which materializes the right to work declared in the constitution. Here political reform came to be supported by social reforms under the Socialist administration.³¹⁰

Another important achievement in legal reform was to revise the Penal Code to abolish crimes against the *tenno* family in general and lese majesty in particular.³¹¹ A central issue was whether the privileged treatment of the *tenno* in criminal law would be consistent with the new constitution of popular sovereignty with the symbolic *tenno* system. Lese majesty is a political crime that seems obviously inconsistent with the principle of popular sovereignty and protection of freedom of expression. On October 4, 1945, MacArthur already ordered the Japanese government to abolish restrictions on “freedom of thought, of religion, of assembly and of speech, including the unrestricted discussion of the Emperor, the Imperial Institution and the Imperial Japanese Government.”³¹² However, the conservative Japanese government did not think that freedom of expression would deprive the *tenno* of special protection in law. In early December 1945, the Japanese government had no idea whatsoever to abolish treason and lese majesty.³¹³ The

³¹⁰ The Katayama cabinet also led to enact the Unemployment Insurance Law autonomously. Under the financial difficulties in the wake of the defeated war, social policy was more positive under the Katayama cabinet than GHQ had expected. For the establishment of the Ministry of Labor and enactment of the Unemployment Insurance Law, see Fukunaga, *Keisei to Hokai*, 150-153.

³¹¹ Article 73 of the Penal Code: Whosoever committed or attempted to commit a dangerous act against the person of the Emperor, the Emperor's Grandmother, the Empress Dowager, the Empress, or the Imperial Son or Grandson who is the heir presumptive to the Throne shall be punished with death.

Art. 74: Acts of an insulting and disrespectful nature committed against the Emperor, the Emperor's Grandmother, the Empress Dowager, the Empress, or the Imperial Son or Grandson who is the heir presumptive to the Throne shall be punished with penal servitude for a period of not less than three months and not exceeding five years.

The same applies in the case of insulting and disrespectful acts committed against the *Jingu* or Imperial Mausolea.

Art. 75: Execution of dangerous acts against the persons of the members of the Imperial family shall be punished with death; attempts to commit such acts shall be punished with perpetual penal servitude.

Art. 76: Whosoever committed insulting and disrespectful acts against the Emperor shall be punished with penal servitude for a period of not less than two months and not exceeding four years.

³¹² SCAPIN 93, October 4, 1945, *Political Reorientation of Japan*, Appendix II, 463-465 in RM039.

³¹³ In a reply to interrogation in the House of Peers, Matsumoto Joji stated that as long as it conflicted with the Penal Code, speech on the *tenno* system would be free. “Discussion on the Tenno System Is Free: What Is against the Penal Code would be Punished,” *Asahi Shinbun*, article, December 2, 1945 in Takeda, *Tennokan no*

conservatives assumed that the *tenno* should be protected differently from common citizens. However, MacArthur and the Government Section showed no willingness to compromise on this matter because they firmly believed that treason and lese majesty as special protections for the *tenno* were remnants of the ancient myth from which ultra-nationalism and militarism came in the past.³¹⁴ The Japanese government did not easily follow GHQ's guidance that defamation of and insult to the *tenno* and his family should be treated equally with instances toward the common citizen. Japanese officials attempted to define defamation on the *tenno* as a crime indictable without a complaint. Kades heatedly refused the Japanese plan because a different treatment between the *tenno* and common citizens would not be tolerated and the Japanese plan was nothing but another form of lese majesty.³¹⁵ Whitney himself attended a meeting with Kimura, the minister of justice, and other high-ranking officials and told them that MacArthur hoped that crimes against the imperial family would be immediately deleted from the Penal Code and in case of defamation of the *tenno*, the prime minister or minister of justice might file a complaint on the *tenno*'s behalf.³¹⁶

On December 27, 1946, Yoshida Shigeru, the immediate predecessor of Katayama, who was a passionate supporter of the *tenno* himself and the institution, wrote MacArthur to ask his reconsideration on deletion of crimes against the imperial family. Yoshida stated that even in the new constitution, the *tenno* would be the symbol of the state and of the unity of the people and this position the *tenno* would occupy "accord[ed] with the traditional faith which ha[d] been held firmly by the Japanese nation ever since the foundation of Japan." In his view, the *tenno* held "truly a high and lofty position" and was undeniably "ethically the center of national veneration." He believed

Sokoku, 273. In fact, a high-ranking official in the Ministry of Justice suggested possible application of lese majesty to too much free speech on the *tenno*. "Koshitsu no Bujyoku to Jyubunni Torishimaru (To Maintain Strict Control of Insult on the Imperial Family)," *Asahi Shinbun*, article, December 7, 1945, *ibid.*, 273-274. The Provisional Legislative Investigating Committee was also opposed to changing crimes against the imperial family. See Oppler, *Legal Reform in Occupied Japan*, 158.

³¹⁴ See Oppler, *Legal Reform in Occupied Japan*, 158-159.

³¹⁵ See Oppler, *Legal Reform in Occupied Japan*, 166.

³¹⁶ See Oppler, *Legal Reform in Occupied Japan*, 166-167.

that these facts justified retention of special crimes against the *tenno*.³¹⁷ Two month later, Yoshida learned that he had failed to convince MacArthur to reconsider the matter. MacArthur wrote that as “the symbol of the State and of the unity of the people,” the *tenno* was “entitled to no more and no less legal protection than that accorded to all other citizens of Japan who, in the aggregate, constitute the State itself. To hold otherwise would violate the fundamental concept, clearly and unequivocally expressed in the new Constitution, all men are equal before the law, with the necessary implication therefrom that no individual, whatever his position, shall be vouchsafed judicial safeguards denied the ordinary citizen, the ultimate repository of all State authority.” MacArthur believed that the very respect and affection the Japanese people had fostered would serve as special protection for the *tenno*.³¹⁸ MacArthur and the Government Section took no serious measures whatsoever regarding Yoshida’s entreaty.

The Katayama cabinet had a totally different attitude and strongly supported amending the Penal Code. The bill was submitted to the Diet in October 1947. The conservatives never gave up. The Liberal Party proposed revising the bill to retain only lese majesty. The proposed revision plan provided that defamatory or insulting acts committed against the *tenno* should be punished with penal servitude for a period of not less than three months and not exceeding five years. The proposed revision did not gain support from a majority in the Diet. The new Penal Code with deletion of crimes against the *tenno* house was promulgated on October 26, 1947.³¹⁹ If the Yoshida cabinet had continued to stay in power, the crimes against the *tenno* house could not have been deleted from the Penal Code. It is true that GHQ without any doubt would have intervened in such a situation. However, the Katayama cabinet positively tried to realize the new constitutional spirits in concrete measures.³²⁰ Revision of the Penal Code was an example of their efforts. Lese majesty

³¹⁷ Letter from Yoshida Shigeru to SCAP, *Political Reorientation of Japan*, 2: 679 in RM506.

³¹⁸ Letter from SCAP to Yoshida Shigeru, February 25, 1947, *Political Reorientation of Japan*, 2: 680 in RM507.

³¹⁹ For Yoshida’s acts to retain the crimes against the imperial house, see Takeda, *Tennokan no Sokoku*, 273-288; Koseki, *Tanjyo*, 346-353.

³²⁰ Alfred Oppler witnessed a good relationship between GHQ and the Katayama cabinet, which was much more reformatory than other cabinets. Oppler, *Legal Reform in Occupied Japan*, 172-177.

sharply conflicts with the principle of popular sovereignty. If the people rule at all, they must enjoy freedom of expression. Because the people are by nature plural, they have to be able to communicate with one another to exert their sovereign power. They are sovereign so long as they can consider all aspects of state affairs. Lese majesty, however, had a chilling effect on free thought and speech. This political crime was definitely inconsistent with the postwar constitutional system. Its abolition has been one of the most important achievements in postwar legal reform.³²¹

In addition, the Katayama cabinet on December 31, 1947 liquidated the Ministry of the Interior that was in charge of executing the *Chian Iji Ho* (Peace Preservation Law) and on March 7, 1948, reorganized a police system in a more democratized way: national local police and local autonomy police and a public safety commission. Local autonomy, which was not guaranteed in the Meiji Constitution, has been promoted by the replacement of the Ministry of the Interior with the Local Autonomy Agency, which would become the Ministry of Home Affairs in 1957.³²²

Establishment of the Supreme Court was also under the obligation of the Katayama cabinet. While it was controlled by the ministry of justice under the *tenno* sovereignty in the Meiji constitutional system, the judiciary now enjoyed independence from the government. Thus the personnel of the Supreme Court, which is situated at the top of the independent judiciary, was vitally important for its future course. The chief justice of the Supreme Court is appointed by the *tenno* who follows the cabinet's designation and the other fourteen justices are appointed by the cabinet.³²³ An advisory committee for recommendation of justices was established for the first appointment by the Yoshida cabinet.³²⁴ Kimura Tokutaro, the minister of justice, Shimoyama Seiichi, *Daishinin Incho* (the Chief Judge of the former highest court), and Kanamori Tokujiro, the minister of state in charge

³²¹ In respect of lese majesty, Chapter 5 section 10 will examine the Placard Case as a test case of accepting the new constitution.

³²² For the liquidation of the Ministry of the Interior and police system reform, seen Fukunaga, *Keisei to Hokai*, 147-150. A severe conflict between conservative G2 and progressive Government Section in GHQ influenced the police system reform. MacArthur himself decided to take about 80 percent of the GS plan.

³²³ The Constitution of Japan, art. 6 par.2 & art. 79 par. 1. See also the *Saibanshoho* (Court Organization Law), arts. 39 & 41.

³²⁴ See Oppler, *Legal Reform in Occupied Japan*, 89-90 & n. 8.

of the new constitution formed a list of recommended candidates for the first chief justice. Because they seemed too conservative to realize new constitutional values, GHQ intervened to postpone the appointment until after the upcoming general election.

The Katayama cabinet recreated a new advisory committee for recommendations based upon a more democratic composition.³²⁵ From thirty listed candidates, Katayama appointed Mibuchi Tadahiko as the first chief justice and fourteen associate justices. Mibuchi started his professional career as a judge but in his forties became an advisory lawyer for the Mitsui Trust Company. He also taught trust law in several universities. He understood socialism and himself translated Anton Menger's *Civil Law and Proletariats*. Mibuchi was a person of high repute because of his sincerity. Katayama personally knew him and decided to appoint him the chief justice just after the committee announced the list of recommended candidates for the justices on July 28, 1947. On August 4, the Supreme Court officially started its service as the highest court and constitutional court in postwar Japan. In his address to the people at the beginning of service, Mibuchi expressed dedication of the newly born Court to justice for the Japanese people. The courts are places, he argued, to defend the people's rights and to realize justice and fairness. Under the democratic new constitution, he continued, the courts have to become courts for the people right through to the bone. To do so, judges should not crouch in the small world of law but open their eyes wider, make their perspectives broader and pay close attention to what politics should be, the movement of society, transformations of the world and the directions of people's feelings and opinions. To cope with these, judges should cultivate insights and abilities.³²⁶ We can see considerable passion for reforming the old judicial system that, in a sense, had helped the government to suppress the liberties and rights of people in prewar Japan.

Yoshida, who formed a cabinet five times during 1946 to 1954, was more or less resistant to thorough postwar reforms. After MacArthur was fired as SCAP, Yoshida made a reconsideration of

³²⁵ For the severe and sometimes dirty competition for justiceship, see Yamamoto Yuji, *Saiko Saibansho Monogatari (A Narrative of the Supreme Court)* (Tokyo: Kodansha, 1994, 1997), 1: 55-106.

³²⁶ See Nomura Jiro, *Saikosai Zensaibankan (All Supreme Court Justices)* (Tokyo: Sanseido, 1986), 2-3.

the list of occupation reforms. It included proposals to strengthen control of the cabinet over local autonomy, legalize the head of family and revive succession of the eldest child, and centralize the police system.³²⁷ The comparison with this makes clear Katayama's position of promoting constitutional values. Under the unstable circumstances, the Katayama cabinet worked hard to make the most of the potentialities of the new constitution. It is true that GHQ's support was necessary for the Katayama cabinet to carry out their policies. But it is also true that the Katayama cabinet played a more progressive role than GHQ had expected. Revision of old statutes and establishment of new institutions materialized a constitutional promise in the new era. In this way, all major achievements of the Katayama cabinet consolidated the constitutional revolution in ideas.

9. Missing Opportunities for "We, the Japanese People"

If popular sovereignty is a fundamentally innovative principle in Japanese history, why was not the Constitution of Japan adopted by a direct vote of the sovereign people? A popular vote would have given the Japanese people a precious opportunity to express their own commitment to liberal democratic values. There were missing opportunities for the principle of popular sovereignty.

Rather than the process Article 73 of the Meiji Constitution provided for, some people argued for a more democratized method to establish a new constitution of popular sovereignty. In early 1946, when formation of the democratic people's front was heatedly advocated, in fact, procedures for a convention with popular participation were also much discussed and proposed. After publishing the draft of constitutional revision, Takano Iwasaburo and his fellows of the *Kenpo Kyenkyukai* (the Constitutional Research Group) devoted their energy to realizing a constitutional convention. On January 26, 1946, the *Yomiuri Hochi Shinbun* carried an article where Takano announced his constitutional plan for a republic and democratic forces should be united to

³²⁷ See Fukunaga, *Keisei to Hokai*, 154. The police system was centralized under the Yoshida cabinet in 1954. But counter-reform on family law has never occurred. The ministry of the interior has not revived as it is. The Ministry of Home Affairs was established in 1960. For Yoshida's leadership in the postwar period, see John W. Dower, *Empire and Aftermath: Yoshida Sigeru and the Japanese Experience, 1878-1954* (Cambridge, Mass.: Council on East Asian Studies, Harvard University, 1979), 305-368.

democratize Japan, and that as a part of the movement for united democratic forces, a constitutional convention by the people should be called in mid May. Suzuki Yasuzo joined Takano to call a popular constitutional convention.³²⁸ On February 14, the *Kenpo Kenkyukai* announced a proposal to establish a democratic constitution; all kinds of progressive associations and groups should unite with one another to hold a popular convention for making a constitutional draft in mid March.³²⁹ After the government's outline of the revised constitution was published, the *Kenpo Kenkyukai* issued another statement that while it welcomed the unexpectedly democratic plan of the government, it had to criticize the halfway popular sovereignty of the plan and it proposed to make a more democratized constitution by a more democratized way than the government tried. The statement advocated that a true constitution of popular sovereignty should be framed by the people themselves through unifying their desires, passions, and good sense.³³⁰ Takano himself made a comment on the outline of the government draft that as to a way of framing a constitution it would be better to form a new committee for deliberation.³³¹ Closely related to the *Kenpo Kenkyukai*, the *Minshu Jinmin Sensen Renmei* (League for the Democratic People's Front) proposed to form a constitutional committee on deliberating and framing the final draft of a new constitution.³³²

The *Asahi Shinbun* also argued that to satisfy the requirement that a form of government be determined by the freely expressed will of the people, it would be desirable to first establish a constitutional convention for further consideration and to deliberate on a draft of the convention in a more democratized Diet.³³³ The *Yomiuri Hochi Shinbun* was more progressive when it advocated that

³²⁸ See "Takano Hakase no Shinkenpo Soan (The New Constitutional Draft of Dr. Takano)," *Yomiuri Hochi Shinbun*, article, January 26, 1946 in *Shoron Shuroku*, 169-170.

³²⁹ "Kokumin no Te niyoru Kenpo Seitei he (Toward a Popular Constitutional Convention)," *Yomiuri Hochi Shinbun*, article, February 15, 1946 in *Shoron Shuroku*, 195.

³³⁰ *Yomiuri Hochi Shinbun*, March 12, 1946 in Suzuki Yasuzo, "Kenpo Kenkyukai no Kenpo Soan Kiso oyobi Kenpo Seitei Kaigi Tesho (The Draft of a Constitution of the Constitutional Study Group and Advocacy of a Constitutional Convention), 2" *Aichi Daigaku Hokei Ronshu*, no. 31, June 1960, 195-217, 200-201.

³³¹ Takano Iwasaburo, "Daiichini 'Kokumin Sensei' (The People's Pledge to Peace Comes First)," *Mainichi Shinbun*, March 8, 1946, in *Shoron Shuroku*, 227-228.

³³² "Kenpo ha Jinmin no Te de (The Constitution should be Established by the People)," *Mainichi Shinbun*, article, March 16, 1946 in *Shoron Shuroku*, 266-267.

³³³ "Kakkitekina Heiwa Kenpo," *Asahi Shinbun*, editorial, March 7, 1946 in *Shoron Shuroku*, 213-214.

the new constitution should be established by the general will of the people and that the current constitution should be first amended to create a constitutional convention and that such a convention should establish a new constitution.³³⁴

In fact, common citizens once favored a popular convention style over the existing procedure or a Diet constitution committee style.³³⁵ Some people in the cabinet legislation bureau also thought that the style of a special committee on constitutional revision was more desirable than the existing procedure.³³⁶ However, a constitutional convention or a popular vote for the proposed draft never occurred in postwar Japan. As discussed above,³³⁷ MacArthur and GHQ hastened to establish the new constitution because they wanted to avoid the intervention of the Far Eastern Commission that generally tended to require a more radical and thorough democratization of Japan. They had already planned to preserve the *tenno* institution to execute the occupational policy easily. Thus they needed as a *fait accompli* the democratic constitution with the principle of popular sovereignty, even though the principle was guaranteed only on the written document for the time being. Meanwhile, the conservative Japanese government was extremely reluctant to listen to people's voices because retention of the *kokutai* was the foremost concern for the governing elites. They wanted to avoid a wide range of public discussion on the constitutional revision, which inevitably would make the *kokutai* a more or less severe target of discussion in the public arena. Thus the Japanese government shared a common interest with MacArthur and GHQ in evading a more popularly involved process of making the new constitution.³³⁸

Indeed, the American and Japanese conspiracy worked dramatically well. Because the

³³⁴ "Jinmin Kenpo no Seitei," *Yomiuri Hochi Shinbun*, editorial, March 8, 1946 in *Shoron Shuroku*, 221-222.

³³⁵ While 53 percent of people approved a popular constitutional convention, 20 percent supported the existing procedure and 24 percent favored revision through a constitutional revision committee in the Diet. See "Kenpo Kaisei to Yoron (The Constitutional Revision and Public Opinion)," *Mainichi Shinbun*, February 4, 1946 in *Shoron Shuroku*, 188.

³³⁶ The cabinet legislation bureau prepared four plans of constitutional revision committee. See Irie, *Keii*, 67, 190-196.

³³⁷ See Chapter 3 section 3.

³³⁸ See Koseki Shoichi, "Nihonkoku Kenpo no Seitei (The Establishment of the Constitution of Japan)," Nakamura Masanori, ed., *Senryo to Sengo Kaikaku (The Occupation and Postwar Reforms)* (Tokyo: Yoshikawa Kobunkan, 1994), 52-74, 70-72.

published constitutional revision plan was more progressive than common citizens had expected, voices for a constitutional convention or popular ratification weakened significantly.³³⁹ Ironically, the progressive constitutional draft played a conservative role in the crucially important political process. Direct popular participation was excluded from constitution-making. The principle of popular sovereignty lost a chance to exercise its decisive power, which has diluted the democratic values in the postwar constitution.

A second potential opportunity for the Japanese people to express their decisive will came in early 1947. MacArthur wrote the Prime Minister Yoshida Shigeru that the Allied Powers had decided the new constitution should be subject to review by the Japanese people and by the Diet between the first and second years of its having taken effect.³⁴⁰ This letter reflected the decision of the Far Eastern Commission on October 17, 1946.³⁴¹ Yoshida responded merely that he had surely received MacArthur's letter and that he kept in mind what MacArthur said.³⁴² Japanese newspapers reported this plan of review of the new constitution only in March 1947 because MacArthur was strongly opposed to publication of the plan.³⁴³ In August 1948, the Ashida cabinet prepared a review of the constitution and the Diet established a committee in its legal affairs office and examined certain articles of the constitution for review. However, neither review by the Diet nor referendum for review has been realized after all. Most politicians and intellectuals were hesitant to review the constitution. After the collapse of the Ashida cabinet due to a money scandal, Yoshida returned to the center of power and expressed no intention to amend the constitution in April 1949, which was approaching the deadline the FEC had set forth.³⁴⁴

In the 1950s, conservatives started to attack the postwar constitution for seeking an

³³⁹ While 67 percent of people agreed on the amendment process of article 73 of the Meiji Constitution the government proposed, 32 percent supported a process of popular convention. See "Shin kenpo soan heno yoron (Public Opinion toward the Draft of the New Constitution)," article, *Mainichi Shinbun*, May 27, 1946 in *Shoron Shuroku*, 308-313, 312.

³⁴⁰ See the Letter of MacArthur to Yoshida, on January 3, 1947 in RM508.

³⁴¹ See RM505.

³⁴² See Koseki, *Tanjyo*, 370. See also, RM509.

³⁴³ See RM504.

³⁴⁴ See Koseki, *Tanjyo*, 378-379.

independent and autonomous constitution. Three fundamental principles of the postwar constitution were the target of nostalgic criticisms. They included the following contentions: the symbolic *tenno* should have been more powerful as the head of the state; the public welfare should have been placed over fundamental human rights too individualistically understood; the self-defense forces should have been maintained to wage a war of self-defense.³⁴⁵ However, these conservative attacks were off the point in a sense because the conservatives abandoned the opportunity of self-expression.³⁴⁶

Although we have an illusion that conservatives have monopolized attempts at constitutional amendment, in fact, there were progressive proposals to amend the postwar constitution in the late 1940s.³⁴⁷ For example, the *Koho Kenkyukai* (the Public Law Research Group) proposed an opinion on constitutional amendment in March 1949.³⁴⁸ The opinion tried to expand and strengthen the basic ideas of the new constitution. First of all, it proposed, the word *kokumin* should be replaced with the word *jinmin*.³⁴⁹ The latter carries connotations more similar to the English word the people than the former. As the Japanese government actually explained,³⁵⁰ the word *kokumin* might include the *tenno* and thus has diluted the revolutionary effect of popular sovereignty.³⁵¹ The opinion proposed that the sovereignty of the people should be declared in the new first article.³⁵² This reorganization could have had a great influence upon the way of thinking because it would show breaking off with the Meiji Constitution in organization.³⁵³ Accordingly, the opinion argued, provisions over the *tenno* should become simpler. Because the word *shocho* (symbol)

³⁴⁵ See Sato Isao, "Kenpo kaiseiron no haikai," 339-343; Watanabe, *Nihonkoku kenpo 'kaisei'shi*, 71-331.

³⁴⁶ See Koseki, *Tanjyo*, 380-381.

³⁴⁷ For the circumstances of the time, see Sato Isao, "Kenpo kaisei rongi no kihonmondai," 323-350; Sato Isao, "Kenpo kaiseiron no haikai," 337-339; Koseki, *Tanjyo*, 371-381.

³⁴⁸ Koho Kenkyukai, "Kenpo kaisei iken (An Opinion on Constitutional Amendment)," *Horitsu Jiho*, vol. 21, no. 4 (1949), 56-61, 37.

³⁴⁹ See Koho Kenkyukai, "Kenpo kaisei iken," 56-57.

³⁵⁰ See Chapter 3 section 5.

³⁵¹ For the details about the distinction between *kokumin* and *jinmin* and the government's manipulation of the word, see Kyoko Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of its Making* (Chicago: The University of Chicago Press, 1991), 184-205; Dower, *Embracing Defeat*, 381-382.

³⁵² See Koho Kenkyukai, "Kenpo kaisei iken," 57.

³⁵³ Both constitutions basically have almost the same structure in which the provisions on the *tenno* occupy chapter 1, even though their contents differ very much.

sounds mysterious, the word *gisho* (emblem) should replace it. Further, in order that the spirits of the postwar constitution become thoroughgoing, the opinion argued, the matters of state the *tenno* performs should be limited to truly ceremonial matters. Appointment of the prime minister and the chief justice of the Supreme Court,³⁵⁴ convocation of the Diet and dissolution of the House of Representatives³⁵⁵ should be removed from the list of the matters of state because they gave an impression that the *tenno* might have powers related to governmental affairs.³⁵⁶ Article 9 should be also modified to sweep away doubts on war of self-defense and armed forces for self-defense.³⁵⁷ This revision would make renunciation of war be taken at face value. In respect of fundamental human rights, moreover, the concept of the public welfare should be removed from Articles of 13, 22 and 29. The opinion feared that the concept might be interpreted along the prewar spirit of *messhi hoko* (selfless devotion to the public). The human dignity of the individual should be placed over public interests.³⁵⁸ All in all, the *Koho Kenkyukai* proposed constitutional amendment to develop its potential for progressive purposes.

The *Tokyo Daigaku Kenpo Kenkyukai* (the University of Tokyo Constitutional Research Group) also published its constitutional amendment plan in June 1949.³⁵⁹ In its overview, Tanaka Jiro wrote that the organization of the postwar constitution should be reconsidered from the standpoint of the principle of popular sovereignty. As Tanaka pointed out, the current composition expressed a political compromise by placing the *tenno* in chapter 1.³⁶⁰ A new first chapter would declare the three general principles of popular sovereignty, pacifism and respect for fundamental human rights. Chapter 2, Denunciation of War, would be absorbed into a general principle in the new chapter 1. New chapter 2 would provide for fundamental human rights. Then a chapter about

³⁵⁴ See the Constitution of Japan, art. 6.

³⁵⁵ See the Constitution of Japan, art. 7 (ii) & (iii).

³⁵⁶ See *Koho Kenkyukai*, "Kenpo kaisei iken," 57.

³⁵⁷ See *Koho Kenkyukai*, "Kenpo kaisei iken," 58.

³⁵⁸ See *Koho Kenkyukai*, "Kenpo kaisei iken," 59.

³⁵⁹ See *Tokyo Daigaku Kenpo Kenkyukai*, "Kenpo kaisei no shomondai (Various Problems over Constitutional Amendment)," *Hogaku Kyokai Zasshi* vol. 67, no. 1 (1949), 1-95.

³⁶⁰ See Tanaka Jiro, "Sosetsu (Outline)," 6.

the *tenno* would come next.³⁶¹ Although the group paid perfunctory attention to the vicious old practices and showed an elitist disdain toward the ability of the people to engage in politics,³⁶² the proposals the group published also were as a whole progressive in nature from a liberal democratic point of view.

If these progressive amendments had succeeded, the new constitution would look different. Discontinuity would be strongly emphasized in organization. If human dignity as individuals is the most fundamental principle of the postwar constitution, why should not such a provision be placed before anything else as the Bonn Basic Law does?³⁶³ Even with the principle of popular sovereignty, the provision on the *tenno* institution should not come first of all if human dignity matters. Continuity in appearance has obscured discontinuity in substance.

The episodes over constitutional amendment in the early postwar period, on the one hand, formed an important ground for countering the imposition theory. This was surely an opportunity to reconsider the constitution by the Japanese people themselves. But the conservative Japanese government willingly missed an otherwise precious chance to express decisively the popular will. If the “imposition” occurred at all, it was limited only to the outset of the event, the defeat and ensuing occupation. The governing elite, who could not understand serious international opinions toward Japan in general and the *tenno* in particular, had invited the “imposition” of the constitution they did not welcome.

On the other hand, however, it is true that if the Constitution of Japan had been authorized by popular vote, popular sovereignty could have been a more vitalized political principle in postwar

³⁶¹ See Tanaka, “Sosetsu,” 7.

³⁶² For instance, Ogawa Ichiro stated that there were too many provisions on personal freedom and they should have been written in the criminal procedure act. Although he pointed out that these provisions reflected the realities of the past in Japan, Ogawa did not show passion for protecting personal freedom but pay more attention to a rational criminal justice system. See Ogawa Ichiro, “Jiyukenteki kihonken (Liberal Fundamental Rights),” 22-30, 25-25. In addition, Ishikawa Kichiemon expressed his elitist doubt toward a national referendum in the amendment process. In the light of the current circumstances around Japanese politics, he saw difficulties in reach a deliberative decision in direct participation of the people in politics due to underdevelopment of political parties and lack of political skills of the people. See Ishikawa Kichiemon, “Kenpo kaisei,” 81-84; 82-83.

³⁶³ See the Basic Law of the Federal Republic of Germany, art. 1.

Japan. Liberal democratic values could have been better articulated. However, it is also true that a significant number of the Japanese people self-consciously confronted the difficult task of constituting a new political order and struggled to initiate a new politics that is based upon a fundamentally innovative idea of popular sovereignty. Either positively or passively, the Japanese people as a whole had to face the basic problem of political legitimacy and justified political power by their choice. We cannot deny the unprecedented value of the experience of public deliberation on the constitution of political legitimacy and public goods for the state. The constitutional choice made relative the traditional authority, which had captured the way of thinking of the people. Popular sovereignty among other things requires robust public discussion between the government elite and common citizens. Making the postwar constitution for the first time brought such a robust debate to Japan. We cannot emphasize this experience too much. How to exercise the principle of popular sovereignty was the next problem for the Japanese people to answer. The principle of popular sovereignty was already established in the fundamental law of the land, no matter who might have helped to write it. The Constitution of Japan has in fact invited the Japanese people to participate in the process of creating new constitutional values. This project has just started.

10. Conclusion

After the Katayama cabinet resigned en masse, Ashida Hitoshi, the president of the *Minshuto*, the Democratic Party, succeeded as prime minister on March 10, 1948. His cabinet was formed upon the same center-left coalition of the Socialist Party, the Democratic Party, and the National Cooperation Party as the Katayama cabinet. This alternation also indicated a new way of performing politics.³⁶⁴ Yoshida Shigeru, the president of *Jiyuto*, the Liberal Party, criticized the rotation of the reins of government within the same coalition and argued for a change in power to appeal to the traditional, though liberal in a historical context, idea of *kensei no jodo* (the normal

³⁶⁴ For the transition to the Ashida cabinet, see Fukunaga, *Keisei to hokai*, 236-246; Masumi Junnosuke, *Nihon Seijishi: Senryo kaikaku, Jiminto shihai* (*Japanese Political History: The Occupational Reform, the Hegemony of the Liberal Democratic Party*) (Tokyo: Tokyo Daigaku Shuppankai, 1988), 119-120.

course of constitutional government).³⁶⁵ What Yoshida resorted to was the practical principle of cabinet change in the prewar period, when the parliamentary government system was not constitutionalized and the *genro* had a great influence on recommending a candidate for the next prime minister to the *tenno*, who held the prerogative to appoint him. Now the cabinet must gain trust from the Diet, particularly the House of Representatives. Thus the normal course of constitutional government has changed its meaning to who can gain the trust of the Diet. On February 21, 1948, the House of Representatives designated Ashida over Yoshida for the prime minister by 216 to 180 of the total 421 votes. Meanwhile, the House of Councillors, on the other hand, designated Yoshida over Ashida by 104 to 102 of the total 208 votes in a runoff election. A joint committee of both Houses was held on February 23.³⁶⁶ It failed to reach an agreement.³⁶⁷ According to the principle of superiority of the lower house, then, the decision of the House of Representatives became the decision of the Diet.³⁶⁸

This transition of cabinet has made it clear that the parliamentary government system the postwar constitution has provided for is operated by the will of the Diet, especially of the House of Representatives. Unlike the Meiji constitutional system, it now becomes crystal-clear who decides one of the most important components of the governmental process and thus is responsible for the decision. A majority of the House of Representatives holds the decisive voice in the process. Furthermore, the Diet has now genuinely become an institution representative of all the people with true universal suffrage.³⁶⁹ The people can even indirectly control a political decision at the level of a national institution. In principle, politics has transformed its nature from dedication to the *tenno* to competition to gain popular support. The formation of the Ashida cabinet has vividly shown this

³⁶⁵ For the normal course of constitutional government, see Chapter 1 section 7.

³⁶⁶ See the Constitution of Japan, art. 67 par. 2. There have been so far only two cases in which each House designates a different person as prime minister. The other occurred in August 1989 when the House of Representatives designated Kaifu Toshiki but the House of Councillors Doi Takako.

³⁶⁷ See the *Kokkai Ho* (the Diet Law), art. 86. A joint committee consists of 10 members each elected in their respective House. *Ibid.*, art. 89. It is necessary to pass a resolution with a majority of two-thirds or more to make an agreement in a joint committee. *Ibid.*, art. 92.

³⁶⁸ See the Constitution of Japan, art. 67 par. 2.

³⁶⁹ See the Constitution of Japan, arts. 43 & 44.

transformation of politics in postwar Japan.³⁷⁰ Therefore, the universal principle of democratic politics has been gradually more meaningful.³⁷¹

The postwar constitution has chosen as the fundamental value the protection and enhancement of human dignity as individuals. To realize the value choice, it has adopted the principles of popular sovereignty and of denunciation of war and armed forces. In sum, it has tried to liberally democratize politics in postwar Japan. Politics has transformed itself from a vertical relation of order and subject to a more horizontal relation among equals in nature. The theorists of both the external imposition and the internal continuity fail to appreciate this transformation in politics because the former refuses to see the efforts of the Japanese people to start a new constitutional life and the latter trivializes the discontinuity that clearly exists between the two Japanese constitutions. The third theory of the postwar constitution as an unconstitutional revolution has presented a viewpoint from which the liberal democratization of politics in postwar Japan should be fully theorized.

However, the most serious problem immediately after the establishment of the postwar constitution was for the Japanese people to internalize new constitutional values because under the circumstances of prevalent preoccupation with the *kokutai*, political compromise was in a sense necessary for creating the postwar constitutional system. In particular, the Japanese people missed a precious opportunity to express their commitment to liberal democracy by themselves in a national referendum. The *kokutai* ideology had been so influential that many people had been enchanted. How successfully has the new constitution disenchanted the Japanese people of the subjection to be sovereign? Writing the principle in the fundamental document is one thing. But operating it properly

³⁷⁰ The Ashida cabinet lasted only for seven months. Money scandals destroyed this cabinet. Behind the incident, it is said that there was a severe conflict between the Government Section and G2 in GHQ. While the former generally perused a more idealistic goal of liberal democratization of Japan, the latter adopted a more realistic approach to the cold war situation. Yoshida Shigeru became the prime minister again and kept office until December 1954. Under his conservative leadership, the Japan people came to live in “the reverse course”. But this is another story. For “the reverse course”, see Takemae, *Inside GHQ*, 457-515.

³⁷¹ “Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.” The Constitution of Japan, preamble par. 1.

in real politics is quite another. Thus, we have to pay close attention to the relationship between the principle of popular sovereignty and the symbolic *tenno* institution. How did the Japanese people conceptualize the new *tenno* system in the regime that the people are sovereign? How were they ready to take full responsibility for politics?

Chapter 5

Transformation of Politics: The Symbolic *Tenno* System and the Rise of Reason

1. Introduction: From Sovereign to Symbol
2. A New Start in Continuity
3. Democracy Explained in School Textbooks
4. The Formation of the Symbolic *Tenno* System
5. The *Tenno* Family and the New Constitution
6. The Tradition and Intellectuals: Tsuda Sokichi and Watsuji Tetsuro
7. The Controversy between the August Revolution and Nomos Sovereignty and Beyond
8. The *Tenno* Institution in the New Constitution
9. The Interpreted Symbol
10. The Placard Case: The Symbolic *Tenno*, Free Speech, and the Emergence of New Politics
11. Conclusion

1. Introduction: From Sovereign to Symbol

The Constitution of Japan was promulgated on November 3, 1946, and became effective six months later. This new constitution has drastically changed the political foundation of Japan. The most fundamental transformation is found in provisions on the *tenno* institution.¹ It is true that the Meiji Constitution and the new constitution both place “the *tenno* (emperor)” as chapter 1 and that the thrones of the two *tennos* are hereditarily succeeded in the same line.² However, their contents are completely different from each other.³ First, the status of the *tenno* has been dramatically transformed. While the *tenno* held the status as sovereign and head of the state and superintended sovereign powers under the Meiji constitutional regime,⁴ the new constitution, on the one hand, has declared the principle of popular sovereignty and, on the other, has retained the *tenno* institution as the symbol of the state and the unity of the people.⁵ Second, the bases of the institutions also differ fundamentally. The *tenno* in the Meiji Constitution was entitled to reign and rule because of the will

¹ For the details on the *tenno* system in the Meiji constitutional regime, see Chapter 1.

² Compare the Constitution of the Empire of Japan, art. 2 with the Constitution of Japan, art. 2.

³ See Miyasawa Toshiyoshi, *Kenpo*, 175-178.

⁴ The Constitution of the Empire of Japan, arts. 1 & 4.

⁵ The Constitution of Japan, preamble and art. 1.

of the imperial founder and ancestors.⁶ Even the will of the *tenno* himself was irrelevant as the foundation of his sovereignty. The idea of one lineal succession unbroken for ages eternal was influential enough for most people to believe in the perpetuity of the state and the *tenno's* governance. Thus this feature was closely connected to the concept of the deification of the *tenno's* rule and the *tenno* himself because the imperial founder was, according to the founding myth, believed to be *Amaterasu Omikami* (legendary sun goddess). Unification of politics and religion was essentially presupposed to be a principle in this sense. In sharp contrast, the new symbolic *tenno* was founded upon the sovereign will of the people.⁷ The *tenno* declared himself to be human before the new constitution was established.⁸ Separation of state from religion has been importantly characteristic of the new constitution.⁹

With respect to powers vested in the *tenno*, accordingly, there are substantial differences between the two institutions. In the Meiji constitutional system, the *tenno* as sovereign held and exercised prerogatives to govern the state. In fact, legislative, administrative and judicial powers were all vested with the *tenno* himself. With support of governmental institutions, further, the *tenno* was generally planned to exert such powers by himself. The legislative power the *tenno* held was exercised with the consent of the Imperial Diet.¹⁰ The *tenno* enjoyed wide leeway when he was allowed to make legislation without the consent of the Diet in the form of independent orders and emergency orders.¹¹ The administrative power all belonged to the *tenno*, who had the prerogatives of administrative appointment and organization, diplomacy, military command and organization, state of siege, honors, and pardon.¹² These prerogatives were exercised upon the advice of ministers of

⁶ See *Tsugebumi* (Imperial Oath Sworn in the Sanctuary in the Imperial Palace); Imperial Rescript on the Promulgation of the Constitution.

⁷ The Constitution of Japan, art. 1.

⁸ See *Hingen Sengen*, Imperial Rescript on January 1, 1946, *FRUS*, 8 (1971): 134-135 in RM096.

⁹ The Constitution of Japan, arts. 20 & 89.

¹⁰ The Constitution of the Empire of Japan, art. 5.

¹¹ The Constitution of the Empire of Japan, arts. 9 & 8.

¹² The Constitution of the Empire of Japan, arts. 10, 11, 12, 13, 14, 15, & 16.

state.¹³ The courts of laws exerted the judicature in the name of the *tenno*.¹⁴ Meanwhile, the new constitution has deprived the *tenno* of all political powers. It has clearly denied the prerogative-oriented governmental system. The *tenno* shall have no powers related to government and perform only functions in matters of state provided for in the constitution.¹⁵ Moreover, the *tenno* cannot act by himself but only upon the advice and approval of the cabinet.¹⁶ The constitution enumerates rather formal and ceremonial functions as matters of state: Appointments of the prime minister and the chief justice of the Supreme Court upon designation by the Diet and the cabinet, respectively; Promulgation of legal norms; Convocation of the Diet; Proclamation of election for the Diet; Attestation of appointment and dismissal of public officials provided for by law and of full powers and credentials of diplomats; Attestation of pardon; Granting honors; Attestation of diplomatic documents provided for by law; Receiving foreign diplomats; Performing ceremonial functions.¹⁷ The legislative, administrative, and judicial powers are vested with the Diet, the cabinet, and the Supreme Court and inferior courts, respectively.¹⁸ The *tenno* as the symbol is supposed to play no positive role in the political process. In this way, the new constitution has presented a totally different picture of the governmental process in postwar Japan.

Now political principles of liberal democracy have been innovated since the postwar constitution was established. They are the product of the Japanese people's struggle to create a new political order based upon freedom after the defeat in the war. It is fair to say, however, that the constitutional revolution did not involve popular mass mobilization for liberal democratic values. Thus the postwar constitution has to have the character of more progressive agendas than reservation of great political achievements. Discrepancies between norms and facts might be larger in this case than in other constitutions. How did the Japanese people receive the innovative

¹³ The Constitution of the Empire of Japan, art. 55.

¹⁴ The Constitution of the Empire of Japan, art. 57.

¹⁵ The Constitution of Japan, art. 4 par. 1.

¹⁶ The Constitution of Japan, art. 3.

¹⁷ The Constitution of Japan, arts. 6 & 7.

¹⁸ For the details on the governmental institutions under the new constitution, see Chapter 4.

constitutional principles? The national consciousness of the innovative constitution is on trial. A liberal democratic constitution cannot be well operated without the people's commitment to its basic values.

This chapter will examine public discourse on the Constitution of Japan in the early postwar period.¹⁹ My main concern lies in how the Japanese people conceptualized the relationship between the principle of popular sovereignty and the symbolic *tenno* institution the postwar constitution has newly introduced. Because writing the principle of popular sovereignty is only a starting point of democratization of society, we should pay attention to how this new principle was accepted and operated around the establishment of the postwar constitution. Internalization of the constitutional values is crucially important from a liberal democratic perspective, particularly because the postwar constitutional revolution was exogenous as well as indigenous. How different was the postwar constitutional regime based upon popular sovereignty with the symbolic *tenno* system from the Meiji constitutional system? How similar were they? By examining these questions, the third theory of the constitutional experience in the postwar era differentiates itself from both the external imposition theory and the internal continuity theory because the latter two theories fail to appreciate the efforts of the Japanese people to strike a delicate balance between the principle of popular sovereignty and the newly established symbolic *tenno* institution.

At first we will briefly look at the starting point of the postwar constitution in terms of discontinuity and continuity. The postwar constitution's promulgation and effectiveness ceremonies well showed a conflict between discontinuity and continuity. Next, we will review the images of democracy explained in high school textbooks as one representative of public discourse on the new constitution. The Ministry of Education once enthusiastically advocated the *kokutai* ideology through their school textbooks. After the constitutional revolution, how different are the postwar textbooks from those in the prewar period? Rather idealistic discourse emerged immediately after the wartime defeat.

¹⁹ I will limit my discussion here to the period until around 1952, when Japan recovered its independence.

Then we will turn our eyes to the most serious problem in the postwar liberal democratic system: the symbolic *tenno* institution. First we will review its origins. Historical records have shown at least three independent lines of influence upon forming the symbolic *tenno* system. We will see a solid indigenous footing of the new institution. Then we will examine how the *tenno* and his family received the newly created constitutional system. We will recognize continuity and discontinuity even here.

Then we will turn our attention to public discussions on the institution. First, we will explore how intellectuals such as Tsuda Sokichi and Watsuji Tetsuro tried to respond to the fundamentally new political situation. By relying upon long tradition, they tried to convince people that the symbolic *tenno* matched an authentic image of the *tenno* and that the *tenno* as sovereign was a deviant. Continuity was a crucial theme for them. The debate between Watsuji and Sasaki Soichi over the change in the *kokutai* will clarify a character of constitutional discourse in postwar Japan. Further, we will consider another debate over the relationship between popular sovereignty and the symbolic *tenno* institution between Miyasawa Toshiyoshi and Odaka Tomo. Although this time the debate was over popular sovereignty, not the *kokutai*, the theme was the same: which was the best characterization of the postwar constitution, discontinuity or continuity? In the process of examining this debate between the August Revolution and Nomos Sovereignty theses, I will clarify my thesis of the postwar constitutional making as an unfinished constitutional revolution. Moreover, we will focus upon the symbolic *tenno* system itself. How was the system understood in the early postwar period? What role was the symbolic *tenno* expected to play in the new constitutional regime? Finally, the Placard Case will be fully analyzed, which will indicate that politics in postwar Japan was changing from one characterized by the order-subject relation to one founded upon mutual persuasion by speech. Through the public discussions, discontinuity gradually became basic recognition of the postwar constitution, although some still continued to argue for continuity.

All the debates we will consider in this chapter occurred over more or less the same topics:

How new is the new constitution? How continuous and discontinuous is the postwar constitution with the Meiji Constitution? In the Meiji constitutional system, people were used to understanding the constitution in the essential connection with the *tenno*. Indeed, the *kokutai* ideology had enchanted even highly educated people. Therefore, it was not unreasonable for them to try to understand the new constitutional order in terms of meanings of the newly introduced symbolic *tenno* institution. Palatable or not, focus tended to be placed on the symbolic *tenno* institution. Significant change in the constitutional text had to be explained anyway because the *kokutai* ideology had profoundly captured most Japanese people. Thus public discussion was repeatedly carried out over the symbolic *tenno* institution and its relation to the new principle of popular sovereignty.

While many people heatedly argued for continuity between the two constitutions and most really wanted to see it, there were a few frank and solid discussions that recognized discontinuity and advocated the newness of the postwar constitution. Whatever might have been argued for the symbolic *tenno* system, it clearly is different from the old *tenno* institution based upon the idea of one line of *tennos* unbroken for ages eternal. The substance of the symbolic *tenno* institution all depends upon the political will of the people. In fact, the postwar constitution has taken the *tenno* into its constitutional frame anyway.

2. A New Start in Continuity

The Constitution of Japan was promulgated on November 3, 1946. The date is a symbol of difficulties this new constitution would face because November 3 was the national holiday for celebrating the birthday of the *Tenno Meiji*.²⁰ However, most Japanese people sincerely welcomed the Constitution of Japan. All political parties but the Communist Party welcomed the new constitution, although the conservatives were truly reluctant to accept the principle of popular sovereignty with

²⁰ For the process of selecting November 3, see Irie Toshio, *Keii*, 428-429, 432-435. Yoshida originally wanted the postwar constitution to be effective on February 11, which was the National Founding Day based upon the founding myth and also the date when the Meiji Constitution was promulgated. However, the deliberation in the Imperial Diet lasted longer than he had expected. See Koseki Shoichi, *Tanjyo*, 319-320.

the symbolic *tenno* institution only a few months before. Newspapers made a large contribution to enhancing the welcoming moods.²¹ Whatever it might mean, the Japanese people surely perceived the constitution as a new beginning. The postwar constitution was regarded as the symbol of a break with a past darkened by long wars, suppression, and austerity.²² Undeniably, a bright future for the state as well as for individuals was ardently expected in connection with the new fundamental law.

From the date of promulgation to that of effectiveness, all kinds of popularization of the ideas of the new constitution were carried out all over the country under the auspices of the Government Section of GHQ. The *Kenpo Fukyukai* (the Committee to Popularize the Constitution) sponsored many lectures on the new constitution around various parts of Japan. The *Kenpo Fukyukai* also edited a booklet, *Atarashii kenpo, akarui seikatsu* (*The New Constitution A Bright Life*), twenty million copies of which were distributed to almost all households. The ceremonies for celebration of the promulgation were held with enthusiasm for the new fundamental law of the nation. People were exposed to lectures, leaflets, illustrated books, movies, and paper slide-picture shows, and even constitution songs and dances.²³ On promulgation day, local governments had lectures, sports and athletic meetings, cultural festivals, concerts, and variety shows for congratulatory events.²⁴ The Japanese people were more or less positively involved in celebration of the new constitution.

On November 3, 1946, a governmental ceremony was held in the House of Peers, which had the *tenno*'s seat placed at the center of the stage higher than common members' seats and even the president's seat. At the ceremony, the *tenno* granted an Imperial Rescript to the Dietpersons and the people.

I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate

²¹ See Ariyama Teruo, *Sengoshi nonakano kenpo to janarizumu* (*The Constitution and Journalism in Postwar History*) (Tokyo: Kashiwa Shobo, 1998), 129 (hereinafter cited as Ariyama, *Sengoshi*).

²² See Tanaka Hideo, "The Conflict between Two Legal Traditions in Making the Constitution of Japan," Ward & Sakamoto, *Democratizing Japan*, 125-126.

²³ See Koseki, *Tanjo*, 321-345.

²⁴ For various congratulatory activities in Hokkaido, Tohoku, Ibaragi, Yamanashi, Shizuoka, Kyoto, Okayama, Ehime, and Fukuoka, see Rekishi Kyoikusha Kyogikai ed., *Nihonkoku kenpo wo kokumin ha do mukaetaka* (*How did the People Receive the Constitution of Japan?*) (Tokyo: Kobunken, 1997), 2001-298.

the amendments of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decisions of the Imperial Diet made in accordance with Article LXXIII of the said Constitution.²⁵

The constitution that solemnly declares the sovereignty of the people was promulgated with the sanction of the *tenno*, the position of which derives from the will of the sovereign people. The postwar constitution was born as the total amendment of the old constitution. Yamazaki Takeshi, the speaker of the House of Representatives, Tokugawa Iemasa, the president of the House of Peers, and Yoshida Shigeru, the prime minister, with reverence replied to what the *tenno* said. Particularly, Yoshida as the prime minister promised that the Japanese people were ready to meet the *seishi* (the desire of the *tenno*) with doing their best from now onward. This ceremony looked like that of the Meiji Constitution, which was quite natural as *kintei kenpo* (a constitution established by the beneficiary *tenno* as a favor). The government tried hard to keep up the continuity between the two constitutions. However, such ceremonial manners are dubious or at least inappropriate from a perspective of the ideals of the new constitution as *mintei kenpo* (a constitution established by the people). The sovereign people, who should have been spotlighted, were ignored because they were nowhere in the ceremony. The limits of using the amendment procedure of the Meiji Constitution explicitly emerged at the very beginning of an innovative constitutional life.

In the afternoon of the same day, the Tokyo Citizens' Congratulatory Ceremony was held at the imperial palace plaza. After Yoshida, Tokugawa, Yamazaki, and Yasui Iku, the Tokyo governor, delivered congratulatory addresses, all of a sudden the *Kimigayo* (the reign of his imperial majesty) was played and then the *tenno* and *kogo* (empress) appeared, riding in a carriage. People gave *banzai* (cheers) for the *tenno* and sang the *Kimigayo* in chorus. Newspapers reported the ceremony by focusing upon the *tenno* surrounded with common citizens deeply moved by seeing him directly. While they praised the postwar constitution for its bloodless revolution and democracy, newspapers

²⁵ The Imperial Rescript on November 3, 1946 in RM499.

carried articles as though the *tenno* was the most important figure in the new constitutional politics.²⁶ The elaborately state-managed ceremony was not for the new constitution itself but for the newly introduced symbolic *tenno*.

At the same time, however, the Imperial Rescript on the Promulgation of the Constitution of Japan itself indicated that something different had happened. It was written in colloquial Japanese with *hiragana*, Chinese characters, and punctuation marks. It accorded with the postwar constitution in colloquial and plain Japanese.²⁷ Change in a writing style could be understood as the first step for thorough democratization because plain language in the fundamental law of the land expands popular participation in the government process. In this way, the postwar constitutional system started in the mixed discourse of discontinuity and continuity.

When the Constitution of Japan became effective on May 3, 1947, the *Kenpo Fukyukai* (Committee to Popularize the Constitution) again held a congratulatory ceremony at the imperial palace plaza. Several addresses were delivered and a new people's song, *Our Japan* was played. Then suddenly the music changed to the *Kimigayo*. The *tenno* appeared. This time the *tenno* was by himself and in a car. People once again repeated *banzai* (cheers) for the *tenno* and sang the *Kimigayo* in chorus. Newspapers were also full of articles on the *tenno* particularly as a common person---husband, father, and biologist.²⁸ The symbolic *tenno* institution was well directed in its search for a soft landing. On the other hand, this meant that the symbolic *tenno* system needed careful treatment in performing the role of symbol the postwar constitution has provided for.²⁹ Because the postwar constitution has officially denied the idea of one line unbroken for ages eternal, the symbolic *tenno* has to have popular support to be stabilized as an institution. In other words, the *tenno* institution now needs justification for its existence. The very tradition did not necessarily serve the purpose. Although it

²⁶ See Ariyama, *Sengoshi*, 137-146.

²⁷ For the significance of change to colloquial Japanese in wording, see Chapter 4 section 2.

²⁸ See Ariyama, *Sengoshi*, 154-156.

²⁹ For the *tenno*'s visit to various parts of Japan, see Sakamoto Kojiro, *Shocho tennosei heno pafomansu: Showaki no tenno gyoko no henshen (Performances to the Symbolic Tenno System: The Transformation of the Tenno Visits in the Showa Period)* (Tokyo: Yamakawa Shuppansha, 1989).

retained the same name, the *tenno* system has essentially transformed its logical structure. A popularly, namely democratically justified *tenno* institution is unprecedentedly new in Japanese history.

However, such recognition toward the *tenno* system did not gain momentum easily. The governing elite expressed their desire to see continuity rather than novelty. In a lecture held by the Committee to Popularize the Constitution on February 1947,³⁰ Kanamori Tokujiro, its vice president and the former minister of state in charge of constitutional revision, argued that the new constitution was necessary because the Japanese people did not respect freedom and lacked self-awareness about political responsibility.³¹ He emphasized the significance of framing the new constitution in the world history of development of liberal democracy.³² However, Kanamori alleged that popular sovereignty was nothing new. For him, Japan had invariably adopted the principle of popular sovereignty but ways of explanation and perception alone had changed.³³ He understood that popular sovereignty as a principle that a source of political power in a common life of people resides in the people.³⁴ If popular sovereignty was a universal principle,³⁵ Kanamori seriously contended, that was true even under the Meiji constitutional regime.³⁶ In his explanation, the Meiji Constitution provided for the *tenno* as the outlet of political power, the source of which was the people. In the new constitution, there were other outlets of the Diet, the cabinet, the courts and the people themselves.³⁷ Although the status of the *tenno* in the postwar constitution became lighter than that in the Meiji system, Kanamori emphasized, the *tenno* as the symbol had never altered the

³⁰ Kanamori Tokujiro, "Shinkenpo taikan (An Overview of the New Constitution)," Kenpo Fukyukai, ed., *Shinkenpo kowa (Lectures on the New Constitution)* (Tokyo: Seikai Tsushinsha, 1947), 31-71 (hereinafter cited as Kanamori, "Taikan"). Kanamori also presented the same idea on the new constitution somewhere else. Kanamori Tokujiro, "Shinkenpo no seishin (The Spirits of the New Constitution)," Jiji Tsushinsha, ed., *Nihonkoku kenpo: Kaisetsu to shiryō (The Constitution of Japan: Explanations and Materials)* (Tokyo: Jiji Tsushinsha, 1946), 16-30.

³¹ Kanamori, "Taikan," 43-44.

³² Kanamori, "Taikan," 32-42.

³³ Kanamori, "Taikan," 52-53.

³⁴ Kanamori, "Taikan," 51.

³⁵ See the Constitution of Japan, preamble, par. 1.

³⁶ Kanamori, "Taikan," 52.

³⁷ Kanamori, "Taikan," 68.

meaning of the institution. The old *tenno* system was so naturally supposed to be the symbol of the state and the unity of the people that the Meiji Constitution did not mention its status.³⁸ No matter what he might say about the newness of the postwar constitution, Kanamori intended to place emphasis upon and defend the continuity between the two constitutions.³⁹

Ashida Hitoshi, the chairman of the special committee for constitutional revision in the House of Representatives and the president of the Committee to Popularize the Constitution, expressed the same kind of observation on the postwar constitution. Ashida confirmed the significant change in the governmental process in which the *tenno* used to enjoy and exercise sovereign powers but now had no relation to governmental affairs. He also clearly admitted that popular sovereignty had been principled. However, he contended that the *tenno* had been included in the people in the long tradition of Japan and thus popular sovereignty in the new constitution meant that the people including the *tenno* were the source of the state's will.⁴⁰ Ashida shared with Kanamori the concept of the *tenno* as the center of national adoration.⁴¹ When he explained the new functions the *tenno* was entitled to perform, Ashida used the word of prerogative, which was no longer suitable for the *tenno* under the new constitutional system.⁴² In this way, Ashida like Kanamori tried to stress the continuity in the *kokutai* between the old and new constitutions.⁴³ Because both of them were central persons who advocated the popularization of its spirit, the revolutionary new constitution was expected to be given some disguise of continuity.

In general, the conservative government tried to conceal the revolutionary newness of the postwar constitution. Because the ruling elite regarded the retention of the *kokutai* as their top

³⁸ Kanamori, "Taikan," 70.

³⁹ See Hata Nagami, "Kenpo Fukyukai no katsudo wo shudoshita shinkenpokan (The View of the New Constitution that Led the Committee to Popularize the Constitution), Rekishi Kyoikusha Kyogikai, ed., *Nihonkoku kenpo wo kokumin ha do mukaetaka (How did the People Receive the Constitution of Japan?)* (Tokyo: Kobunken, 1997), 96-121, 99-103 (hereinafter cited as Hata, "Kenpo Fukyukai").

⁴⁰ Ashida Hitoshi, "Shinkenpo to kyoiku (The New Constitution and Education)," *Shinkenpo kowa*, 73-110, 90-91.

⁴¹ Ashida, "Shinkenpo to kyoiku," 90.

⁴² Ashida Hitoshi, *Shinkenpo kaishaku (Interpretations of the New Constitution)* (Tokyo: Daiyamondosha, 1946), 26.

⁴³ See Hata, "Kenpo Fukyukai," 104-107.

priority, they did not necessarily welcome the Constitution of Japan. It can be said that for the safety of the *tenno* house, they unwillingly accepted it. Soon after the recovery of independence in 1950s, the conservatives started a campaign against the “imposed” constitution and for establishing an autonomous constitution. When the Liberal Democratic Party was formed in 1955, one of its main policies was to independently revise the current constitution and reconsider legal reforms in the occupation.⁴⁴ On the other hand, however, most common citizens supported the postwar constitution from the bottom of their hearts. Ideals such as popular sovereignty, civil rights and civil liberties, and the peace the postwar constitution has inspired, have attracted a sufficiently significant number of citizens to have prevented conservative attempts to revise the constitution. Citizens have never given two thirds of the Dietpersons permission to project constitutional amendments which attempt to revert to the prewar situation.⁴⁵

Discontinuity and continuity, progressive and conservative, and *goken* (to defend the constitution) and *kaiken* (to revise the constitution) have been characteristic of public discourse on the postwar constitution.⁴⁶ Thus it is worth examining the origins of such public discourse. Before we fully engage in the examination, let us pay attention to how democracy was understood immediately after the defeat. Liberal democratization of politics was the foremost important problem of the time and thus public understanding of democracy constituted a great portion of public discourse on the postwar constitution, along with the *tenno* institution.

3. Democracy Explained in School Textbooks

⁴⁴ Jiyuminshuto(Liberal Democratic Party), To no Seiko (Major Policies of the Party),6, November 15, 1955 in Rekishigaku Kenkyukai, ed., *Nihonshi Shiryo* (Tokyo: Iwanami Shoten, 1997), 5: 254-256, 256.

⁴⁵ Article 96 paragraph 1 of the Constitution of Japan reads: “Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.” For the amendment process in the postwar constitutional system, see Chapter 4 section 8.

⁴⁶ There is a twist in the constitutional discourse in postwar Japan. While Conservatives argue for *kaiken* (revision of the constitution), progressives argue for *goken* (defense of the constitution). What they try to preserve differs between conservatives and progressives: for the former the Meiji constitutional conceptions and for the latter the postwar constitutional ideals.

The new constitution has adopted the principle of popular sovereignty and a political system of liberal democracy. How did people understand democracy in the reconstruction era? We will see briefly how school textbooks explain governmental principles of the new constitution because they well display not only the government's attitude toward the new constitution but also the formation of public understanding about it through education. The Ministry of Education once tried hard to implant the *kokutai* ideology into young students. Under the new constitution, however, it could not maintain the same stance. A change was necessary, but how?

The Ministry of Education edited and published *Atarashii kenpo no hanashi (A Story on the New Constitution)*, which was a textbook of social studies for first year students of junior high school (the seventh grade). This small textbook was used from August 1947 to March 1952. It pointed out democracy as one of fundamental principles of the new constitution. According to the textbook, democracy meant that collective decisions in a group were made by as many people as possible and that similarly, the government of the state was operated based upon decisions by as many people as possible.⁴⁷ Interestingly, the textbook took the position that democracy does not necessarily limit its application to politics over the state. It might reflect in the social atmosphere of the time that democratization was needed in all aspects of human life. Democracy was, the text continued, the enterprise of the people as a whole to govern the state. It was least erroneous to make decisions by opinions of all. When governmental decisions were based upon democracy, it concluded, people would become happy and the state would prosper.⁴⁸ Then the textbook introduced a distinction between direct democracy and representative democracy. Even though political decisions should be made by all members, it explained, the state, unlike a school class, was too large for all members to gather in one place. Representatives gathered in the Diet for the people to govern the state. However, the textbook pointed out, important things were not left to the Diet but decided by the people themselves. This is direct democracy, which the new constitution has provided for in a few cases,

⁴⁷ Monbusho ed., *Atarashi kenpo no hanashi (A Story on the New Constitution)* (Tokyo: Dowasha, 2001, 1947), 16-17.

⁴⁸ *Atarashi kenpo no hanashi*, 18.

most importantly amendment to the constitution.⁴⁹ The textbook explained that the new constitution adopted two kinds of democracy: representative and direct. While the former is a normal way of governing, the latter is an extraordinary way of making crucially important decisions.⁵⁰

The textbook also mentioned popular sovereignty as a basic principle of the new constitution. It explained that because governmental affairs were decided by the people as a whole, they would be supreme. Because the new constitution had premised democracy, it added, sovereignty quite naturally resided in the people as a whole. However, this explanation obscured a revolutionarily novel feature of popular sovereignty in the new constitution. Democratic politics was partially realized even in the Meiji constitutional system.⁵¹ Thus the government was once extremely reluctant to revise the Meiji Constitution. The textbook presented a logic developed from democracy to popular sovereignty, not the other way around. Therefore, it may be said that the textbook tried to conceal a distinctive characteristic of the new constitution because it did not want to clarify the change in the *kokutai*.⁵²

At all rates, the textbook offered an optimistic view on democracy: “Your ideas and activities will govern the state. There is nothing more pleasant than if you all keep on good terms with one another and administer your own country by yourselves.”⁵³ Because it was for seventh grade, of course, there was no mention about complicated matters in actual democracy such as severe confrontations of interests, apathy and the tyranny of majority. The textbook simply emphasized a positive image of democracy. It is undeniable that this optimistic view indicated a widely accepted sentiment that the new constitution was really understood in a manner that it is

⁴⁹ See Chapter 4 section 7.

⁵⁰ *Atarashi kenpo no hanashi*, 19-20.

⁵¹ See Chapter 1 section 7.

⁵² In fact, the textbook wrote the section of the *tenno* in a different tone from the rest of the book. The title of the section was “tenno heika (His Majesty the Emperor)” written with an honorific title. And the text was full of honorific words. It sounds as if the *kokutai* had never changed. See *Atarashi kenpo no hanashi*, 28-30. Indeed, the textbook wrote “we should place the symbolic tenno at the center of us and then should not give him trouble when we govern the state.” *Atarashi kenpo no hanashi*, 30. Continuity was implicitly emphasized. See Ito Satoru, “‘Atarashi kenpo no hanashi’ ni miru ‘kokutai goji’ no ronri (The Logic of the Retention of the Kokutai Seen in A Story of the New Constitution),” *Nihonkoku kenpo wo kokumin ha do mukaetaka*, 62-95.

⁵³ *Atarashi kenpo no hanashi*, 21.

connected with a bright life.⁵⁴

Another textbook for junior and senior high school students was more substantial. The two-volume textbook *Minshushugi (Democracy)* was edited and published by the Ministry of Education in October 1948 and August 1949. As *Atarashi kenpo no hanashi*, *Minshushugi* also took democracy not only as a political phenomenon but as deeply related to social and economic life.⁵⁵ The textbook thus understood democracy as having three aspects: political, social and economic democracy. Although they were interrelated with one another, it believed, political democracy was the most basic because political democracy was recognized early on and political decisions more or less influenced other decisions.⁵⁶

The textbook started its discussion by mentioning the popularization of the word democracy and its ambiguities. It understood that democracy was not just about political institutions but about spiritual attitudes. Its fundamental spirit lay in respect for humankind. By following authoritative orders blindly, many Japanese people abandoned even self-respect during the pre- and mid-war period. Recovery of self-respect would lead to respect for others' dignity. The textbook argued that democracy presupposed the equality of all people.⁵⁷ Further, it also understood democracy from a utilitarian point of view. While democratization of society would lead to prosperity and peace, the textbook juxtaposed, its failure would cause human beings war and ruin in the future. In short, it seriously maintained, establishment of democracy was a problem of life and death.⁵⁸

The textbook juxtaposed democracy with dictatorship and rejected the latter because it

⁵⁴ The Kenpo Fukyukai (Committee to Popularize the Constitution)'s pamphlet was called *Atarashi Kenpo Akarui Seikatsu (The New Constitution! A Bright Life!)*. See Koseki, *Tanjyo*, 332-334. See also this Chapter section 2.

⁵⁵ See Monbusho, ed., *Minshushugi (Democracy)* (Tokyo: Komichi Shobo, 1995, 1948 & 1949), 16-19. In fact, its chapters 8, 9 and 10 were entitled democracy in social life, democracy in economic life, and democracy and labor unions. *Ibid.*, 146-162, 163-191, 192-211.

⁵⁶ *Minshushugi*, 212-217.

⁵⁷ *Minshushugi*, 17-18.

⁵⁸ *Minshushugi*, 16.

believed that democracy was a much better way of doing politics.⁵⁹ Dictatorship tended to favor a small minority at the sacrifice of the overwhelming majority of people. On the contrary, it argued that democracy depended upon the full protection of freedom and equality. Importantly, it emphasized, a close relationship between democracy and freedom of speech. Freedom of speech was necessary for knowing facts, forming opinions, exchanging ideas and thus making better political decisions.⁶⁰ It argued that the free flow of information would help people to cultivate critical powers and enhance political judgments. It also stressed that free speech would make majority rule work well because abuse of the majority would be prevented through free exchange of information and ideas.⁶¹ It was awakened voters with deliberated opinions who resisted against demagogical or authoritative politics and well practiced democracy.⁶²

The textbook recommended its readers to practice democracy by themselves. Although reading and studying democratic theories gave them knowledge about democracy, it argued, this knowledge did not necessarily mean living in it. The textbook suggested that it was best to practice democracy to acquire it and that school was a good place to learn democracy. The teacher-student relationship in the prewar school education was based upon a vertical morality of order and subject, which should be replaced with a horizontal morality of mutual respect for individual dignity. Student councils and extra-curriculum activities were good opportunities for students to train themselves for a democratic way of administering matters. Elections of executive boards or representatives, management of general meetings and decision-making for groups were all precious occasions to learn how democracy would actually work.⁶³ The textbook also emphasized education for women, which would be necessary to enhance the substantial equality of men and women the

⁵⁹ See *Minshushugi*, 212-240.

⁶⁰ *Minshushugi*, 27-28.

⁶¹ *Minshushugi*, 102-105.

⁶² *Minshushugi*, 109-128.

⁶³ *Minshushugi*, 289-294, 299-310. The textbook took the Future Farmers of America for an example of extra-curricular activities in the United States.

new constitution has provided for.⁶⁴

Finally, the textbook warned its readers against a short-sighted expectation that democracy would soon bring prosperity and happiness to Japan. Because Japan not only was essentially a small land and lacked natural resources but also had recently suffered from devastating damages in the reckless war, the textbook coolly pointed out, it was not easy to recover and develop immediately. There was no easy magic for prosperity.⁶⁵ The textbook argued that a driving force of democracy resided in the people's spirit of self-reliance, namely the indomitable efforts of the people to carve out a destiny for themselves and to build up their own happiness all by themselves. Democracy thus depended upon confidence in the common citizens, not heroes.⁶⁶ Democracy was nothing but self-government based upon deep respect for individual dignity, freedom and equality. It was true that there were so severe conflicts among interests that people could not always expect unanimous political decisions. However, because democracy relied upon majority rule, political decisions conformed to the interests of the majority of the people.⁶⁷ In addition, majority rule should always be supplemented with free exchange of information and ideas and mutual criticism. In sum, the textbook stated, democracy would be realized as politics of the people, by the people and for the people. Democracy would eventually bring the people their own interests though trial and error. Thus the people tended to try hard democratic decision-making all the more because benefits from democratic practices would belong to themselves. Then, the textbook recommended its readers to take a pragmatic approach to democracy. Discussion and practice and practice and discussion would make democracy function well.⁶⁸

In this way, high school textbooks by the Ministry of Education presented a bright image of democracy. They formed such an image both from an intrinsic view and from an instrumental

⁶⁴ *Minshushugi*, 311-334.

⁶⁵ *Minshushugi*, 365-370.

⁶⁶ *Minshushugi*, 360-361.

⁶⁷ *Minshushugi*, 363.

⁶⁸ *Minshushugi*, 378-379.

perspective.⁶⁹ On the one hand, they supposed that democracy was dependant upon fundamental values of people. Dignity, freedom and equality were understood as profoundly connected to the idea of democracy. The textbooks thus argued for a liberal type of democracy, although they did not use the term of liberal democracy explicitly and raise a serious question on intrinsic tension between liberalism and democracy. On the other, they also appealed to utilitarian motivation. They argued that democracy would lead to prosperity and the happiness of the people. They basically presupposed a close relation of democracy to marketplace capitalism, which was being modified by various attempts deriving from social consciousness. When they placed democracy over dictatorship, their political motivation was obvious. As the cold war became intense, textbooks tried to reject the communist way of politicking. However, we should rather pay attention to their romantic view of democracy. The government might come to believe that collapse of the Meiji constitutional regime had required a serious reflection on a political manner, although it was quite hesitant to change the old style immediately after the war.⁷⁰ Whatever reasons they might have had, it seems undeniable that democracy was really regarded as a hope for the future at the beginning of the new constitutional system. If people fully acquired a democratic attitude, the future of Japan was widely believed to be filled with prosperity and happiness.

Then, a question had to be asked whether the optimistic view of democracy the government had expounded really had a solid footing in the new constitution. Because the constitution has carried over the *tenno* system anyway, the system might work against the optimistic view on democracy. In the old regime, the *tenno* was the sole source of political power. In fact, *Atarashii kenpo no hanashi* (*A Story of the New Constitution*) was full of terms of respect for the *tenno*.⁷¹ This textbook even stated that the Japanese people should place the *tenno* at their center and that they

⁶⁹ For basic ideas about democracy, see Robert A. Dahl, *On Democracy* (New Haven: Yale University Press, 1998).

⁷⁰ See Chapter 2.

⁷¹ See *Atarashii kenpo no hanashi*, 28-30.

should not give the *tenno* trouble when they govern the state.⁷² The textbook almost said that the sovereign people should serve the *tenno* for his peace. Without doubt, such feeling is harmful to liberal democracy. Thus the next question is how the Japanese people tried to strike a balance between the principle of popular sovereignty and the symbolic *tenno* institution. Before embarking upon a consideration of the relationship between the two institutions, we first briefly confirm the origins of the symbolic *tenno* system.

4. The Formation of the Symbolic *Tenno* System

As discussed in the third chapter,⁷³ at its early stage, the Allied, overwhelmingly American, occupation forces decided to maintain the *tenno* system to operate its purposes smoothly. However, international opinion, particularly in China, the Soviet Union, Australia, and Holland were so severe that MacArthur and GHQ and the U.S. government were definitely unable to sustain the status quo of the *tenno* institution.⁷⁴ The Shidehara cabinet was extremely reluctant to execute, among other things, constitutional reform. The *Kenpo Mondai Chosa Iinkai* (the Committee for the Investigation of Constitutional Problems) over which Matsumoto Joji presided showed an unacceptably poor performance. MacArthur and the Government Section of GHQ decided to frame a draft of constitutional revision by themselves and present it to the Japanese government to make the Japanese draft by modeling their draft.

The GHQ draft of the Constitution of Japan used the word “symbol”. Article 1 reads “The Emperor shall be the symbol of the State and of the Unity of the People, deriving his position from the sovereign will of the People, and from no other sources.”⁷⁵ This is the direct origin of the *shocho*

⁷² *Atarashii kenpo no hanashi*, 30.

⁷³ See Chapter 3 section 3.

⁷⁴ For conflicting views on the *tenno* around 1945, see Takeda Kiyoko, *Tenokan no Sokoku* (Tokyo: Iwanami Shoten, 1978, 2001).

⁷⁵ For the text of the GHQ draft, see Takayanagi Kenzo, Otomo Yuichiro, and Tanaka Hideo, eds., *Nihonkoku Kenpo Seitei no Katei (The Making the Constitution of Japan)* (Tokyo: Yuhikaku, 1972), 1: 266-303 (hereinafter cited as Takayanagi, *Seitei Katei*). Article 1, *ibid.* 268.

tennosei (the symbolic *tenno* institution) in the postwar constitution.⁷⁶ Nakamura Masanori has clarified the complicated process of providing for the word symbol.⁷⁷

There were three independent lines of theoretical influence. Two were on the United States side. Joseph C. Grew, former American ambassador to Japan, was the central figure of the pro-Japanese in the Department of State. He served as the director of the Office of Far Eastern Affairs from May 1944 and Undersecretary of State from December 1944 to August 1945 to plan a policy for postwar Japan. He had never changed his mind about treatment of the *tenno*: utilizing the authority of the *tenno* for the occupational aim to liberally democratize Japan. He mentioned the *tenno* system as the symbol of Japanese society.⁷⁸

In GHQ, Brigadier General Bonner F. Fellers, Military Secretary to SCAP, submitted to MacArthur a report that the *tenno* should not be subject to a war criminal investigation. In the report, Fellers used the word symbol twice. “[The Japanese] Emperor is the living symbol of the race in whom lies the virtues of their ancestors.” “Were the Japanese given [an] opportunity [to choose their own government], they would select the Emperor as the symbolic head of the state.”⁷⁹ And MacArthur himself referred to the *tenno* as a symbol. He telegraphed Eisenhower, the Chief of Staff, United States Army, that he was opposed to a policy of trying the *tenno* as a war criminal. What he stated in the telegraph was basically the same as Fellers’ argument.

“If [The Emperor] is to be tried, great changes must be made in occupational plans and due preparation therefore should be accomplished in preparedness before actual action is initiated. His indictment will unquestionably cause a tremendous confusion among the Japanese people, the repercussions of which cannot be

⁷⁶ For the formation of the symbolic *tenno* institution, see Tanaka Hideo, *Kenpo seiteikatei oboegaki* (Tokyo: Yuhikaku, 1979), 112-129; Koseki Shoichi, “Shocho tennosei no seiritsu katei (The Making Process of the Symbolic *Tenno* System),” *Horitsu Jiho* vol. 52(1980), no. 7, 92-99; no. 8, 95-101; no. 10, 78-83; no. 11, 81-87; Matsuo Takayoshi, “Shocho tennosei no seiritsu nishiteno oboegaki (A Note on Forming the Symbolic *Tenno* System),” *Sengo nihon heno shuppatsu (The Departure for Postwar Japan)* (Tokyo: Iwanami Shoten, 2002), 49-85 (hereinafter cited as Matsuo, *Shuppatsu*).

⁷⁷ See Nakamura Masanori, *Shocho Tennosei heno Michi (The Road to the Symbolic Tenno System)* (Tokyo: Iwanami Shoten, 1989) (hereinafter cited as Nakamura, *Shocho*).

⁷⁸ See Nakamura, *Shocho*, 162-163.

⁷⁹ Memorandum from Fellers to MacArthur, October 2, 1945, Congressional Information Service, Framing the Constitution of Japan: Primary Sources in English, 1944-1949 (microfilm by University Press of America for CIS; Bethesda, MD, 1989), 3-g-34 in RM038.

overestimated. He is a symbol which unites all Japanese. Destroy him and the nation will disintegrate. Practically all Japanese venerate him as the social head of the state and believe rightly or wrongly that the Potsdam agreements were intended to maintain him as the Emperor of Japan.”⁸⁰

It is clear that MacArthur used the word “symbol” for the *tenno*. When he informed Courtney Whitney, Chief of the Government Section of his decision to write a draft of the Japanese constitution on February 3, 1946, however, MacArthur did not say anything about the symbolism of the *tenno*. The so-called MacArthur Notes on the fundamental principles of the new constitution included the following on the *tenno*.

Emperor is at the head of the state.
His succession is dynastic.
His duties and powers will be exercised in accordance with the Constitution and responsive to the basic will of the people as provided therein.⁸¹

When the Government Section started its work on constitutional revision, Whitney reported to its members the general principles MacArthur presented to him as follows: “The Emperor is at the head of the state and his succession is dynastic. But his powers will be exercised in accordance with the Constitution and responsive to the will of the people as provided therein.”⁸² In the free discussion, the members agreed that while “placing sovereignty squarely in the hands of the people”, “the Emperor’s role [would] be that of a social monarch, merely.”⁸³ Thus, when the Government Section started writing a new constitution for Japan, no specific word of “symbol” emerged yet in the official documentation. The members of the Government Section divided into small groups for drafting a part of the constitution under the steering committee. Provisions on the *tenno* were drafted in the committee on the emperor, treaties and enabling provisions, to which George A. Nelson, Jr., first lieutenant, and Richard A. Pool, ensign, were assigned.

⁸⁰ Telegraph from MacArthur to Eisenhower, January 25, 1946, *FRUS*, 8(1971): 395-397 in RM054.

⁸¹ Three basic points stated by the Supreme Commander to be “Musts” in constitutional revision. Takayanagi, *Seitei Katei*, 1: 98.

⁸² Summary Report on Meeting of the Government Section, 4 February 1946 in Takayanagi, *Seitei Katei*, 1: 102.

⁸³ Summary Report on Meeting of the Government Section, 4 February 1946, Points in Open Discussion, in Takayanagi, *Seitei Katei*, 1: 104.

The first draft of the committee explicitly adopted the symbolic *tenno* system.

“Article 1 Sovereignty over Japan shall be in the Japanese People and shall be exercised by the State, which is their instrument.”

“Article 2 The Japanese Nation shall be reigned over by a line of Emperors, whose succession is dynastic. The Imperial Throne shall be the symbol of the State and of the Unity of the People, and the Emperor shall be the symbolic personification thereof, deriving his position from the sovereign will of the People, and from no other source.”⁸⁴

At the meeting of the steering committee and the committee on the emperor on February 6, 1946, article 1 on sovereignty was deleted and the first sentence of article 2 was also deleted because the term “reign” might carry the connotation of the term of “govern” in Japanese usage.⁸⁵ The second draft provided merely that “An Imperial Throne shall be the symbol of the State and of the Unity of the People, and an Emperor shall be the symbolic personification thereof, deriving his position from the sovereign will of the People, and from no other source.”⁸⁶ Further, this second draft was revised to a simple provision that “The Emperor shall be the symbol of the State and of the Unity of the People, deriving his position from the sovereign will of the People, and from no other sources.”⁸⁷ Because the juxtaposition of the throne and the *tenno* in the proposed draft showed a double symbolism, “the mysticism” of the throne was omitted for the sake of simplification.⁸⁸ This was the final version of the GHQ draft, which was presented to Matsumoto, Yoshida, and other Japanese representatives on February 13, 1946.

On the one hand, Theodore McNelly, who has specialized in research on framing the postwar constitution, has argued that Alfred Rodman Hussey, one of three members of the steering committee, was a leading figure in advocating the symbolic *tenno*.⁸⁹

⁸⁴ CIS 3-b-209 in the Hussey Papers. See RM015.

⁸⁵ Meeting of the Steering Committee with Committee on The Emperor (original draft), Wednesday, 6th February 1946 in Takayanagi, *Seitei Katei*, 1: 130-132.

⁸⁶ Memorandum for the Chief, Government Section in Takayanagi, *Seitei Katei*, 1: 144.

⁸⁷ See Takayanagi, *Seitei Katei*, 1: 268.

⁸⁸ Review of the Amended Drafts by the Steering Committee, 12 February 1946 in Takayanagi, *Seitei Katei*, 1: 246.

⁸⁹ Theodore McNelly, “The Role of Monarchy in the Political Modernization of Japan,” *The Origins of Japan’s Democratic Constitution* (Lanham, MD.: University Press of America, 2000), 100. He only writes that “We have it on good authority that the late Rodman Hussey was the principal advocate of the statement that the emperor

On the other, Kades bears witness that when the Government Section drafted their own constitutional plan, MacArthur did not order use of the term “symbol.”⁹⁰ He also bears witness that on February 6, 1946, the members who participated in preparation of provisions on the *tenno* did not know the usages of the term “symbol” by Grew, Fellers, and MacArthur.⁹¹ He hinted that Jerivis Langdon, Jr., might influence him in using the term “symbol.” When Kades attended Cornell University, he was a senior editor of the *Cornell Daily Sun*, of which Langdon was the editor-in-chief. Landon wrote articles on the Statute of Westminster, 1931, which provided that “the Crown is the symbol of the free association of the British Commonwealth of Nations,” and “they are united by a common allegiance to the Crown.” Kades read Langdon’s articles enthusiastically and he pointed out that when the symbolic personification was to be replaced with a less mysterious and pompous phrase, he came across the term “symbol” from subconsciousness because he was familiar with the Statute of Westminster through reading Langdon’s articles.⁹²

This is the second line of influence about framing the symbolic *tenno* institution. Walter Bagehot has presented a famous formula that the English constitutional structure has the dignified parts represented by the king and peers and efficient parts represented by the cabinet and the House of Commons in the United Kingdom.⁹³ He uses the term “symbol” referring to the monarchy. “The nation is divided into parties, but the Crown is of no party. Its apparent separation from business is that which removes it both from enmities and from desecration, which preserves its mystery, which enables it to combine the affection of conflicting parties---to be a visible symbol of unity to those still so imperfectly educated as to need a symbol.”⁹⁴

Arthur James Balfour wrote an introduction to the world classic edition of Bagehot’s *the English Constitution*. He also used the word of “symbol” and the concept of monarch as the chief of a

is a symbol.”

⁹⁰ The first letter from Charles Kades to Nakamura Masanori, Nakamura, *Shocho*, 190.

⁹¹ The second letter from Charles Kades to Nakamura Masanori, Nakamura, *Shocho*, 191.

⁹² The second letter from Charles Kades to Nakamura Masanori, Nakamura, *Shocho*, 192-193.

⁹³ Walter Bagehot, *The English Constitution* (Oxford: Oxford University Press, 1867, 1928), 3-4.

⁹⁴ Bagehot, *The English Constitution*, 40.

unified nation.

Patriotism involves conceptions of unity and continuity. The coldest patriot recognizes himself as part (by birth or adoption) of an enduring 'Whole'. He has feelings, however, vague, about its past. He entertains, however faintly, hopes and fears about its future. How can the machinery of Cabinet Government either suggest or strengthen sentiments like these, even at their lowest level? It assumes their existence. It cannot perform its duties without them. But are they its natural product? Admittedly it works through Party at every stage---Party Cabinets in Downing Street, Party majorities in the House of Commons, Party majorities in the constituencies. These cannot of themselves give us unity because they are at once the product and the instrument of partisan separations. They cannot give us continuity, because partisan majorities have ever proved unstable. They do the Nation's work and on the whole do it well; but is it not at the cost of deepening and hardening national divisions? If therefore Bagehot's cabman sought a shrine symbolic of his country's unity and continuity rather than of its controversies and quarrels, evidently, it was to Buckingham Palace that he should have looked rather than to Downing Street.⁹⁵

Wider horizons open before us when we turn to the second of the non-Party elements in our political system---I mean the Monarchy. British Kingship, like most other parts of our ancient constitution, has a very modern side to it. Our King, in virtue of his descent and of his office, is the living representative of our national history. So far from concealing the popular character of our institutions (as Bagehot supposed) he brings it into prominence. He is not the leader of a party, nor the representative of a class; he is the chief of a nation,---the chief indeed of many nations. He is everybody's King; by which I do not so much mean that he is the ruler of the Empire, as that he is the common possession of every part of it. He is the predestined link uniting all the various communities, whatever be their status, of which the Empire is composed. The autonomous democracies, including among them Great Britain, the mother of them all, each regard him as their constitutional head; and besides this he is the chief of all the diverse races in all the scattered territories, for whose welfare Great Britain, in the course of generations, has made herself responsible.⁹⁶

These expressions are extremely similar to the phrases Grew and Fellers used for the description of the *tenno* institution. In fact, Balfour himself prepared a draft of the Statute of Westminster of 1931.

In sum, two independent lineages of influence intersected coincidentally.⁹⁷ One lineage ran from Grew through Fellers to MacArthur. Bagehot and Balfour were at its origin. The other line was

⁹⁵ Arthur James Balfour, introduction to Bagehot's *The English Constitution*, xx.

⁹⁶ See Balfour, introduction to *The English Constitution*, xxv. However, it is noteworthy that the *tenno* did not represent the unification of various peoples. The Japanese government intentionally omitted protection of foreigners in the process of making the postwar constitution, which the Government Section for some reason approved. See Introduction and Chapter 3 section 4.

⁹⁷ See Nakamura, *Shocho*, 194-195.

obscure: from Bagehot, and Balfour through Langdon to Kades. Pool or Nelson also somehow used the term of “symbol.” These are the exogenous origins of the symbolic *tenno* system.

Indigenously, there was a solid basis for accepting the symbolic *tenno* institution. As the previous chapter has showed,⁹⁸ the constitutional draft of the *Kenpo Kenkyukai* (the Constitutional Research Group) had a great influence upon the work of the Government Section. The draft offered an image of the *tenno* without political power but with ritualistic and ceremonial functions. Although its conception of the *tenno* institution is regarded as virtually symbolic, the draft of the *Kenpo Kenkyukai* did not adopt the term of “symbol” directly. There is testimony that the word of “symbol” was used in discussions of the group, although it has not been entirely confirmed yet. Iwabuchi Tatsuo, a constant participant in activities of the *Kenpo Kenkyukai*, witnessed that Sugimori Kojiro and Murofushi Takanobu, its other important members, came up with the term “symbol” in a discussion of the *Kenkyukai*.⁹⁹ When he went to GHQ to submit the constitutional draft of the *Kenkyukai*, Sugimori explained the contents of the draft in a rather detailed way.¹⁰⁰ In Iwabuchi’s account, the explanation Sugimori gave to an unidentifiable official of GHQ included the term “symbol” about the *tenno*.¹⁰¹

In addition, as Koseki Shoichi has clarified,¹⁰² Kato Kanjyu, an important Socialist, published an article in which he placed the *tenno* as the symbol of national harmony. Kato wrote the article on November 10, 1945, which it was about one month and a half before the *Kenpo Kenkyukai* finished its draft of the revised constitution and well before the Government Section started its work on constitutional writing. Kato with his wife Kato Shizue were highly influential over GHQ because they as leftist socialists had never cooperated with the ultra-nationalist rule in the pre- and mid-war

⁹⁸ See Chapter 3 sections 2 & 3.

⁹⁹ See Kenpo Chosakai, *Kenpo Seitei no Yurai* (Tokyo, Jiji Tsushinsha, 1961), 252-253 (hereinafter cited as Chosakai, *Yurai*).

¹⁰⁰ See Suzuki Yasuzo, “Kenpo Kenkyukai no Kenposoan Kiso oyobi Kenpo Seiteikaigi Teisho,” *Aichi Daigaku Hokei Ronshu*, No. 28 (1959), 204. See also, Sato, *Seiritsushi*, 2: 829-830.

¹⁰¹ See Chosakai, *Yurai*, 253.

¹⁰² See Koseki, *Tanjyo*, 68-70.

period and had a long enthusiastic commitment to labor movement and women's problems.¹⁰³

In view of its historical development, the imperial institution should always exist as a ceremonial and ritual symbol of the harmony of the Japanese. The emperor system is a product of history; the fact that it is not absolute is something to which history truly attests. That is to say, as one can see from history, the imperial institution was frequently exposed to crises. The reason why the emperor's position was preserved in such cases was not because he was absolute. Rather, it was the common feeling of the Japanese, in various periods of their history, that it was in their mutual interest to avoid the disorder that would arise from the abolition of the emperor as an historical institution, and they thought that by protecting the emperor they could maintain the unity of the country.¹⁰⁴

Although the concrete flow of influence is uncertain, Kato's idea shows that there was an indigenous solid intellectual basis for accepting the symbolic *tenno* institution in postwar Japan. At the same time, as Koseki has accurately pointed out, Kato's conception of the symbolic *tenno* system was "a product of history" and something beyond an institution that performs the state functions the postwar constitution has provided for.¹⁰⁵ The conservative mind could easily gain in the symbolic *tenno* a footing for eroding new constitutional values.

In fact, Satomi Kishio, who had written many books on the *kokutai*, the national polity or national character of the state, from a conservative perspective, was regarded as the first person that defined the *tenno* as the symbol in Japan.¹⁰⁶ Satomi understood the *tenno* as the supreme symbol of the society and state of the Japanese people. In his interpretation, symbolism derived from the traditional and religious authority of the *tenno* from ancient days.¹⁰⁷ On January 28, 1946, Satomi proposed the revised constitution based upon the *kokutai* ideology that the *tenno* in one line unbroken for ages eternal should reign and govern the state.¹⁰⁸ More liberally, Tsuda Sokichi, an eminent

¹⁰³ For the relation of Mr. and Mrs. Kato to GHQ, see Interview with Kato Sizue, "GHQ no fujin komon (A Women Advisor to GHQ)," in Nishi Kiyoko, *Senryoka no Nihon Fujin Seisaku (Policy of Women Problems in Occupied Japan)* (Tokyo: Domesu Shuppan, 1985), 56-69.

¹⁰⁴ Kato Kanjyu, "Seijiron toshiteno kenporon (Constitutional Debate as Political Debate)," *Jiron*, January 1946, 37, in Koseki, *Tanjyo*, 69. For translation, see Koseki, *Birth*, translated by Moore, 41.

¹⁰⁵ See Koseki, *Tanjyo*, 70.

¹⁰⁶ See Nakamura Masanori, *Sengoshi to shocho tenno (Postwar History and the Symbolic Tenno)* (Tokyo: Iwanami Shoten, 1992), 17 (hereinafter cited as Nakamura, *Sengoshi*).

¹⁰⁷ See Nakamura, *Sengoshi*, 17.

¹⁰⁸ For the draft of the revised constitution by Satomi, see Sato, *Seiritushi*, 2: 852-853.

historian on ancient Japan, argued for the symbolic *tenno* institution in January 1946, which was surely before the Government Section started to engage in framing the Japanese constitution.¹⁰⁹ Tsuda saw the significance of the *koshitsu* (imperial house, or *tenno* house) in a democratized political life of the state as “the center of the national unity and the living symbol of the national spirit”.¹¹⁰ Too much emphasis upon the Japanese tradition or harmony of the Japanese people could lead easily to the internal continuity theory, which tries to trivialize the revolutionary newness of the postwar constitution. The symbolic *tenno* system could without doubt provide a logical foundation for Japanese exceptionalism. Therefore, it is pivotally important to ask what the symbol the *tenno* institution has come to present under the postwar constitution concretely stands for. What the new constitution has declared is more or less neutral: the *tenno* as “the symbol of the State and of the unity of the people” derives “his position from the will of the people with whom resides sovereign power.”¹¹¹ Thus, a relationship between the principle of popular sovereignty and the symbolic *tenno* system has to be carefully explored in order to clarify the revolutionary features of the postwar constitution. How was it conceptualized in the wake of the establishment of the constitution? The ultimate question comes down to what the symbolic *tenno* system really stands for.

5. The *Tenno* Family and the New Constitution

At first, we examine how the *tenno* and his family recognized their own status under the postwar constitution. This new constitution placed a living person as the symbol of the state and of the unity of the Japanese people. Unlike a lifeless thing much as a crown or a flag, the *tenno* can act and indeed has his own will. Thus the *tenno*'s state of mind is greatly relevant to the healthy operation of the postwar constitutional regime.

In reality, however, it seemed that *Tenno Showa (Hirohito)* had never understood that he no

¹⁰⁹ Tsuda Sokichi, “Kenkoku no jijyo to bansei ikkei noshiso,” *Sekai*, April 1946, in Hidaka Rokuro, ed., *Sengoshiso no shuppatsu (The Beginnings of Postwar Thoughts)* (Tokyo: Chikuma Shobo, 1968), 114-142. For Tsuda's argument, see this Chapter section 6.

¹¹⁰ Tsuda, “Kenkoku,” in Hidaka, *Sengoshiso no shuppatsu*, 140.

¹¹¹ The Constitution of Japan, art. 1.

longer held and exercised the sovereign power and found himself the symbol now. Even under the new constitutional regime, he still wanted cabinet members to report themselves to him. Because the Katayama and Ashida cabinets, the first and second under the postwar constitution, reported to him on as few occasions as possible, the *tenno* expressed his dissatisfaction to Ashida Hitoshi, minister of foreign affairs in the Katayama cabinet.¹¹² On the other hand, the second Yoshida cabinet, which started in October 1948, ceased to work for “symbolizing” the *tenno* and made every effort to revive the *tenno* institution under the Meiji Constitution.¹¹³ Yoshida and his cabinet members often reported to the *tenno* about governmental matters.¹¹⁴ Further, the *tenno* attempted to play an active role in foreign affairs without the advice and approval of the cabinet. The *tenno* positively supported cooperation policy toward the United States. On May 6, 1947, just after the new constitution became effective, the *tenno* visited General MacArthur to have their fourth meeting. The *tenno* expressed his anxiety over the thorough disarmament policy the new constitution had adopted and asked MacArthur to support for the realization of an initiative on the part of the United States to guarantee the national security of Japan.¹¹⁵ In July of the same year, further, the *tenno* through his aide Terasaki Hideshige proposed to the United States government that in order to keep the national security of Japan after a peace treaty, the United States should continue military occupation of the Ryukyu Islands including Okinawa in the form of long term lease.¹¹⁶ Such an action would have been unconstitutional even in the Meiji constitutional system because although the *tenno* had the diplomatic prerogative, the advice of a minister of state was understood as necessary for his exercise

¹¹² Shindo Eiichi & Shimogawabe Motoharu, eds., *Ashida Hitoshi Nikki (Ashida Hitoshi Diary)* (Tokyo: Iwanami Shoten, 1986) July 22, 1947, 2: 13-14 (hereinafter cited as *Ashida Nikki*). See also, Watanabe Osamu, *Sengo seijishi no nakano tennosei (The Tenno System in Postwar Political History)* (Tokyo: Aoki Shoten, 1990), 144-145 (hereinafter cited as Watanabe, *Sengo seijishi*).

¹¹³ See Watanabe, *Sengo seijishi*, 160.

¹¹⁴ For reports to the *tenno*, see Matsuo Takayoshi, “Shocho tennosei no seiritsu ni tsuiteno oboegaki (A Note on Formation of the Symbolic *Tenno* System),” *Shuppatsu*, 49-85, 76-83.

¹¹⁵ Kojima Minoru, *Nihon senryo* (Tokyo: Bungei Shunju, 1987), 3: 31. Watanabe, *Sengoseijishi*, 154-155.

¹¹⁶ For the detail of this *tenno* message, see Shindo Eiichi, “Bunkatsu sareta ryodo (The Divided Territory),” *Sekai*, April 1979, reprinted in Shindo Eiichi, *Bunkatsu sareta ryodo* (Tokyo: Iwanami Shoten, 2002), 28-76; Shindo Eiichi, “‘Tenno meseji’ sairon (The *Tenno*’s Message Revisited),” *Sekai*, October 1979, *ibid.*, 77-99.

of the prerogative.¹¹⁷ And it would have been all the more unconstitutional for a symbolic *tenno* without any governmental power.

In respect of domestic politics, for example, when Matsuoka Komakichi, the speaker of the House of Representatives, reported to him the designation of Katayama Tetsu as the first prime minister under the new constitution, the *tenno* asked questions about Katayama and said that he believed Katayama was weak.¹¹⁸ When Ashida became the prime minister succeeding Katayama, the *tenno* told him that he should take action against the communist party and asked what influence the Ashida cabinet had when it had members from the left faction of the Socialist Party.¹¹⁹ The *tenno* was seriously worried about leftist forces in politics. Conversely, he conveyed a message to John Dulles that he wanted GHQ to mitigate purges because the purged were mostly politicians and servicemen who supported him during the pre- and mid-war period.¹²⁰

Under the new constitution, the *tenno* should have been deprived of all powers related to government. The actions the *tenno* took without any doubt deviated from the constitutional norm. The *tenno* misunderstood, believing that he continued to hold and exert sovereign power, and never tried to become the symbolic *tenno*.¹²¹

If the cabinet had often reported to him and followed his suggestions, conversely, the *tenno* should have not necessarily acted directly. This means that whether he liked it or not, the political structure had been to a significant degree transformed from a system in which the *tenno* was essential to a system in which the *tenno* is a mere decoration. The *tenno* had been gradually eliminated from the substantial decision-making process and that was why he strongly wanted cabinet members to

¹¹⁷ See the Constitution of the Empire of Japan, arts. 13 & 55.

¹¹⁸ Katayama naikaku kiroku kankokai, ed., *Katayama naikaku (The Katayama Cabinet)* (Tokyo, 1980), 299.

¹¹⁹ *Ashida Nikki*, March 10, 1948, 2: 72. See also, Matsuo, “Shocho tennosei no seiritsu ni tsuitemo oboegaki,” 78; Watanabe, *Sengo seijishi*, 157.

¹²⁰ Hata Ikuhiko, *Hirohito tenno itsutsu no ketsudan (Five Decisions the Tenno Hirohito Made)* (Tokyo: Kodansha, 1984), 242. Watanabe, *Sengo seijishi*, 158.

¹²¹ Later, the *tenno* told a reporter of *Newsweek* that he has never mentally changed his role from prewar to postwar and that he tried to act strictly upon the constitutions. However, his statement does not make sense because the two constitutions have completely different principles and granted fundamentally different roles to the *tenno* and thus his attitudes should have been different if he strictly subjected himself to the two constitutions. To him, the constitution meant the Meiji Constitution. See Watanabe, *Sengo seijishi*, 159.

report to him. While conservatives have always attempted to maximize the authority of the *tenno*, they have never succeeded in making the *tenno* sovereign again.

Nonetheless, it was also true that the position of the symbolic *tenno* was occupied by the same person who was sovereign and a living god only shortly before. We cannot ignore the perceptual, psychological, and emotional factors of the people. Constitutional reason might sometimes give way to these factors. When he resigned as prime minister on February 10, 1948, Katayama reported his resignation to the *tenno*, which incurred GHQ's harsh reaction.¹²² GHQ fiercely criticized the bureaucratic manner of politicking, which undermined the principle of popular sovereignty the new constitution had declared. GHQ's intervention could barely set a new political practice in the right direction. Indeed, the *tenno* system persistently restrained people from thinking freely.

However, we can also perceive a new phenomenon within the *tenno* family. An unprecedented incident indeed occurred when the *tenno*'s youngest brother, Prince Mikasa, publicly criticized the manner in which the government held the celebratory ceremony for the postwar constitution that newly came into effect on May 3, 1947. His story first appeared in a small column of the *Asahi Shinbun* on May 6¹²³ and he himself contributed an essay to the *Teikoku Daigaku Shinbun* (*Imperial University Newspaper*) two days later because he was a special student at the graduate school of the Tokyo Imperial University.¹²⁴ The prince was absent from the ceremony of May 3 because of illness. About ten days before, he wrote, he received an invitation letter to the ceremony. He wondered why the *kogo* (empress) and his wife were not invited. By juxtaposing the Japanese custom with that of the British royal family, the prince conjectured this inferior treatment of female *tenno* house members might be related to the extremely slow advancement of women in society. When he listened to the ceremony on the radio, he found too many *keigo* (honorific words) used for the *tenno*

¹²² Ukai Nobushige, "Tenno," *Hogaku Kyokai Zasshi*, 67: 1 (1949), reprinted in *Kenpo ni okeru shocho to daihyo* (*Symbol and Representation in the Constitution*) (Tokyo: Iwanami Shoten, 1977), 26-36, 30.

¹²³ See Ariyama, *Sengoshi*, 157.

¹²⁴ See John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton, 1999), 401-402.

house. To build a new culture state, he believed, simplification and democratization of the Japanese language should come first and the words for the *tenno* house could surely not be exceptional. Then the prince turned to the ceremony itself. He did not agree with Prime Minister Yoshida leading participants in calling out “*Tenno Heika Banzai!*(Long Live the Emperor!)” three times. If it had been a ceremony for celebrating the *tenno*’s birthday, such an act would have been appropriate. But, in the light of the spirit of the new constitution, the *tenno* as the supreme public servant should have led the participants in calling out “*Zen Nihon Kokumin Banzai!* (Long Live All the Japanese People!).” The *tenno* now gave up his sovereign power over the people and was no longer a living god. Further, in favor of Japan’s rebirth as a peace-loving country, the *tenno* could have led citizens to call out “*Sekai Zen Jinrui Banzai!* (Long Live All the Peoples of the World!).” The prince stated that progressive provisions of the new constitution had made clear the obsolescence of its operators. At the end of his essay, the prince pointed out that democratization of the *tenno* house was both a first step in the democratization of Japan and its last step.¹²⁵

Whatever the prince might have really intended, it was unprecedented that a member of the *tenno* house himself argued for democratization of the family in a public arena. This episode well shows that the principle of popular sovereignty with the symbolic *tenno* institution the postwar constitution has ordained includes an intrinsic tension. And the tension was actually conceptualized and publicly expressed. The question to be asked is what the latter really stands for and how it is related to the principle of popular sovereignty. So now we turn our attention to the conceptualization of the *tenno* institution in postwar Japan.

6. The Tradition and Intellectuals: Tsuda Sokichi and Watsuji Tetsuro

The announcement of the government draft of the revised constitution, which proposed the symbolic *tenno* system, put a stop to the unprecedented heated discussion over the *tenno* and its

¹²⁵ See Mikasanomiya Takahito, “Shinkenpo shikou kinen shikiten no hini omou (Reflections on the Day of Celebratory Ceremony for Effectiveness of the New Constitution),” *Teikoku Daigaku Shinbun*, No. 1025, May 8, 1947.

institution after defeat in the war.¹²⁶ When the Constitution of Japan was established, however, what was clear was that on the one hand, the Japanese people was now sovereign but on the other, the *tenno* also remained as an institution. The people and the *tenno* are both constitutional organs under the postwar constitutional system. The relationship between the two has been constitutionally provided in a way that the *tenno* “shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.”¹²⁷ Besides that, however, there was nothing clear about the relationship in the real social and political context.

The postwar constitution has undoubtedly weakened the powers the *tenno* had had under the Meiji constitutional regime. Unlike the draft of the *Kenpo Kenkyukai* (Constitutional Research Group),¹²⁸ however, the postwar constitution has provided the *tenno* as a not entirely ceremonial and ritualistic institution. The *tenno* is supposed to perform the state affairs enumerated in the constitution including affairs political in nature such as dissolution of the House of Representatives.¹²⁹ Thus a question should be asked how different the symbolic *tenno* is from the *tenno* in the Meiji Constitution.

Under the unstable situation around the *tenno* system in the wake of the defeat, the theorization of the symbolic *tenno* was promoted by liberals in the old era, not by ultra-nationalists or advocates for the *kokutai*. Tsuda Sokichi, a professor of Japanese history at Waseda University and a part time lecturer at the faculty of law, the Tokyo Imperial University, was one of the most eminent theorists. He was a distinguished scholar of ancient Japanese history. His positivist

¹²⁶ The discussions over the *tenno* and its institution in the newspapers were concentrated in the period from October 1945 and March 1946, when the government draft revealed its intention to retain the *tenno* system as the symbol. Since then the discussions had rapidly become sluggish. Further, it is noteworthy that GHQ censored the media at that time to carry out their occupation policy more smoothly. See Ishida Takeshi, “Sengo no tennosei (The Tenno System in the Postwar Era),” *Sengo nihon no seijitaisei (The Political Regime of Postwar Japan)* (Tokyo: Miraisha, 1961), 7-59; Takeyama Akiko, “Amerika senryoki masu media no ‘tennosei rongi’ (‘The Discussions on the Tenno System’ in the Mass Media during the American Occupation),” *Mediashi kenkyu (Studies of History of the Media)*, No. 5 (1996), 115-144. See also, Ikeuchi Hajime & Okazaki Keiko, “Seiryokikan niokeru nihon shinbun no suko (Tendencies of Japanese Newspapers during the Occupation),” *Tokyo Daigaku Shinbun Kenkyusho Kiyo*, No. 5 (1956), 109-131.

¹²⁷ The Constitution of Japan, art. 1.

¹²⁸ For the draft of the Constitutional Research Group, see Chapter 3 section 2.

¹²⁹ See the Constitution of Japan, art. 7 (iii).

approach, which rejected the myth of the national foundation, derived from his subjective intention to promote the safety of the *tenno* house by separating it from the mysterious pre-modern ideology. Like Minobe, Tsuda became a victim of a fanatical right-wing assault. He had never taken a compromising position about his study. He was accused of profanation of the dignity of the *tenno* house in the Publishing Law and convicted in a Tokyo district court in 1942.¹³⁰ And he was forced to resign from his professorship at Waseda. Thus people, regardless of their ideological positions, were very interested in what Tsuda would say after liberation from the suppression of academic activities during the war. By showing how the idea of a line unbroken for ages eternal was born and had developed, he argued for a symbolic *tenno* institution in his famous and controversial essay of 1946 before the government draft of the revised constitution was announced.¹³¹

Tsuda mentioned five points of the birth of the idea of one line unbroken for ages eternal. First, the *tenno* house was not an exogenous conqueror but an endogenous power maximizer, thus there were very few people who came into antagonism with the *tenno* house. The *tenno* ruled local powerful clans, not common people. Second, there were few wars against foreign peoples, which usually made monarchy unstable and then gave an opportunity to change a family line of monarchy. Third, the *tenno* had nothing to do as the head of the state in ancient times. Thus the *tenno* did not directly govern the nation. While the *tenno* bore relation to political matters in his name, senior statesmen actually made and executed political decisions. Fourth, the *tenno* also had religious authority and assumed religious tasks. The *tenno* prayed for the common people. The *tenno* was called a living god only because he or she ideologically or nominally governed the state in the capacity of a god. In other words, living god was the name of the status of the *tenno* as a political monarch. The *tenno* had never been regarded as a god, as an object of worship. Fifth and finally, the *tenno* also held a leading position in culture. The *tenno* house first accepted and made most use of an

¹³⁰ See Ienaga Saburo, *Rekisho no naka no kenpo* (Tokyo: Tokyo Daigaku Shuppankai, 1977), 1: 173.

¹³¹ Tsuda Sokichi, "Kenkoku no jijyo to bansei ikkei no shiso (Conditions of the Nation Building and the Idea of a Line Unbroken for Ages Eternal), *Sekai* April 1946 in Hidaka, *Sengo shiso no shuppatsu*, 114-142 (hereinafter cited as Tsuda, "Kenkoku no jijyo").

advanced culture, when it was introduced from China through the Korean peninsula to Japan. In sum, the *tenno* house was affectionate and respectable for senior statesmen and local powerful clans and they could maintain their lives and status through being dependent upon the *tenno* house.¹³²

The continuity of the *tenno* house as a fact, Tsuda added, brought about a conviction that it would last forever. The eternality of the *tenno* house, in Tsuda's explanation, lies in the fact that the *tenno* did nothing wrong because he or she did not directly govern the state. This is a negative reason. Positively, however, the *tenno* house possessed an unchallenged spiritual authority. Although those who held the real powers of a political monarch changed from aristocrats to militants, they had always been under the *tenno* house, the existence of which had never suffered from social turbulence. Tsuda pointed out that this dual organizational system was incomparable in the world. In Tsuda's understanding, spiritual authority did not mean religious authority separated from political power but the *tenno* from the beginning to the end held authority as a political governor of Japan. His authority was spiritual to the extent that he did not govern the state by himself. The authority the *tenno* held was recognized in relation to political power holders, either aristocrats or soldiers, not to the common people.¹³³

From Tsuda's perspective, therefore, the Meiji constitutional regime was deviant from the traditional Japanese dualism. The central meaning of the Meiji Restoration was a political reform to realize the direct governance on the part of the *tenno*. The Meiji Constitution was established based upon a European idea that a monarch and the people are in conflict with each other. Thus, while the constitutional system magnified the *tenno's* power over the people, it imposed restraint upon the political activities of the people. In Tsuda's view, however, that kind of governmental system was foreign to the Japanese tradition that the *tenno* house was an object of affection and respect by the people. On the one hand, Tsuda criticized the distortion of the *tenno's* will by fanatical military clans and bureaucrats and rejected the forced mysterious idea of the *kokutai* as a false ideology. On the

¹³² Tsuda, "Kenkoku no jijyo," 123-128.

¹³³ See Tsuda, "kenkoku no jijyo," 129-136.

other, however, he also criticized opponents of the *tenno* institution because they misunderstood the history of the *tenno* house. Both sides of the *tenno* system, in his opinion, failed to recognize that the essence of the *tenno* was compatible with democracy. In Japanese history, the *tenno* house and the people had never been antagonistic to each other. If democracy meant that the people should bear their own responsibility for the practice of national politics, it was reconciled to the *tenno* system because the *tenno* lay within, not outside, the people and the *tenno* governed, which was based upon the popular will embodied by himself. From the people's side, democracy could be in concord with the *tenno* system when the people promoted democracy completely. Tsuda's reasoning reached a point similar to what the Constitution of Japan declared several months later.¹³⁴ "The significance of the existence of the imperial house consists in the center of the unity of the people and the living symbol of the national spirit."¹³⁵

As mentioned above, Tsuda was a victim of the ultra-nationalistic movement which was deeply connected to the narrow conception of the *tenno* institution. Thus what he said about the *tenno* institution and Japanese history attracted close public attention after the defeat in the war. In the new era, Tsuda presented an unchanged true image of the *tenno* as "the living symbol of the national spirit." No matter what he might personally intend, because of his academic reputation, his essay provided a solid theoretical base for the unstable *tenno* institution at that time. He liberated the *tenno* institution from the narrow idea of the *kokutai* related to the fanatic movement. From his point of view, the Constitution of Japan is nothing revolutionary, but it expresses merely the core of Japanese tradition of a line unbroken for ages eternal. From his logic, the postwar constitution is supposed to guarantee a return to the normalcy. In fact, Tsuda published another essay in 1952 to the effect that the authentic authority of the *tenno* had been clarified by Articles 1 through 4 of the new constitution and that has assured the eternity of the throne.¹³⁶

¹³⁴ Tsuda wrote this essay in January 1946. It was at least more than one month before the government officially announced its constitutional draft including the symbolic emperor system.

¹³⁵ Tsuda, "Kenkoku no jijyo," 140.

¹³⁶ See Tsuda Sokichi, "Nihon no koshitsu (The *Tenno* Household of Japan)," *Chuo Koron*, July 1952, reprinted

Watsuji Tesuro played a similar role to Tsuda. Watsuji was a professor of ethics at the Tokyo Imperial University and a moderate liberal in the pre- and mid- war period. Although the right wing criticized him as a liberal, he was never victimized as Minobe and Tsuda were. Watsuji wrote an essay on the nature of the *tenno's* governance in November 1945.¹³⁷ He argued that the tradition of the *tenno's* governance in Japan had no essential relation to feudalism from the medieval period and doctrines of Shintoism. In Watsuji's explanation, loyalty was characteristic of a feudal relation between master and servant. Loyalty was the morality of *samurai*, warriors. The relationship between the *tenno* and the people was originally characterized as *makoto*, purity or honesty. It was not regarded as a master and servant relation.¹³⁸ The Meiji constitutional system only halfway overcame feudalism. Complicated relations of human morality were mistakenly simplified as a family view of the state. Thus, the idea of harmony of loyalty and filial piety should not be connected to the tradition of the *tenno's* governance.¹³⁹ When the *tenno* began to govern the state in the age of the gods, there were no ultimate god and doctrinal ideas. *Matsurigoto*, politics, meant *matsurigoto*, feasts. Shinto was much later organized, on the one hand, to cope with Buddhism as a doctrinal religion and, on the other, to become the religion for supporting the tradition of the *tenno's* governance. However, Watsuji asserted, the Meiji constitutional system protected freedom of religion and thus the establishment of Shintoism should not have been an essential element of the *tenno's* governance. Watsuji defended the *tenno's* rule from the fanatic Shintoist movement, which was naturally unrelated to the *tenno's* authority to govern the state.¹⁴⁰ At the conclusion of his essay, Watsuji made clear his intention to save the *tenno* institution by arguing that the recent narrow understanding of feudalism and Shintoism should not damage the tradition of the *tenno's* governance.

in *Chuo Koron*, March 1989, 106-117, 116-117. See also, Tsuda Sokichi, *Nihon no koshitsu* (Tokyo: Waseda Daigaku Shuppanbu, 1952).

¹³⁷ See Watsuji Tetsuro, "Hoken shiso to Shinto no kyogi (The Feudalistic Ideas and the Doctrines of Shintoism)," *Sekai*, January 1946, in *Kokumin togo no shocho (The Symbol of the Unity of the People)* (Tokyo: Keiso Shobo, 1948) in *Watsuji Tetsuro zenshu* (Tokyo: Iwanami Shoten, 1962), 14: 319-328 (hereinafter cited as Watsuji, "Hoken," *Zenshu*).

¹³⁸ See Watsuji, "Hoken," *Zenshu*, 14: 319-323.

¹³⁹ See Watsuji, "Hoken," *Zenshu*, 14: 324.

¹⁴⁰ See Watsuji, "Hoken," *Zenshu*, 14: 325-328.

Watsuji also contended that popular sovereignty did not necessarily conflict with the *tenno* system. Popular sovereignty did not mean that individual people were sovereign but that the will of harmony of the people was the source of ultimate power in the nation. In his view, what best expressed the general will of the people was nothing but the *tenno*. In Japanese history, the people had recognized the *tenno* alone as the expression of their general will. Watsuji appreciated the underlying strength of what had existed for an extremely long time.¹⁴¹ Watsuji understood a nation as a culture community sharing the same language, custom, history, and belief and also a group of members of a state in a political sense. Thus the will of the people was one general will, not the aggregated wills of individuals. The living entirety of one group was invisible and only individuals could be visible. In Watsuji's view, a question of by what the living entirety or the general will of the people was expressed was in essence a question of how the living entirety which could not be an object and was invisible was made an object and visible. He answered himself that the living entirety had been expressed in the *tenno* in Japan.¹⁴²

By adopting the symbolic *tenno* institution, in Watsuji's understanding, the Constitution of Japan has provided that the *tenno* shall be expressive of the general will of the people. The symbolic *tenno* institution was chosen by the freely expressed will of the people as it had been the case throughout Japanese history. It was significant that the *tenno* even with no real political power had held authority, which had been indispensable for persons with real political power. That was because the *tenno* had been the expresser of the entirety of the people. Watsuji pointed out as evidence of the *tenno* expressive of the unity of the people that there had been many poems and novels in popular culture on the *tenno* throughout history, although it was a very weak argument because they did not directly support the *tenno*'s position as the sole expresser of the living entirety of the people. They might at the best show that people had recognized or not forgotten the existence of the *tenno* even

¹⁴¹ Watsuji wrote this essay in December 1945 for the *Domei* Press. No newspapers in Tokyo carried his essay because it seemed too conservative when the overthrow of the *tenno* institution was a hot topic. He reprinted it in a different essay. Watsuji Tetsuro, "Kokumin zentaisei no hyogensha (A Person Expressing the Entirety of the People)," in *Kokumin togo no shocho, Watsuji Tetsuro zenshu*, 14: 329-331.

¹⁴² See Watsuji, "Kokumin zentaisei no hyogensha," *Watsuji Tetsuro zenshu*, 14: 341.

without real political power.¹⁴³

In this way, Watsuji attempted to defend the symbolic *tenno* system as a historically appropriate type of the *tenno* institution. His intention became clearer when Watsuji asked Sasaki Soichi for instructions on changing the *kokutai*. Sasaki, an eminent professor of constitutional law, explicitly argued that the Constitution of Japan had changed the *kokutai* from *tenno* sovereignty to popular sovereignty. As we have already discussed,¹⁴⁴ Kanamori Tokujiro, the minister of state in charge of the constitutional problem in the first Yoshida cabinet, repeated that the new constitution would never change the *kokutai* in a moral sense. In his explanation, the *tenno* would remain as *akogare no mato* (the center of national adoration) even under the new constitution. Sasaki's essay of 1946 tried to clarify the significance of the constitutional change.¹⁴⁵ According to Sasaki, the *kokutai* as a character of a state from a political point of view was determined by the location of sovereignty in the state. Under the Meiji constitutional regime, the *tenno* held sovereign power based upon the fact of one line unbroken for ages eternal. However, the new constitution would change that *kokutai* because the *tenno* would be the symbol of the unity of the people, who would become the holder of ultimate power over political affairs.¹⁴⁶ Sasaki straightforwardly acknowledged that the constitutional change would alter the *kokutai*. He further added that although the alternation of the *kokutai* in the political sense would not be directly connected to a change of the *kokutai* as a character of a state from an ethical and spiritual point of view, the *kokutai* in a spiritual sense might change in the long run because the *kokutai* in both senses had influenced each other in Japan.¹⁴⁷

Like Minobe,¹⁴⁸ Sasaki was also a liberal constitutional theorist in the old era but could not draw a ground design for the new era. Sasaki firmly believed that the principle that the *tenno* held

¹⁴³ See Akasaka Norio, *Shocho tenno to iu monogatari (A Story as the Symbolic Tenno)* (Tokyo: Chikuma Shobo, 1990), 64-65.

¹⁴⁴ See Chapter 3 section 5.

¹⁴⁵ Sasaki Soichi, "Kokutai ha henkosuru (The *Kokutai* Is Changing)," *Sekai Bunka*, 1: 10-11 (1946), 5-12.

¹⁴⁶ See Sasaki, "Kokutai ha henkosuru," 6-9.

¹⁴⁷ See Sasaki, "Kokutai ha henkosuru," 12.

¹⁴⁸ For the stance toward constitutional revision Minobe Tatsukichi took in the postwar period, see Chapter 2 section 6

sovereign power would be maintained even in the new era.¹⁴⁹ In fact, Sasaki as a member of the House of Peers had argued against the Constitution of Japan. He objected to the proposed change in the principle of the *tenno* sovereignty as the fundamental character of Japan.¹⁵⁰ Once the Constitution of Japan was established, however, Sasaki tried to see the situation more directly than Minobe.¹⁵¹ He explicitly argued that the *kokutai* had changed.¹⁵²

Watsuji could not agree with Sasaki.¹⁵³ First of all, Watsuji argued, classification of governmental forms by the location of sovereignty had been traditionally called the *seitai*. As Sasaki said, the concept of the *kokutai* was complicated and ambiguous and then often misused. Thus Watsuji suggested that it should be better not to use the term of *kokutai* when one discussed classification of forms of government. It was well argued that the recent change from the Meiji Constitution to the Constitution of Japan would alter only the *seitai* in Japan.¹⁵⁴

To Watsuji, furthermore, the change of the *kokutai* in the political sense seemed trivial because the *tenno*'s supervision of sovereignty had been merely exceptional in the long tradition of Japan.¹⁵⁵ In his view, the entirety of the Japanese people had been expressed by the very *tenno*. From the beginning of Japanese history, the *tenno* was the symbol of the unity of the group. The *tenno* made the entirety of the Japanese people an objective as the symbol. If legal study had no idea about the symbol, Watsuji suggested that it could learn from philosophy, which had long treated problems of symbolism. Because he understood the significance of symbolism in the essence of the *tenno*, the

¹⁴⁹ See Nakamura Akira, "Sasaki hakase no kokutai henkoron," *Shinkenpo noto (Notes on the New Constitution)* (Tokyo: Kyowa Shuppansha, 1947), 84-90.

¹⁵⁰ For his address against the proposed constitutional revision in the House of Peers, see Sasaki Soichi, independent, House of Peers, plenary session, October 5, 1946, in Shimizu Shin, ed., *Nihonkoku kenpo shingiroku* (Tokyo: Hara Shobo, 1976), 4: 549-568. For the translation, see RM477.

¹⁵¹ See Yokota Koichi, "Seiken zengo no tennozo (Images of the *Tenno* around the Establishment of the Constitution of Japan)," *Hosei Kenkyu*, 45: 1 (1978), 26-64, 50-53.

¹⁵² See Sasaki Soichi, *Nihonkoku kenporon (Treatise on the Constitution of Japan)* (Tokyo: Yuhikaku, 1952), 176-177. Sasaki favored colloquialism itself of the constitutional text. *Ibid.*, 114-115.

¹⁵³ Watsuji Tetsuro, "Kokutairon henko nituki Sasaki hakase no oshie wo kou (Ask Dr. Sasaki for Instructions on the Change of the *Kokutai*)," *Sekai*, March 1947, in *Kokumin togo no shocho, Watsuji Tetsuro zenshu*, 14: 355-368 (hereinafter cited as Watsuji, "Sasaki hakase," *Zenshu*).

¹⁵⁴ Watsuji, "Sasaki hakase," *Zenshu*, 14: 358-359.

¹⁵⁵ Watsuji, "Sasaki hakase," *Zenshu*, 14: 360-362.

tenno that Article 1 of the Constitution of Japan provided for should have more superintendent sovereign power than the *tennos* in the *Muromachi* and *Edo* periods. In Watsuji's view, the new constitution clarified that the *tenno* should be the symbol of the sovereign will of the people.¹⁵⁶ He reasoned that if sovereignty resided in the general will of the people and the *tenno* should be the symbol of the unity of the people, then the *tenno* should be nothing but the symbol of sovereignty. Watsuji emphasized that the essence of the *tenno* lay in the symbol of the unity of the Japanese people but it was not necessarily related to the state. Even when Japan lost unity as the state, the *tenno* had continued to retain its status. Thus, what the *tenno* had symbolized was the popular unity of culture, not of politics. To Watsuji, the tradition of respect for the *tenno* which had existed throughout the history of Japan was nothing other than self-recognition of the unity of the people as a cultural community.¹⁵⁷ Although the unity of the state and that of the people were not the same, many people did not differentiate the two and directly connected the tradition of respect for the *tenno* to the state. This was the concept of the *kokutai* in the spiritual and ethical sense. Watsuji cautiously refused to confuse the feudalistic master-servant relationship with the idea of respecting the *tenno* because such a confused idea of the *kokutai* was what the recent dictatorship resorted to.¹⁵⁸

We should keep in mind the background that the governing elite was at the end of the war desperate to retain their cherished *kokutai*, the principle that the *tenno* in one line unbroken for ages eternal governed Japan as sovereign.¹⁵⁹ In the process of making the postwar constitution, their foremost concern gradually shifted to the safety of the *tenno* house. Although the symbolic *tenno* system did not necessarily conform to the core idea of the *kokutai*, it anyway retained the *tenno* institution as a center of the stage in a sense and thus the elites could console themselves with the ambiguous idea of the *kokutai*. The Sasaki-Watsuji controversy was important not only because they were eminent scholars but also because it showed that a debate over the *tenno* institution could be

¹⁵⁶ Watsuji, "Sasaki hakase," *Zenshu*, 14: 365.

¹⁵⁷ Watsuji, "Sasaki hakase," *Zenshu*, 14: 367.

¹⁵⁸ Watsuji, "Sasaki hakase," *Zenshu*, 14: 367-368.

¹⁵⁹ See Chapter 2 sections 2 & 4.

carried out in a rational way under the postwar constitutional regime.¹⁶⁰ We may recall the *tenno* organ theory controversy between Uesugi and Minobe, in which Uesugi could often appeal to the mysterious idea of the *kokutai* deeply connected to labeling rebellion. The concept of the *kokutai* functioned as a litmus test for loyalty to the *tenno* in the Meiji constitutional regime. Thus people could not openly object to it and when someone questioned their stance toward the *kokutai*, they had to defend themselves by proving that they supported the concept.¹⁶¹ The Sasaki-Watsuji debate thus showed a possibility of rationalization of politics in postwar Japan.

Now the postwar constitution declared popular sovereignty, conversations on constitutional values should not be confined to narrow constitutional scholarship, which could not make a meaningful contribution to constituting a new political order in the postwar era. The controversy was carried out beyond difference of disciplines. Many constitutional scholars have commented that this controversy was not productive because it lacked agreements on basic concepts, which derived from disciplinary differences.¹⁶² However, if disciplines matter, under the principle of popular sovereignty, constitutional scholarship should have assumed extra responsibility to explain clearly its own scholarly contents to common citizens. The constitution was no longer an instrument of the elite for ruling the people. The prewar constitutional scholarship had unfortunately presented that interpretive technicality might lose the perspective appropriate for the day.¹⁶³ The constitution was open to challenges by common citizens, no matter what they might think of it.¹⁶⁴

¹⁶⁰ However, expressions on the *tenno* himself and the institution soon came under severe social pressure. For example, Fukasawa Shichiro's novel *Furyu Mutan* incurred a murder in 1961. An enraged member of the fanatic right wing, who believed the novel disrespectful to the *tenno*, forced his way into the house of the president of its publisher and killed a housekeeper. Soon after that incident, the publisher refused to publish academically balanced arguments on the *tenno* institution. See Kyoya Hideo, *1961 nen fuyu "Furyu mutan" jiken (The Winter of 1961)* (Tokyo: Heibonsha, 1996, 1983); Shimizu Hideo, "Jyanarizumu, rondan niokeru tennoseiron (Discussions on the *Tenno* Institution in Journalism and the Pres)," *Jurist*, no. 933 (May 1989), 52-58. More recently, after Motoshima Hitoshi, mayor of Nagasaki City, expressed his thought that the *tenno* should take responsibility for the last war, he was almost assassinated in January 1990. See Norma Field, *In the Realm of a Dying Emperor: Japan at Century's End* (New York: Vintage, 1991, 1992), 175-266.

¹⁶¹ See Chapter 1 section 8.

¹⁶² See, e.g., Sugihara Yasuo, "Kaisetsu (Comment)," *Kokumin shuken to tennosei (Popular Sovereignty and the Tenno System)* (Tokyo: Sanseido, 1977), 8-9.

¹⁶³ See Nakamura Akira, "Watsuji hakase no tennosei fuhenron," *Shinkenpo noto*, 91.

¹⁶⁴ The controversy still continued. Sasaki wrote an essay responding to Watsuji's question. Sasaki Soichi,

In any event, the Sasaki-Watsuji controversy made it clear that there was no consensus among old liberals.¹⁶⁵ While some of them, even reluctantly, tried to take the postwar constitution seriously, others attempted to trivialize its significance. Watsuji's argument surely had an effect of mitigating the impact of change in the *kokutai*. Its emphasis upon the fact that the *tenno* had been the symbol of the unity of the cultural community of Japan has not only offered internal continuity advocating a solid theoretical foundation but also diminished the universalistic values of the new constitution.

7. The Controversy between the August Revolution and Nomos Sovereignty and Beyond

Another important debate over the nature of the postwar constitution occurred between 1946 and 1949. This time two prominent legal professors exchanged ideas about a relationship between popular sovereignty and the symbolic *tenno* institution, both of which had been newly established in the postwar constitution. As the Sasaki-Watsuji debate suggested, public discourse on the new constitution in postwar Japan can be described as a conflict between two ideas: continuity and discontinuity.¹⁶⁶ It depended upon how people evaluated the revolutionary character of the Constitution of 1946. Whereas conservatives have attempted to trivialize its newness, liberals have argued for expanding democratic promise in the postwar Constitution. The Miyasawa-Odaka controversy more clearly showed that the dichotomy was relevant in the wake of the wartime defeat. However, it also indicated that the Japanese people had started a new constitutional life, whether they willingly recognize it or reluctantly ignore it.

The beginning of the controversy lay in an important question of how to understand the

“Kokutai mondai no shoronten (Issues of the Problem of the Kokutai),” *Kikan Horitsugaku*, No. 4, June 1948. Then Watsuji published a book including a comment on Sasaki's answer in November 1948. Watsuji Tetsuro, “Sasaki hakase no kyoji nitsuite (On the Instructions of Dr. Sasaki),” *Kokumin togo no shocho* in *Watsuji Tetsuro zenshu* vol. 14. Sasaki again expressed his comment after reading Watsuji's comment. Sasaki Soichi, “Watsuji hakase sairon dokugo no kan,” *Tenno no kokkateki shochosei*, 1949.

¹⁶⁵ For the meaning of this controversy, see Okudaira Yasuhiro, “Sasaki-Watsuji ryohakase no kokutai ronso (The Debate between Drs. Sasaki and Watsuji),” Hogaku semina, ed., *Gendai tennosei (The Current Tenno System)* (Tokyo: Nihon Hyoronsha, 1977), 114-123 (hereinafter cited as Okudaira, “Kokutai ronso”).

¹⁶⁶ See this Chapter section 2.

relationship between the two Constitutions. The Constitution of Japan was born as an entire revision of the Meiji Constitution. However, this procedure, a revision pursuant to the Meiji Constitution, contradicts the content of the postwar constitution.¹⁶⁷ The *tenno* formally took the initiative in amending the Meiji Constitution, which had been replaced by the Constitution of Japan that declared the Japanese people as having established this constitution.¹⁶⁸

If we follow a thesis whereby there is no limitation on amending a constitution, we would have no difficulty in justifying the process in which the Constitution of Japan was established. Under this thesis of legal positivism, the transformation from *tenno* sovereignty to popular sovereignty would be legitimate simply by following the required procedure.¹⁶⁹ The Constitution of Japan is a *kintei kenpo* (a constitution established by the *tenno*).¹⁷⁰ However, this thesis was and has been in an extreme minority among Japanese constitutional scholars. Almost all constitutionalists of the day accepted the theory that no constitutional amendment could change the *kokutai*, because they assumed that the fundamentals of Japanese government had been set forth by divine will and that they would last forever.¹⁷¹ If we do not accept the strict legal positivism, therefore, we should take seriously the legal and political discrepancy in substance between the two constitutions.

The establishment of the Constitution of Japan, therefore, was based upon something different from mere legality. So revolution came to be a crucial issue. As discussed earlier,¹⁷² Minobe Tatsukichi recognized that there was a bloodless revolution when the Japanese government accepted the Potsdam Declaration.¹⁷³ Actually, the revolution theory was provided by his student, Miyasawa Toshiyoshi. Miyasawa, a professor of constitutional law at the Tokyo Imperial University, played an

¹⁶⁷ See the Constitution of the Empire of Japan, art. 73.

¹⁶⁸ See the Constitution of Japan, preamble, par. 1.

¹⁶⁹ See Kawamura Matasuke, "Shin kenpo tanjyo no hori (A Legal Theory of the Birth of the New Constitution)," *Kaizo*, 28: 5 (1947), 4-10.

¹⁷⁰ Sasaki Soichi was a representative of this theory. Sasaki, *Nihonkoku kenporon*, 71, 136. For the issue of constitutional limitations on amendment, see Ashibe Nobuyoshi, "Kenpo kaisei no genkai (Limits of Constitutional Amendment)," *Kenpo seitei kenryoku (The Power to Make a Constitution)* (Tokyo: Tokyo Daigaku Shuppankai, 1983), 88-116.

¹⁷¹ See, e.g., Minobe, *Kenpo satsuyo*, 119-120.

¹⁷² See Chapter 2 section 6.

¹⁷³ See Minobe, *Shinkenpo chikujyo kaisetsu*, 1-4; Minobe, *Kihongenri*, 32-36.

important role in the Matsumoto Committee.¹⁷⁴ He developed “the August Revolution Thesis” in the spring of 1946.¹⁷⁵

When he saw the government draft of the revised constitution, Miyasawa recognized that something had fundamentally changed. While the Meiji Constitution adopted the principle that the *tenno* should hold and exercise sovereign power based upon divine will, the Constitution of Japan would declare the principle of popular sovereignty. He rejected arguments that popular sovereignty did not necessarily conflict with the existing fundamental principle of politics and that the basic principle of Japanese politics was essentially the principle of popular sovereignty. In Miyasawa’s view, the principle of popular sovereignty would require that even the authority of the *tenno* be founded upon the will of the people. The requirement was explicitly in discord with the divine *tenno* system.¹⁷⁶

Then Miyasawa raised the procedural issue. The constitution of Japan would be an illegal product of amendment of the Meiji Constitution because the fundamental principles of the constitution were understood as unchangeable and such a revision regarded as logically suicidal and legally impossible. The Constitution of Japan, which changed the *kokutai*, the notion that sovereignty resided in the *tenno*, based upon divine will, in fact exceeded the amendment power provided by Article 73 of the Meiji Constitution.¹⁷⁷ He suggested that a different reasoning must have worked.

Miyasawa therefore argued that the acceptance of the Potsdam Declaration brought a revolution without blood to Japan. Otherwise the transformation of sovereignty from the *tenno* to the people could not be explained in a rational way. Miyasawa pointed out that the basis of adopting the new constitution should be found in the constitutional change brought about by Japan’s surrender, which had already established the principle of popular sovereignty in spite of, or in violation of, the

¹⁷⁴ See Chapter 2 section 4.

¹⁷⁵ See Miyasawa Toshiyoshi, “Hachigatsu kakumei to kokumin shuken shugi (The August Revolution and the Principle of Popular Sovereignty),” *Sekai Bunka*, 1: 4 (1946), 64-71 (hereinafter cited as Miyasawa, “Hachigatsu kakumei”).

¹⁷⁶ Miyasawa, “Hachigatsu kakumei,” 66-67.

¹⁷⁷ Miyasawa, “Hachigatsu kakumei,” 67-68.

Meiji Constitution. Miyasawa understood the nature of this change as a revolution because even the *tenno*'s will could not legally change the essence of the Japanese constitutional regime. The *tenno* himself was restricted in the idea of one line unbroken for ages eternal. The new constitution could be founded upon popular sovereignty only because "the August Revolution" had already discarded the divine right to rule of the *tenno* and replaced it with popular sovereignty in Japan.¹⁷⁸ The *tenno*'s declaration of himself as a human on January 1, 1946 could make sense only on the premise of the August Revolution.¹⁷⁹

Miyasawa recognized that it might have been more in order if the Constitution of Japan had been adopted by a popularly elected constitutional convention rather than through the process provided in Article 73 of the Meiji Constitution. In his view, however, Japan's acceptance of the Potsdam Declaration did not abolish the whole Meiji Constitution, but simply substantially modified it, as long as the old provisions were in conflict with the principle of popular sovereignty. Thus, the new Constitution was legally established by following only the procedure provided in Article 73 that was still valid. Historical continuity between the two Constitutions was favored, in terms of procedural efficiency.¹⁸⁰ As a result, the Constitution of Japan should be referred to as the new constitution, not as the amended constitution.¹⁸¹

While Miyasawa represented those who tried to see discontinuity in the postwar Japanese constitutional framework, there was another school of thought. As we have just discussed above,¹⁸² Watsuji Tetsuro was one of the most prominent scholars who belonged to this school. Here we take another example from legal scholars. Odaka Tomo, a professor of jurisprudence at the University of Tokyo, argued that although the new constitution had changed the *kokutai* in a legal form, continuity

¹⁷⁸ Miyasawa, "Hachigatsu kakumei," 68-69.

¹⁷⁹ Miyasawa, "Hachigatsu kakumei," 70.

¹⁸⁰ Miyasawa Toshiyoshi, "Shinkenpo no gaikan (An Overview of the New Constitution)," Kokkagakkai, ed., *Shinkenpo no kenkyu (Studies on the New Constitution)* (Tokyo: Yushikaku, 1947), 12-13.

¹⁸¹ Miyasawa as a member of the House of Peers interpellated the Yoshida cabinet about the change of the *kokutai* from the standpoint of the August Revolution thesis. His interpellation is reprinted in his book. Miyasawa Toshiyoshi, *Kenpo no genri (Constitutional Principles)* (Tokyo: Iwanami Shoten, 1967), 345-355.

¹⁸² See this Chapter section 5.

could be found between the two constitutions in a national ideal. Both *tenno* sovereignty and popular sovereignty were an expression of the idea of righteous politics. Namely, these two principles in governance were parts of the idea of “nomos sovereignty.”¹⁸³

Odaka further developed his idea of nomos sovereignty as a book in October 1947.¹⁸⁴ He recognized that the new constitution would change the *kokutai* as the *tenno*'s governance. He even appreciated that the principle of popular sovereignty had been newly adopted by the postwar constitution because it would express the people's attitude of positive and responsible commitment to politics. The promotion of their political awareness, the guidance of legislation by deliberated public opinions, and constant political criticism through free speech would gradually make the idea of popular sovereignty a substantial principle of politics. In this sense, Odaka highly valued the fact that the new constitution had changed an expressive form of the fundamental principle of politics from *tenno* governance to popular sovereignty.¹⁸⁵ However, here he cautiously avoided the term of *tenno* sovereignty not to juxtapose it with popular sovereignty.¹⁸⁶ The main purpose of his argument lay in making a search for a possibility of connecting popular sovereignty and the *tenno* system through the living national spirit.¹⁸⁷ He sought a harmony between the two systems apparently incompatible by asking a question different from that of who is the ultimate power holder in the state.

To Odaka, the most urgent problem of the day was to reconsider the concept of sovereignty that had been understood as absolute and to recast it under the ideal of law rather than to seek the location of sovereignty in the state: monarch or the people.¹⁸⁸ Criticizing the position that power is above law, he defended another position that any political power must be subject to law as justice.

¹⁸³ Odaka Tomo, “Kokuminshuken to tennosei (Popular Sovereignty and the *Tenno* System),” Kokkagakkai, ed., *Shinkenpo no kenkyu*, 18-43.

¹⁸⁴ Odaka Tomo, *Kokuminshuken to tennosei (Popular Sovereignty and the Tenno System)* (Tokyo: Kunitachi Shoin, 1947).

¹⁸⁵ Odaka, *Kokuminshuken to tennosei*, 202.

¹⁸⁶ See Miyasawa's criticism. Miyasawa Toshiyoshi, “Kokuminshuken to tennosei to nitsuiteno obegaki (A Note on Popular Sovereignty and the Tenno System),” *Kokka Gakkai Zaashi*, vol. 62, no. 6, 1948, *Kenpo no genri*, 281-317, 299-300 (hereinafter cited as Miyasawa, “Oboegaki,” *Kenpo no genri*).

¹⁸⁷ See Odaka, *Kokuminshuken to tennosei*, preface, 2.

¹⁸⁸ Odaka, *Kokuminshuken to tennosei*, 58.

Then Odaka argued that no kind of supreme power could breach law and that *nomos* as the fundamental principle of law should be the king of kings. If supreme authority in a state was called sovereignty, it was *nomos*, not the monarch or the people that held sovereignty. Because the idea of sovereignty as naked power was anachronistic, to Odaka, the idea of *nomos* sovereignty should be established in the new era.¹⁸⁹ He understood the standard of the rightness of law as a realization of the equal welfare of all people. Because equality was a contested concept, in his view, the welfare of the whole people should be pursued by constant discussion of the rightness of law. This was what his popular sovereignty required.¹⁹⁰

How did Odaka understand popular sovereignty in his thesis of *nomos* sovereignty? In the principle of popular sovereignty, the general will of the people is supreme. To him, that was always right as the legal ideal because that aimed to realize the public interest and common welfare. To regard the general will of the people that was always right as the supreme authority of politics above all real wills for power, the principle of popular sovereignty accepted *nomos* sovereignty.¹⁹¹ The next problem was how to recognize “the general will of the people that was always right.” Rejecting the leader principle that the will of a great leader was regarded as the general will of the people, Odaka admitted that majority rule was the solid method to express in the real will for power “the general will of the people that was always right.” A serious problem about majority rule for him was, however, that there was no guarantee that what was decided by a majority was always right. The essence of the principle of popular sovereignty was, in his interpretation, that the ideal of the righteous legislative will, which people could realize only approximately, no matter how hard they might try, was highly raised as the general will of the people.¹⁹²

Then how did Odaka reconcile the principle of popular sovereignty with the *tenno* system? It was a superficial view to Odaka that the *tenno*-centered national polity of Japan and popular

¹⁸⁹ Odaka, *Kokuminshuken to tennosei*, 63.

¹⁹⁰ Odaka, *Kokuminshuken to tennosei*, 69-78.

¹⁹¹ Odaka relied upon the contract theory of Jean-Jacques Rousseau. Odaka, *Kokuminshuken to tennosei*, 120-128.

¹⁹² Odaka, *Kokuminshuken to tennosei*, 132-135.

sovereignty were as irreconcilable as oil and water. Rather, popular sovereignty and governance of the *tenno* had something in common. On the one hand, the principle of popular sovereignty did not mean what the people could do as real politics whatever they wished but represented an ideal that the invariably righteous general will of the people must be the supreme policy of politics. On the other hand, rule by the *tenno* did not mean that the *tenno*'s real will had made final decisions on political affairs but meant that the *tenno*'s will that was always righteous should have been a model of politics. Both the *tenno*'s rule and popular sovereignty thus came down to the acceptance of *nomos* sovereignty.¹⁹³

Odaka tried to defend the *tenno* system by appealing to history. Japan had had a long tradition of the *tenno*'s governance but in reality it had taken different sorts of forms. That was irrelevant to the direct exertion of sovereign power on the part of the *tenno*. The eternal governance of the *tenno*, in his understanding, meant the ideal of politics of Japan.¹⁹⁴ No matter what forms the *tenno*'s governance might take, furthermore, the *tenno* had been adored by the Japanese people throughout its tradition. In Odaka's view, the continuous profound respect for the *tenno* of the people could be understood only as the ideal of invariably righteous governance separated from actual politics. Indeed, "a line unbroken for ages eternal"¹⁹⁵ was nothing other than an ideal. This provision well expressed an admiration for eternity that never exists in the human world. In fact, he argued, the *tenno* reigned but did not govern even during most of the period under the Meiji Constitution. Thus, the Japanese tradition showed that the *tenno* had constantly embodied the invariably righteous ideal of politics.¹⁹⁶

Odaka therefore concluded that in Japanese history the rule of *nomos* had been consistent. While the Meiji Constitution had declared the *tenno*'s governance, one of the two closely tied elements of the same ideal, the new constitution has adopted an expressive form of popular

¹⁹³ Odaka, *Kokuminshuken to tennosei*, 155-156.

¹⁹⁴ Odaka, *Kokuminshuken to tennosei*, 147-148.

¹⁹⁵ The Constitution of the Empire of Japan, art. 1.

¹⁹⁶ Odaka, *Kokuminshuken to tennosei*, 150-155.

sovereignty when it grasped the ideal of *nomos* sovereignty.

According to the Japanese tradition, the *tenno* had embodied “the ideal of invariably righteous politics”. Purification of the *tenno*’s status as such from all its superfluous mixture in real politics leads to the symbolic *tenno* system. The *tenno* as symbol represents the invisible people as a whole in a visible way when he appoints a prime minister and a chief justice of the Supreme Court and promulgates the Constitution as amended and statutes. These acts of the *tenno* make decisions by majority rule understood as acts of the people as a whole. These acts give meaning to decisions of a majority as acts of the people as a whole. Thus, the acts by the *tenno* as symbol are not meaningless forms but the most important state affairs that are filled with the ideal and meaning of popular sovereignty. This is a true reconciliation of popular sovereignty and the *tenno* institution in the new Constitution. This is what a new *tenno* institution should be like in a new era, without extinguishing the tradition of history and with purifying long-standing abuses associated with the tradition of history.¹⁹⁷

In this way, Odaka claimed that *nomos* as an expression of a legal idea had remained unchanged. Thus, to him, the Meiji Constitution and the Constitution of Japan had the core system of governance in common. Undoubtedly, his argument well served the continuity thesis.

Miyasawa criticized the *nomos* sovereignty thesis for concealing a clear discontinuity between the two constitutions. This thesis failed to explain who had the ultimate power to decide political issues within the state.¹⁹⁸ The *nomos* sovereignty thesis said nothing special, Miyasawa commented, because it advocated only a self-evident principle that political decision-making by those who were supreme must follow *nomos* whether the *tenno* held sovereign power or the people.¹⁹⁹ It only preached the mental attitude of legislators: to follow the sublime ideals of politics.²⁰⁰ The real issue was, rather, who decided the content of the sovereign *nomos*. Its aim of reconciling popular sovereignty and the *tenno* system in the new constitutional regime functioned as “a bandage that wraps a fatal injury which the *tenno* system has suffered from by adopting the principle of popular sovereignty and that gives the *tenno* system the best opportunity available to take on the same appearance as in the good old days.”²⁰¹ For Miyasawa, discussions on the *tenno* system in the new constitution should have started from clear recognition that the principle of the *tenno*’s governance

¹⁹⁷ Odaka, *Kokuminshuken to tennosei*, 205-206.

¹⁹⁸ See Miyasawa, “Oboegaki,” *Kenpo no genri*, 296.

¹⁹⁹ See Miyasawa, “Oboegaki,” *Kenpo no genri*, 303.

²⁰⁰ See Miyasawa, “Oboegaki,” *Kenpo no genri*, 298-299.

²⁰¹ Miyasawa, “Oboegaki,” *Kenpo no genri*, 299.

hitherto established had been denied in the new era. Without starting discussions from this recognition, he believed, the nature of the *tenno* institution in the new constitution could never be appreciated.²⁰²

Odaka responded to Miyasawa's criticism. Odaka repeated that even sovereignty was never almighty but that what it could do depended upon the fundamental principle of law, or *nomos*.²⁰³ He agreed with Miyasawa that who decided the concrete content of *nomos* was the crucial question and it was either a person with special status as a monarch or the people in general. However, he disagreed that sovereignty should be understood as the ultimate power to decide political affairs in the state. To Odaka, whether it was the monarch or the people could not decide ultimately the concrete content of *nomos* because it was objectively determined and thus a political decision by either the monarch or the people had to conform to the fundamental principle of *nomos* so determined. He tried to reject sovereign power as whatever its holder might wish to do.²⁰⁴ He understood sovereignty as normative and idealistic. This was what he wanted to defend and the apologia for the *tenno* system had only secondary significance.²⁰⁵ When sovereignty resided in the people, it meant to him an ideal in a dual sense: both that political affairs should be carried out according to the will of the people and that politics of the people should always be politics for the people. Thus this ideal burdened the people themselves with a responsibility whereby the people tried hard to realize the ideal in this dual sense.²⁰⁶ Odaka once again argued for the mental attitude of the people who should be ideally invariably righteous.

This controversy deviated from what Miyasawa originally thought was a seriously misleading argument in Odaka's essay. For Miyasawa, the real issue over sovereignty in the new constitution was the shift of its holder from the *tenno* to the people. Now Odaka was more interested

²⁰² See Miyasawa, "Oboegaki," *Kenpo no genri*, 307.

²⁰³ Odaka Tomo, "Nomosu no shuken ni tsuite," *Kokka Gakkai Zasshi*, vol. 62, no. 11 (1948), reprinted in *Kokuminshuken to tennosei* (Tokyo: Seirin Shoin, 1954), 218.

²⁰⁴ Odaka, "Nomosu no shuken ni tsuite," *Kokuminshuken to tennosei*, 221-222.

²⁰⁵ Odaka, "Nomosu no shuken ni tsuite," *Kokuminshuken to tennosei*, 231, 225.

²⁰⁶ Odaka, "Nomosu no shuken ni tsuite," *Kokuminshuken to tennosei*, 236-237.

in defending his position on how to exercise sovereign power, no matter who might be sovereign. Miyasawa repeated his criticism of Odaka's *nomos* sovereignty. Although Odaka attempted to reformulate the ultimate power to make a political decision to responsibility to decide the concrete content according to the fundamental ideal of *nomos*, for Miyasawa there remained the same question of who should assume responsibility, the *tenno* or the people.²⁰⁷ To him, Odaka's argument served only to evade clarifying the location of sovereignty and there was a danger that such reformulation might be politically misused. Miyasawa believed that sovereignty in question was persistently a matter of choice between alternatives. *Tenno* sovereignty and popular sovereignty should be distinguishable in principle. Odaka again replied to Miyasawa's criticism by refocusing on the distinction between fact and oughtness. Even if popular sovereignty was established as a principle in a constitution, a small minority of the people always ruled in reality. He agreed with Miyasawa that he was wrong if his *nomos* sovereignty worked for obscuring the clear distinction between popular sovereignty and *tenno* sovereignty as norm.²⁰⁸ However, Odaka believed that admitting that sovereignty normatively resided in the people was only the starting point of the matter. The real question for him was how to bring fact as close to oughtness as possible. In the Meiji constitutional regime, as far as oughtness and fact were separated, the political system could be all the more democratic. On the contrary, the new constitution allowed oughtness to become fact when the people tried hard to realize the ideal of politics of the people for the people.²⁰⁹ There was no difference between *tenno* sovereignty and popular sovereignty in seeking *nomos* sovereignty. But they were decisively different because while the former saw *nomos* in obeying the *tenno*'s order, the latter expressed a mental attitude for obtaining *nomos* by the responsibility and cooperation of all the people. It seemed to him much more important to grasp the distinction between *tenno* sovereignty

²⁰⁷ Miyasawa Toshiyoshi, "Nomosu no shuken to sofisuto (Nomos Sovereignty and a Sophist)," *Kokka Gakkai Zasshi*, vol. 63, no. 10-11 (1949), reprinted in *Kenpo no genri*, 318-344, 329-331.

²⁰⁸ Odaka Tomo, "Jijitsu toshiteno shuken to toi toshiteno shuken (Sovereignty as Fact and Sovereignty as Oughtness)," *Kokka Gakkai Zasshi*, vol. 64, no.4 (1950), reprinted in *Kokuminshuken to tennosei*, 247-283, 269 (hereinafter cited as Odaka, "Jijitus to toi").

²⁰⁹ Odaka, "Jijitus to toi," *Kokuminshuken to tennosei*, 281-282.

and popular sovereignty in this respect than to point out the difference between the two in principle clearly understood from the provisions of the two constitutions.²¹⁰

This controversy between Miyasawa and Odaka has had an impact. First, it made clear the discontinuity between the two constitutions. Most Japanese constitutional scholars have basically favored Miyasawa's position over Odaka's *nomos* sovereignty thesis.²¹¹ As Odaka himself admitted in the course of the debate, the new constitution had altered the fundamental principle of government in Japan. While *tenno* sovereignty had been no longer a guiding principle for state affairs, the people now had the ultimate power to make a decision in the state. The Miyasawa-Odaka controversy has revealed the alternation of the location of sovereignty, which was obscured by the efforts of the government to retain the *kokutai* from the immediate aftermath of the war to the process of making the new constitution.²¹² From this controversy onward, secondly, sovereignty had been conceptualized along Miyasawa's formulation: the ultimate power to decide the way the state should be.²¹³ When he also described the concept of sovereignty as a principle, however, he failed to clarify the dynamic nature of sovereignty. Sovereignty possesses dual elements: to show the location of political legitimacy in the state and to mean the actual power to create a fundamental political order in the state. Further theorization of popular sovereignty would be reserved for the future.²¹⁴

Thirdly, even though his thesis was disfavored, the fact that Odaka had written apologia for the *tenno* institution in one of the most prestigious academic journals in Japan vividly showed that there was a considerable part of intellectuals including legal scholars who wished to see continuity

²¹⁰ Odaka, "Jijitus to toi," *Kokuminshuken to tennosei*, 282-283.

²¹¹ For example, Sugihara Yasuo describes the result of this controversy as a sweeping victory for Miyasawa. Sugihara Yasuo, "Kaisetsu," *Kokuminshuken to tennosei*, 6. See Okada Nobuhiro, "Shukenron no gojyunen (Five Decades of Theories on Sovereignty)," Higuchi Yoichi, et al., *Kenpo riron no gojyunen (Five Decades of Japanese Constitutional Theories)* (Tokyo: Nihon Hyoronsha, 1996), 1-18, 4-6; Tsujimura Miyoko, *Shimin shuken no kanousei (A Possibility of Sovereignty of Citizens)* (Tokyo: Yushindo, 2002), 31-32 (hereinafter cited as Tsujimura, *Shimin shuken*).

²¹² See Chapters 2 & 3.

²¹³ Miyasawa, "Oboegaki," *Kenpo no genri*, 285.

²¹⁴ See Okada, "Shukenron no gojyunen," *Kenpo riron no gojyunen*, 6-12; Tsujimura, *Shimin shuken*, 32-34. For the current situation of theories on popular sovereignty, see Ashibe Nobuyoshi, *Kenpogaku (Treatise on Constitutional Law)* (Tokyo: Yuhikaku, 1992), 1: 234-249.

between the old and new constitutions.²¹⁵ Odaka targeted his theory not on the political reality of the *tenno* institution, but on its moral aspect. In fact, Miyasawa as a member of the House of Peers, agreed with the Minister of State, Kanamori Tokujiro, that the idea of the *kokutai* as the moral and ethical nature of the state had never changed even with the new constitution.²¹⁶ This aspect of the idea of the *kokutai* was powerful enough to capture most intellectuals of the day. As Watsuji's argument for the *tenno* as the symbol of the cultural unity of the nation, thus, Odaka's nomos sovereignty thesis had passionately played a distracting role in searching for a new meaning of constitutional life. Thus, a lesson to learn was that an appropriate constitutional theory should be flexible enough to cope with this moral aspect of the *tenno* system.²¹⁷

It was definitely true that Odaka's thesis had served a conservative purpose in avoiding self-conscious confrontation with a serious inconsistency between popular sovereignty and the symbolic *tenno* institution. It was also true, however, that Odaka asked a necessary question whether sovereignty should be interpreted as almighty, whatever he might intend. What he raised became all the more serious for the development of democratic politics. It was deeply related to the problem of how a minority should be protected against a tyrannical majority under popular sovereignty. However, prewar Japan had never yet experienced the tyranny of majority that democracy inevitably involves. Prevention of abuse of political power on the part of a minority had an urgent relevancy to the problems of the day.²¹⁸ Miyasawa rather set a well-timed framework of discussing the organization of political power. Thus Odaka and Miyasawa argued with each other on considerably different planes.²¹⁹ Odaka might ask the right question but it was at the wrong time.

Miyasawa's theory of the August Revolution has gained basic support as an exquisite

²¹⁵ Miyasawa expressed his intention to write an essay criticizing Odaka in the way that he believed that Odaka's thesis would make a great contribution to a widespread sentiment of seeking reconciliation between popular sovereignty and the *tenno* system. Miyasawa, "Oboegaki," *Kenpo no genri*, 282-284.

²¹⁶ See Miyasawa's interpellation in the House of Peers, which is reprinted in *Kenpo no genri*, 349.

²¹⁷ See Okudaira, "Kokutai ronso," 122-123.

²¹⁸ Minobe asked the same question that became relevant when democracy develops. For the details of discussion, see Chapter 2 section 6.

²¹⁹ See Takami, *Miyasawa Toshiyoshi no kenpo gakushiteki kenkyu (A Constitutional Doctrinal Study on Miyasawa Toshiyoshi)* (Tokyo: Yuhikaku, 2000), 339-343; Okada, "Shukenron no gojyunen," *Kenpo riron no gojyunen*, 4-6.

explanation of the constitutional change in Japanese constitutional scholarship.²²⁰ The theory is based upon three indispensable premises. First, there should be limits of constitutional amendment. Second, the Potsdam Declaration and the Byrnes reply should be interpreted as the requirement of popular sovereignty in Japan. Finally, international agreements should be understood as influencing a domestic legal system directly. Thus the criticisms the August Revolution theory has received are over these three premises.

Kawamura Matasuke, a professor of constitutional law at the Kyushu Imperial University, disagreed with Miyasawa that the process of establishing the Constitution of Japan was not necessarily regarded as revolutionary.²²¹ Kawamura, a colleague of Miyasawa as a disciple of Minobe Tatsukichi and a member of the Matsumoto Committee²²² and a future associate justice of the newly created Supreme Court, simply argued that the new constitution was a legal product of the amendment process of the Meiji Constitution. Kawamura attacked the premises upon which the August Revolution theory relied. First of all, Kawamura did not understand that the Potsdam Declaration and the Byrnes reply required the Japanese government to adopt a new constitution of popular sovereignty.²²³ He paid attention to the term of the Byrnes reply that “The ultimate form of government in Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people.” He rejected on the one hand a loose interpretation that Japan could decide a form of government by herself and on the other a strict interpretation that a form of government should be decided by a referendum of the Japanese people. Thus he did not believe that the term had required amending the amendment procedure of the Meiji Constitution,²²⁴ either. Rather, he read it more politically. Namely, “the freely expressed will of the Japanese people” meant to him a will not suppressed and distorted by military clique, bureaucrats, and dictators, that is, a

²²⁰ See, e.g., Tawara Shizuo, “Sengo kenpo gakkai no tenbo (Prospects for Postwar Constitutional Scholarship), *Koho Kenkyu* no. 1, 114.

²²¹ Kawamura Matasuke, “Shinkenpo tanjyo no hori,” *Kaizo*, 28: 5 (1947), 4-10; Kawamura Matasuke, *Shinkenpo to minshushugi (The New Constitution and Democracy)* (Tokyo: Kunitachi Shoin, 1948), 80-92.

²²² See Chapter 2 section 4.

²²³ For the Potsdam Declaration and Byrnes reply, see Chapter 2 section 2.

²²⁴ The Constitution of the Empire of Japan, art. 73.

free and frank will of the many people.²²⁵ Therefore, the formal steps such as the *tenno's* project, deliberation and decision of the House of Peers, and the *tenno's* sanction were not regarded as contradictory to the term of surrender. In fact, he contended, MacArthur and GHQ approved the process the Japanese government followed by relying upon Article 73 of the Meiji Constitution.²²⁶ In sum, Kawamura understood that the Japanese government had promised the Allied powers to democratically implement the provision of the amendment process and it did implement constitutional revision as democratically as possible.²²⁷

The second point Kawamura disagreed with Miyasawa on concerned the limits of constitutional amendment. Kawamura refused to see constitutional limitations on the amendment process. To him, the *kokutai* meant a classification of a government system by a location of sovereignty and thus the distinction between *tenno* sovereignty and popular sovereignty formed a mere problem of the organization of government. The *kokutai* understood thus was of a legal nature and subject to change even if its ethical understanding ordered otherwise.²²⁸ It was true that the Meiji Constitution presupposed only partial, not total, amendment. However, Kawamura asserted that a distinction between partial amendment and total amendment came down to a matter of degree because if a half of the provisions of a constitution were amended twice, then all the provisions of the constitution could be constitutionally amended. Thus there was no use saying a constitution could be constitutionally amended only partially.²²⁹ As a result, Kawamura rejected the idea of revolution to explain the legal basis of the new constitution. He concluded that it legally derived from the process of amending the Meiji Constitution.²³⁰

Miyasawa responded to Kawamura's criticism by defending his basic points. Even if "the freely expressed will of the Japanese people" meant a political condition, it should not be missed

²²⁵ Kawamura, *Shinkenpo to minshusugi*, 85.

²²⁶ See MacArthur's statement on June 21, 1946, *Political Reorientation of Japan*, 2: 660, RM313.

²²⁷ Kawamura, *Shinkenpo to minshushugi*, 86.

²²⁸ Kawamura, *Shinkenpo to minshushugi*, 88-89.

²²⁹ See Kawamura, *Shinkenpo to minshushugi*, 90-91.

²³⁰ Kawamura, *Shinkenpo to minshushugi*, 92.

that such a condition would bring a legal meaning. To Miyasawa, it was critically important to recognize that a popularly authorized *tenno* institution was completely different from a *tenno* system based upon the divine will of the imperial founder and other imperial ancestors.²³¹ When the freely expressed will of the people had decisive power over the ultimate form of government, even their choice of supervision of sovereign power on the part of the *tenno* would deny the hitherto central constitutional principle of the *tenno* institution. Miyasawa argued that the Byrnes reply, in comparison with Article 12 of the Potsdam Declaration and along with the understanding of the Japanese government on retaining the *kokutai*, clearly meant both the denial of *tenno* sovereignty with divine right and the establishment of popular sovereignty.²³² Further, Miyasawa contended that when the Japanese government accepted the Potsdam Declaration, popular sovereignty was principled at the same time. He denied the argument that the Japanese government only had an obligation to establish a constitution of popular sovereignty and that thus the principle started to exist with the new constitution. Miyasawa believed that constitutional change in sovereignty had already occurred before the new constitution was established because the very promise to abolish the *tenno* system with divine right and to establish a constitution based upon popular sovereignty was absolutely impermissible under the *tenno* institution of divine rule in a line unbroken for ages eternal.²³³

Miyasawa criticized Kawamura for inconsistency in his attitude toward constitutional limitations on amendment. Kawamura rejected the idea of limits on constitutional amendment and distinguished legal amendment from illegal amendment according to a provision of constitutional amendment. However, he could make such a distinction as if he had set forth a premise that a provision concerning constitutional amendment was not freely amended.²³⁴ In Miyasawa's

²³¹ See the Constitution of the Empire of Japan, *Tsuge buni*, Imperial Oath Sworn in the Sanctuary in the Imperial Palace.

²³² Miyasawa Toshiyoshi, "Nihonkoku kenpo tanjyo no hori," *Nihonkoku kenpo* (Tokyo: Nihon Hyoronsha, 1955), appendix, reprinted in *Kenpo no genri*, 375-399, 393-394.

²³³ Miyasawa, "Nihonkoku kenpo tanjyo no hori," *Kenpo no genri*, 395.

²³⁴ Miyasawa, "Nihonkoku kenpo tanjyo no hori," *Kenpo no genri*, 396-397. Kawamura argued that there was

understanding, the power to amend a constitution derived from the power to make the constitution. If fundamental principles upon which the power to make a constitution was based could be amended by its derivative power to amend, that would be seriously self-contradictory as a matter of law, although as a matter of fact that could happen even desirably.²³⁵

As discussed above,²³⁶ the *kokutai*, the principle of *tenno* sovereignty, was mostly understood as eternal and thus unchangeable in the constitutional scholarship of prewar Japan. Even Minobe, the liberal champion, interpreted “a line unbroken for ages eternal” as showing the *tenno*’s sovereignty would last forever.²³⁷ The Meiji constitutional regime had been supported by an idea beyond mere legality. Most people, whether liberals or conservatives, had shared a conviction of perpetuity of the *tenno*’s rule. Thus, the transformation of governmental principle from the Meiji Constitution to the postwar constitution should be understood as something extraordinary. This extraordinariness cannot be explained by legality. If making a constitution means preservation of the political achievements of a time, to allow it to deny the fundamental achievements is logically self-contradictory. It is quite true that such self-contradiction often occurs in the real world of politics. However, if we want to see such extraordinariness as it is, it cannot be explained from a legalistic point of view. Indeed, the Constitution of Japan is a product of what is politically extraordinary. Recognition of the limits of constitutional amendment helps to realize that something extraordinary happens, though it might be useless in actual politics. Thus Miyasawa’s position on limits on constitutional amendment is well sustainable theoretically as well as historically.

Another problem Miyasawa’s August Revolution theory has to face is why Article 73 of the Meiji Constitution was utilized to establish the Constitution of Japan if the August Revolution had already overthrown *tenno* sovereignty. He argued that the Revolution had not abolished the Meiji Constitution but changed the meanings of its provisions as far as they conflicted with the new

no limit on amending a provision of constitutional amendment. Kawamura, “Shinkenpo tanjyo no hori,” 9.

²³⁵ Miyasawa, “Nihonkoku kenpo tanjyo no hori,” *Kenpo no genri*, 397.

²³⁶ See Chapter 1.

²³⁷ Minobe, *Kenpo satsuyo*, 119-120.

principle of popular sovereignty. Thus state affairs were executed by following the provisions of the Meiji Constitution so long as they were in harmony with popular sovereignty. In this interpretation, constitutional amendment formally followed the procedure of Article 73 but it was also subject to the principle of popular sovereignty. Miyasawa concluded that sanction of the *tenno* and decisions in the House of Peers, which were understood as contradictory to the new principle, formally existed but substantially lost their constitutional effect.²³⁸ In sum, he saw Article 73 was partially valid and partially invalid from the standpoint of popular sovereignty when the constitutional amendment was actually implemented. Appearance of legal continuity was added, in his logic, for the mere policy reason to prevent disorder invoked by a drastic transformation of values.

According to Miyasawa's account, however, the deliberation in the House of Peers, in which he himself actively participated to make a marked contribution to clarifying the change in the *kokutai*,²³⁹ would have been void. Then, his thesis is far removed from the actual process of making the Constitution of Japan.

In this respect, his theory of the August Revolution should be understood not as an explanatory theory of what actually happened in August 1945 but as a legal theory for exploring the creation of the new constitution.²⁴⁰ That is why it does not matter how Miyasawa actually behaved to the reality caused by the defeat in the war. Judging from the behavior of Miyasawa, in fact, his life seems to have had nothing to do with his thesis. He was not an exception among most intellectuals when he argued in October 1945 that constitutional amendment was not necessarily required to realize the liberal democratization of Japanese politics and that because of its simplicity and flexibility, appropriate interpretations and operations of the Meiji Constitution would accomplish the purpose. In his understanding, the Meiji Constitution was essentially based upon liberalism and democracy and the first task of democratization was to recover its potential of liberal democracy

²³⁸ Miyasawa, "Shinkenpo no gaikan," 12-13.

²³⁹ See Chapter 3 section 5; Miyasawa's interpellation in the plenary session of the House of Peers on August 26, 1946, reprinted in *Kenpo no genri*, 345-355.

²⁴⁰ See Ashibe, *Kenpo seitei kenkyoku*, 341; Takami, *Miyasawa Toshiyoshi*, 179-180.

distorted for the last decade.²⁴¹ In this line of thinking, Miyasawa played an important role in the Matsumoto Committee.²⁴² Even after he published the first essay of the August Revolution thesis in May 1946, Miyasawa jointly in the House of Peers attempted to propose to modify the governmental draft concerning the status of the *tenno* from the symbol to the head of the state.²⁴³ At the time of deliberating on the new constitution, he still believed that it was better to use a vague expression on the principle of popular sovereignty.²⁴⁴ Because of his opportunism, Miyasawa failed to fully celebrate a new meaning of constitutional law. There is, thus, a serious inconsistency between his less commitment to the new value of government in an actual life and his recognition of revolution in theory.²⁴⁵ However, it does not necessarily cause damage to the merits of the August Revolution thesis as a constitutional theory.²⁴⁶ This thesis along with the debate between Odaka and Miyasawa has clarified the fundamental change of sovereignty. The clarification was desperately needed for the Japanese people at the beginning of their own new constitutional life.

What is the most serious problem Miyasawa's August Revolution theory has to be confronted with is, however, the fact that the Japanese people did not mobilize themselves for freedom.²⁴⁷ Unlike the Americans in the American Revolution or the French in the French Revolution, direct participation of the Japanese people in destroying the old regime and creating a new political order was extremely limited immediately after the war. Rather, we cannot ignore the defeat and the succeeding Allied occupation as indispensable factors in making the Constitution of

²⁴¹ Miyasawa Toshisyoshi, "Kenpo kaisei ni tsuite (On the Constitutional Amendment)," *Mainichi Shinbun*, October 19, 1945, in *Shoron Shuroku*, 21-24.

²⁴² See Chapter 2 section 4.

²⁴³ See Koseki, *Tanjyo*, 276.

²⁴⁴ Miyasawa Toshiyoshi, "Shinsei nihon no michishirube 'shinkenpo'," Mikuni Ichiro ed., *Showashi tanbo* (Tokyo: Bancho Shobo, 1975), 5: 161 in Koseki, *Tanjyo*, 275-276.

²⁴⁵ Miyasawa delivered a lecture on the Diet and the cabinet provided for in the new constitution at the meeting held by the Kenpo Fukyukai (the Committee to Popularize the Constitution) in February 1947. His lecture sounds quite cynical. We cannot feel his enthusiasm about the new constitution from the lecture. See Miyasawa Toshiyoshi, "Kokkai to naikaku (The Diet and the Cabinet)," Kenpo Fukyukai, ed., *Shinkenpo kowa*, 223-256.

²⁴⁶ See Higuchi Yoichi, *Kindai kenpo ni totteno ronri to kachi* (Tokyo: Nihon Hyoronsha, 1994), 82-83 (Hereinafter cited as Higuchi, *Ronri to Kachi*).

²⁴⁷ See Hasegawa Masayasu, *Kenpo gendaishi (Modern Constitutional History)* (Tokyo: Nihon Hyoronsha, 1981), 1: 7.

Japan. In the first place, most people, particularly the governing elite, did not believe that the Potsdam Declaration and Byrnes reply required the Japanese government to adopt a government system based upon the radically different principle of popular sovereignty.²⁴⁸ Constitutional scholars were no different. After all, they were prevalently infatuated with the idea of the *kokutai* and obsessed with defending the *tenno* institution. The enchantment of the *kokutai* had so profoundly penetrated to most people that the acceptance of the Potsdam Declaration did not cause a radical change in their mental attitude in postwar Japan. Miyasawa's opportunistic behavior well expressed that the Japanese elite had experienced no real revolution at all in the aftermath of World War II. Miyasawa's revolution is nothing other than a retrospective elitist reaction to what happened with the fundamental law after the defeat.²⁴⁹

In fact, it is very difficult to understand the mere acceptance of the Potsdam Declaration as a revolution in terms of the actual life of the Japanese people of the day. If any kind of constitutional revolution occurred, furthermore, it was under the sovereignty of General MacArthur.²⁵⁰ With the Allied occupation, Japan had lost independence.

Miyasawa's thesis retrospectively advocates a legal theory of constitutional revolution based upon internationalism.²⁵¹ As a legal theory, surely, it has consistency. However, if sovereignty means something important in politics, it indicates not only a source of political legitimacy but also attribution of active political power to someone. Thus popular sovereignty requires the people to exercise at least potentially the ultimate power as well as to be the only legitimate source of political authority. We should think of the process of constitutional making as more political than

²⁴⁸ See Sato Koji, *Kenpo (Constitutional Law)*, 3rd ed., (Tokyo: Seirin Shoin, 1995), 76.

²⁴⁹ Kanamori Tokujiro, who as the minister of state struggled to defend the government plan of the new constitution in public deliberation, is critical of the August Revolution thesis because of its shallowness. Kanamori Tokujiro, *Kenpo Igen (A Constitutional Will)* (Tokyo: Gakuyo Shobo, 1959), 11.

²⁵⁰ Nagao Ryuichi, "'Hachigatsu kakumei setsu' noto (A Note on 'the August Revolution Theory')," *Nihon kokka shisoshi kenkyu (Studies on History of Japanese State Thoughts)* (Tokyo: Sobunsha, 1982), 140-147; Nagao Ryuichi, "Ninonkoku kenpo no seitosei mondai (The Problem of Legitimacy of the Constitution of Japan), *Nihon kenpo shisoshi* (Tokyo: Kodansha, 1996), 267-268.

²⁵¹ Miyasawa took the position that international law is superior to constitutional law. See Miyasawa, *Kenpo*, 384-385. See also, Higuchi, *Ronri to Kachi*, 89-90; Nagao, *Nihon kenpo shisoshi*, 269-270.

Miyasawa's August Revolution thesis.

The constitutional revolution in the wake of the wartime defeat can be understood as a two-step process. First, the acceptance of the Potsdam Declaration by the Japanese government had abolished the governmental system based upon the *tenno* sovereignty derived from divine right. No matter what the statement "The ultimate form of government in Japan shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the Japanese people" might have meant, there had never existed such a thing as a free discussion on the foundation of the *tenno*'s authority in prewar Japan. The concept of a line unbroken for ages eternal was well beyond rational justification. Even the loosest interpretation that the Japanese government could decide its own form of government freely from the Allied occupation at the end of the occupational period required the Japanese government to choose a form of government, which was completely inconsistent with the principle the Meiji constitutional system had relied upon.²⁵² The *tenno*'s sovereignty could not be an object of choice. The Meiji Constitution only confirmed the sovereignty of the *tenno* which had been naturally assumed since the foundation of the nation. Thus, the acceptance of the Potsdam Declaration had overthrown the basis of the Meiji constitutional regime. As Hannah Arendt has pointed out, there has been no government or state powerful enough to survive defeat in war since World War I.²⁵³ Arendt's observation was also the case with Japan after World War II. International relations had come to influence inevitably and sometimes directly domestic political and legal systems.

Unlike the assumption of the August Revolution thesis, however, the mere acceptance of the Potsdam Declaration did not bring popular sovereignty to Japan. The second step of constitutional revolution was related to the actual power aspect of popular sovereignty. The constitutional debates had gradually revealed the necessity of a fundamental change in the

²⁵² For a loose reading of the Potsdam Declaration, see Sasakai, "Kokutai ha henkosuru," *Sekai Bunka*, vol. 1, nos. 10-11, 1946, 10-11; Nagao, "'Hachigatsu kakumeisetsu' noto," *Nihon kokka shisoushi kenkyu*, 140-147.

²⁵³ Hannah Arendt, *On Revolution*, 15.

governmental system in postwar Japan.²⁵⁴ Whatever form the institution of the *tenno* might have taken, a large number of Japanese people heard that forms and foundations of the *tenno* system were widely and heatedly discussed. Unlike the case of the Meiji Constitution,²⁵⁵ the discussion was not limited to the governing elite. In the constitutional debates, the Japanese people had been self-consciously confronted with what should be an appropriate source political legitimacy of their country for the first time in their history.²⁵⁶

In the constitutional discussion, furthermore, the Japanese people had experienced freedom both negative and positive. As discussed in Chapter 1, the idea of the *kokutai* as the *tenno* system in a line unbroken for ages eternal was incompatible with internal freedom because standards of value had been monopolized by the imperial founder and ancestors and thus common citizens could not confine themselves to an inner fortress to cope with political power, which a modern liberal democratic constitution generally guarantees.²⁵⁷ Now the principle of *tenno* sovereignty by divine right was abolished, a condition was met that common citizens could enjoy civil liberties. The Japanese people had also experienced positive freedom when they themselves discussed the creation of a fundamental political order. The people at the periphery of the power structure of the Meiji constitutional system such as Takano Iwasaburo and the members of the *Kenpo Kenkyukai* (Constitutional Research Group) actively campaigned for the principle of popular sovereignty.²⁵⁸ The Japanese people participated in the general election of the Imperial Diet as a quasi-constitutional convention and their representatives argued for and against the constitutional draft in the public arena.²⁵⁹ Popular participation in constituting a fundamental political order was the first thing in their history. The principle of popular sovereignty became clear when the Japanese people exercised

²⁵⁴ See Sato, *Kenpo*, 76.

²⁵⁵ See Chapter 1 section 2.

²⁵⁶ See Chapter 3 sections 2 & 5.

²⁵⁷ See Maruyama, "Theory and Psychology of Ultra-Nationalism," *Thought and Behaviour in Modern Japan Politics*, 1-24.

²⁵⁸ See Chapter 3 section 2.

²⁵⁹ See Chapter 3 section 5.

their positive freedom. They eventually established the new constitution by themselves.²⁶⁰

In sum, the Potsdam Declaration had abolished *tenno* sovereignty based upon the concept of the *kokutai* and then the idea of popular sovereignty had gradually emerged through constitutional debates among the Japanese people including the governing elite and has been finally established as the fundamental principle of the new constitution. In the process of making the Constitution of Japan, therefore, it can be fairly said that the Japanese people simultaneously experienced a sense of freedom and of a new beginning.²⁶¹ This was really a revolution politically understood.

It is true that liberation came from GHQ as gift. It is also true that popular sovereignty was claimed under the Allied occupational power. This constitutional revolution without doubt had serious limitations. Whatever the limits might have been, however, the Japanese people as a whole first confronted the problem of constituting a political order by themselves after the wartime defeat. The whole process of making the postwar constitution should be taken as a revolutionary idea. The Constitution of Japan has required the Japanese people to change their way of thinking and behaving. Popular sovereignty was a fundamentally innovative idea for them. Since the establishment of the Constitution of Japan, the method of government has changed dramatically. Politics has become an art of human relationships founded upon mutual persuasion by speech. This was what the Meiji constitutional system lacked. The government can no longer disregard liberty and equality and the will of the people. Of course, these ideas are elusive and manipulative, and yet we have to acknowledge frankly the radical transformation at least at the level of ideas. People with either a clear idea of popular sovereignty or force of habit for defending the *kokutai* participated in the process of making the Constitution of Japan. By coping with the claim of popular sovereignty, defenders of the *kokutai* had come to be forced to justify the *tenno* institution by some means. What was taken for granted under the Meiji Constitution has lost its basis without rationalization. The Constitution of Japan has been also a revolution of ideas.

²⁶⁰ See the Constitution of Japan, preamble.

²⁶¹ See Hannah Arendt, *On Revolution* (New York, Penguin, 1963, 1965), 29.

The inspiration from the Odaka-Miyasawa debate has now given us a distinct theory of the Constitution of Japan as an unfinished constitutional revolution. The next question is how the Japanese people have tried to complete this unfinished constitutional revolution. How have the Japanese people as sovereign made relative the newly introduced symbolic *tenno* system, the previous model of which was regarded as having absolute authority? How have they accepted the new constitutional principles? How has discontinuity in the two constitutions that became gradually basic recognition been discussed concretely? Let us focus our attention on how the symbolic *tenno* institution was understood in relation to the principle of popular sovereignty in the early postwar period.

8. The *Tenno* Institution in the New Constitution

The new constitution has transformed the status of the *tenno* from sovereign to symbol.²⁶² Because the term of symbol was unfamiliar to the legal circle, its understanding was not undisputable. We have already seen what the eminent scholars in the field of history, ethics and jurisprudence tried to mean by the symbol.²⁶³ They tended to argue that the *tenno* had traditionally been the symbol of the unity of the nation and the *tenno* institution has essentially carried only a tenuous political meaning and thus nothing new with the new constitution. These arguments, however, seem disharmonious with a core idea of the new constitution because as a matter of principle, the status of the *tenno* derives from the will of the sovereign people, which was never recognized before the new constitution.

Minobe Tatsukichi, once foremost liberal but now seemingly behind the times,

²⁶² Compare article 1 of the Constitution of Japan with article 1 of the Constitution of the Empire of Japan. The former reads: "The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power." The latter reads: "The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal." See Chapter 4 section 4.

²⁶³ See this Chapter sections 6 & 7.

acknowledged the great change of the status of the *tenno*.²⁶⁴ However, he interpreted the new constitution as though he had never appreciated its newness. For example, he understood that the *tenno* was supposed to be situated above the diet, cabinet and courts to unify them and thus granted the powers to perform authoritative acts such as to convoke the Diet, dissolve the House of Representatives, appoint the prime minister and the chief justice of the Supreme Court, promulgate amendments to the constitution, laws, cabinet orders, and treaties, and attest important state actions.²⁶⁵ The *tenno*'s involvement was believed to enhance the authority of these state actions. The purpose of these provisions is, in Minobe's interpretation, respect for the authority of the *tenno*.²⁶⁶

Minobe understood that the symbolic *tenno* should be respected as a figure expressing the state and all the people integrated as a whole. Although the *tenno* was not granted the power to represent the will of the people, he was interpreted to be a representative in form, not will. While the people were no longer subjects under the *tenno*'s rule but now sovereign, Minobe believed, they were still under an obligation to respect the *tenno* as their representative in form.²⁶⁷ Minobe's constitutional revolution stopped half-way when he contended that Japan was still a monarchy under the Constitution of Japan because the *tenno* was understood to be the source and embodiment of honors, which the concept of a monarch centrally depended upon in his opinion.²⁶⁸ Thus, the image of the symbolic *tenno* Minobe presented was not much different from that of the Meiji constitutional system because he argued that the *tenno*, who was legally sovereign, should have been beyond real politics.

Sasaki Soichi, another liberal champion but a dissenter of the symbolic *tenno* institution in the House of Peers, showed a little more discontinuous interpretation of the new constitution. The symbolic *tenno* meant to him realization of the nature and situation of Japan as a state by the figure

²⁶⁴ For Minobe's constitutional arguments in the postwar era, see Chapter 2 section 6.

²⁶⁵ See the Constitution of Japan, arts. 6 & 7.

²⁶⁶ Minobe, *Kihongenri*, 65.

²⁶⁷ Minobe, *Kihongenri*, 66.

²⁶⁸ Minobe, *Kihongenri*, 67-69.

of the *tenno*.²⁶⁹ Unlike Minobe,²⁷⁰ Sasaki distinguished the meanings of the *tenno*'s status as the symbol of the state and the symbol of the unity of the people. The former meant that when people saw the figure of the *tenno*, they realized Japan as one distinct body of life. The latter symbolized the nature that people who had their own lives shared a common life unified in Japan.²⁷¹ Sasaki pointed out, further, that Article 1 of the new constitution should be interpreted as not descriptive but normative. Namely, the *tenno* should play a role as the symbol of the state and of the unity of the people. This role had nothing to do with governmental functions. The *tenno* should situate himself outside politics. Sasaki once again confirmed the change of the *kokutai*.²⁷²

Kawamura Matasuke, a prominent constitutional scholar and a near future associate justice of the Supreme Court, presented an interpretation mixed between continuity and discontinuity. He understood that Article 1 of the new constitution showed the national consciousness that when they look up to the *tenno*, people vividly and profoundly realize the existence of the state of Japan and an integrated body of the united Japanese people. In Kawamura's interpretation, the article expressed nothing but such national psychology and had no legal effect. Thus, the status of the head of the state might not be derived from the provision.²⁷³ Kawamura clearly denied that the *tenno* had any kind of sovereign powers, not to mention supervision of sovereignty. Although Articles 6 and 7 of the new constitution provide for the *tenno*'s performance of matters of state, Kawamura argued, they could not be regarded as parts of sovereign power because the acts of the *tenno* on these matters were not dependent upon his discretionary decision but substantial decision-making of other organs. The Diet designates the prime minister²⁷⁴ and the cabinet designates the chief justice of the Supreme

²⁶⁹ Sasaki, "Tenno no kokkateki shochosei," *Kenpogaku ronbunsen*, 184.

²⁷⁰ Minobe stated that because unification of the people was nothing other than the state, there was no substantial difference between the symbol of the state and the symbol of the unification of the people. Minobe, *Shinkenpo gairon*, 53.

²⁷¹ Sasaki, "Tenno no kokkateki shochosei," *Kenpogaku ronbunsen*, 184-185.

²⁷² Sasaki, *Kenporon*, 154-156.

²⁷³ Kawamura, *Shinkenpo to minshushugi*, 99-100.

²⁷⁴ The Constitution of Japan, art. 6 par. 1 and art. 67 par. 1.

Court.²⁷⁵ The matters of state provided for in Article 7 are performed only with the advice and approval of the cabinet. Thus, Kawamura continued, all matters of state the *tenno* is supposed to perform were predetermined by institutions other than the *tenno* and the *tenno*'s acts were planned to arrange forms for what had been already decided.²⁷⁶ Unlike the Meiji constitutional system, Kawamura concluded, the *tenno* had no power to appoint minister of state and therefore he could do nothing but agree on decisions made by the cabinet. Kawamura clarified the break of the old *tenno* institution in the postwar constitution.

Kawamura believed that the principle of no monarchical responsibility in a constitutional monarchy was inconsistent with the modern ethical and legal fundamental principle of free personality with responsibility. Particularly in Japan, the “sacred and inviolable” clause²⁷⁷ had been misunderstood as a basis of the mysterious deification of the *tenno*. Kawamura stated that abolition of the sacred and inviolable clause had a good reason. Further, he added, although it retained the hereditary line of *tennos*, the symbolic *tenno* system could not be considered a monarchy traditionally understood because the *tenno* had no political power whatsoever. The *tenno* in the new constitution was much weaker than kings in Britain and Belgium. Kawamura thus wondered whether the symbolic *tenno* system could be classified as a monarchy. He refused to categorize the *tenno* as a monarch defined in constitutional scholarship because not only executive powers and the power to give consent to constitutional amendment but also any governmental powers were removed from the *tenno*.²⁷⁸

However, Kawamura showed a compromising attitude when he realistically admitted that there was the prevalent popular sentiment that the people had the *tenno* govern the state or had the *tenno* as the head of the state, although he frankly recognized that democracy and monarchy essentially were incompatible. If the opinion a majority of people enjoyed should prevail, he

²⁷⁵ The Constitution of Japan, art. 6 par. 2.

²⁷⁶ Kawamura, *Shinkenpo to minshushugi*, 100-104.

²⁷⁷ The Constitution of the Empire of Japan, art. 3.

²⁷⁸ Kawamura, *Shinkenpo to minshushugi*, 108-110.

contended, a harmony between the two institutions was supported by a current majority of the Japanese people. If the *tenno's* promulgation of law gave authority to decisions by the will of a majority of the people and it helped to cultivate a law-abiding spirit, then it was unexpectedly good for developing democracy in Japan.²⁷⁹

Thus, Kawamura relied upon the authority the *tenno* traditionally possessed in order to cope with a minority's failure to obey the will of a majority which he thought of as defects of democratic politics in prewar Japan. It was quite dubious, however, that such a compromising attitude actually made a great contribution to developing democratic politics in postwar Japan because democracy with popular sovereignty required the people to have an independent and self-governing spirit and assume responsibility for their political decisions. Although he pointed out that the human *tenno* was in principle equal to the people and thus special legal protections such as lese majesty were abolished, Kawamura also set reservations on free speech that criticized the *tenno* system. Because the *tenno* was the symbol of the state and the object of admiration of an overwhelming majority of the people, he asserted, a speech act that insulted the *tenno* meant to dishonor the popular sentiment that respected the *tenno*. Although he emphasized that free speech was indispensable for democracy,²⁸⁰ Kawamura did not apply his acute analysis to this case. In his view, those who criticized the *tenno* naturally needed to show courtesy.²⁸¹ Here a constitutional principle of free speech turned into a matter of morality.²⁸² Kawamura's interpretation well showed continuity in discontinuity in constitutional understanding.

A well-balanced thought on the new constitution was made public by a legal philosopher as early as October 1946, immediately after the House of Representatives voted for the government draft of constitutional revision with slightly modifications.²⁸³ The essay of Tsuneto Kyo was

²⁷⁹ Kawamura, *Shinkenpo to minshushugi*, 110-111.

²⁸⁰ Kawamura, *Shinkenpo to minshushugi*, 68-69.

²⁸¹ Kawamura, *Shinkenpo to minshushugi*, 107.

²⁸² Kawamura did not pay much attention to the profound relationship between democracy and freedom of speech. See Kawamura, *Shinkenpo to minshushugi*, 14-19, & 185-196.

²⁸³ Tsuneto Kyo, "Tenno no shochoteki chii nitsuite," *Sekai*, October, November, and December, 1946 reprinted

regarded as influential with respect to understanding characteristics of the symbolic *tenno* institution in the new constitution.²⁸⁴ Tsuneto clearly pointed out the forthcoming new constitution as revolutionarily innovative because it would deprive the *tenno* of almost all political powers granted by the Meiji Constitution and thus it would try to abolish the traditional *tenno* system.²⁸⁵ He understood that the Meiji Constitution had adopted an imperfect constitutional monarchy because elements of a despotic monarchy had still remained in it. Thus, he did not support the argument that simplicity and flexibility in the Meiji Constitution meant that no fundamental alternation of constitutional text was required to democratize the political system after the wartime defeat. In his view, small constitutional amendments would not be effective enough for the government to administer properly a political regime and to build a democratic peace state as steadily and soon as possible.²⁸⁶ The Meiji Constitution, he believed, had become an obstacle for constructing a new Japan fundamentally characterized by democracy. Thus a new constitution was necessary.²⁸⁷

Rejecting both the conservative criticism that the symbolic *tenno* institution was fundamentally different from the traditional *tenno* system and the radical criticism that article 1 of the new constitution showed a not thoroughgoing democratization, Tsuneto saw the new constitution that was to be established by the freely expressed will of the people through the Imperial Diet as expressing a position that the *tenno* institution should be retained with sweeping reform.²⁸⁸ He also refused to follow the strict originalist idea because the framers' intentions served only as a reference to interpret law. The established text itself should be objectively interpreted.²⁸⁹

Tsuneto contended that in a monarchy, monarch was essentially the symbol of the state.

in *Shinkenpo to minshushugi* (*The New Constitution and Democracy*) (Tokyo: Iwanami Shoten, 1947), 1-77 (hereinafter cited as Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*). See also, Tsuneto Kyo, "Kaisei kenpo no kakumeiteki seikaku (The Revolutionary Characteristics of the Revised Constitution)," *Jiron*, January 1947 reprinted in *Shinkenpo to minshushugi*, 79-101.

²⁸⁴ See Sato Isao, "Tenno no shochosei (The Symbolic *Tenno* System)," *Jurist*, May 15, 1957, 2-7, 3; Yokota Koichi, "Seiken zengono tennozo," 53.

²⁸⁵ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 1.

²⁸⁶ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 76-77.

²⁸⁷ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 3.

²⁸⁸ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 27-29.

²⁸⁹ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 27.

That was because the characteristics and structure of monarchy as a body sociologically made the monarch a symbol. In his view, this was also true of the *tenno* system in Japan. Thus the *tenno* had been the symbol of the state since Japan was built as a monarchy.²⁹⁰ To Tsuneto, what was significant for Article 1 of the new constitution was first that a sociological fact that the *tenno* held the status of the symbol of the state would be expressed as a legal declaration. Secondly, it radically transformed the *tenno* system that had hitherto existed. Thus the nature of the state of Japan the *tenno* would symbolize would become fundamentally different from what the old *tenno* system had symbolized. Thirdly and fourthly, the *tenno* would hold the status of the symbol of the unity of the Japanese people as well as of the state of Japan, depending upon the sovereign will of the people.²⁹¹ Further, it was important for him to distinguish symbol from representation. While the relationship between symbol and what it symbolizes is a mutual relationship between things different in nature, the relationship between representative and what it represents is a mutual relationship between things similar in essence.²⁹² This meant that his theory made clear the fact that the *tenno* and the people as a unity were regarded as different in nature.²⁹³

Unlike the Meiji Constitution, Tsuneto correctly pointed out, the new constitution would vest the *tenno* with no political powers. The *tenno* could perform only formal and ceremonial acts provided for in the constitution. Thus, the symbolic *tenno* would neither be the superintendent of sovereign power nor the head of the administrative department in a normal sense and thus, Tsuneto argued, it was difficult to say that the *tenno* was the head of the state in the common usage of the term. However, he admitted that the symbolic *tenno* could be called the head of the state only in an insufficient sense of the term because it would perform the highest formal and ceremonial activities in national politics and would represent the state in international relations.²⁹⁴ In this respect, Tsuneto was wrong when he understood that the *tenno* would represent the state in international relations

²⁹⁰ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 15.

²⁹¹ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 15-16.

²⁹² Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 11.

²⁹³ See Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 72.

²⁹⁴ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 46.

because the tenno should attest the full powers and credentials of ambassadors and ministers, attest instruments of ratification and other diplomatic documents, and receive foreign ambassadors and ministers.²⁹⁵ Because he understood that the *tenno*'s actions provided for in the new constitution made important state actions legally effective by giving them the requisite forms,²⁹⁶ Tsuneto mistakenly interpreted the *tenno*'s performance on state matters relating to international relations as representing the state.²⁹⁷ Rather, the cabinet would make substantial decisions on international matters and thus it would represent the state of Japan. The *tenno*'s performance on state matters are commonly understood as adding formality to what has already been determined by other institutions with the advice and approval of the cabinet.²⁹⁸

However, the misreading the new constitution did not diminish the values of Tsuneto's theory on the symbolic *tenno* institution. He coolly recognized that the political regime provided for in the new constitution would not be purely democratic but include monarchical elements in its central part. He expected that there was a good possibility that politics under the revised constitution would be self-government by the people but at the same time acknowledged that because the *tenno* institution would be outwardly retained, it could not be denied that it would possibly have a considerable influence on political practices.²⁹⁹ Tsuneto warned that further democratization might be confronted with a serious problem from inside the new constitution.

In Tsuneto's view, the reason why the general will of the people required the drastic alternation of the *tenno* system was that it judged that the old *tenno* system would become a serious obstacle to creating a new Japan. At the same time, the general will of the people also retained the *tenno* system even fundamentally changed because most people were aware that they had respected the historical tradition that Japan, with the *tenno* at the center, could retain national unification and

²⁹⁵ See the Constitution of Japan, art. 7 (v), (viii), & (ix). See also, Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 46.

²⁹⁶ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 67.

²⁹⁷ See Yokota Koichi, "Seiken zengono tennozo," 56.

²⁹⁸ Sato Koji, *Kenpo*, 253-254; Takahashi Kazuyuki, "Kokumishuken to shocho tennosei," Nonaka et al., *Kenpo*, 1: 114-117.

²⁹⁹ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 50-51.

independence as the state.³⁰⁰

As Sasaki, Tsuneto interpreted that the symbol of the state and that of the unity of the people would have different meanings. The provision that the *tenno* would be the symbol of the state would legally mean that Japan would still maintain the fundamentally transformed *tenno* system only with formal and ritualistic functions as a part of important political organizations.³⁰¹ Tsuneto argued for the *tenno* as a symbol of the state that would have considerably changed in political structure from a sovereign *tenno* founded upon mysterious characteristics to a symbolic *tenno* as a human being.³⁰² On the other hand, the *tenno* as the symbol of the unity of the people meant that the *tenno* symbolized the relationship that the people as a whole except the *tenno* formed one group commonly under the government. Above all, Tsuneto offered a critically important interpretation about the symbol when he stated that the *tenno* as the performer on state matters delegated by the people would symbolize the state of Japan and at the same time symbolize the unity of the Japanese people as a delegate of the people who “desire peace for all time are deeply conscious of the high ideals controlling human relationships” and who “have determined to preserve our security and existence, trusting in the justices and faith of the peace-loving peoples of the world.”³⁰³ Thus Tsuneto provided a systematic view on the symbolic *tenno* institution in the new constitution. By following his style, then, we can add that the *tenno* symbolizes a state that is operated on the universal principle that “Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.”³⁰⁴ This well clarifies an inherent tension involved in the new constitution that the universalistic values are planned to be symbolized by the most particularistic institution. In any event, however, Tsuneto’s effort to interpret the new symbolic *tenno* system from the perspective of

³⁰⁰ Tsuneto, “Shochoteki chii,” *Shinkenpo to minshushugi*, 64-65.

³⁰¹ Tsuneto, “Shochoteki chii,” *Shinkenpo to minshushugi*, 60.

³⁰² Tsuneto, “Shochoteki chii,” *Shinkenpo to minshushugi*, 61.

³⁰³ Tsuneto, “Shochoteki chii,” *Shinkenpo to minshushugi*, 74-75. Quotations are from the preamble of the new constitution. See the Constitution of Japan, preamble par. 2.

³⁰⁴ The Constitution of Japan, preamble par. 1.

the new constitution as a whole was precious because most commentators of the time tended to pay a great deal of attention to the *tenno* system itself.³⁰⁵

It is noteworthy that Tsuneto denied the *tenno* as *akogare no mato* (the center of national adoration). He rejected as a moral or religious reading the government explanation on the symbolic *tenno* institution that the state of Japan was established based upon the unification of the whole people in relation situating the *tenno* at the center of national adoration and thus images of the state and the unity of the people were realized in the figure of the *tenno*. Because he believed that legal norms provided for things that should be realized in real social life, Article 1 of the postwar constitution should be understood as a provision on the real status of the *tenno* to offer guidance for political practice. The center of adoration as what the *tenno* should be would give the people only a standard for moral practice.³⁰⁶ For him, it was wrong to understand that the *tenno* would symbolize the unity as a whole formed by people who respected the *tenno* with a special feeling indicated by the word of adoration because Article 1 of the revised constitution would mean that the *tenno* would symbolize the unity as a whole of the people formed by all Japanese individuals.³⁰⁷ Further, Tsuneto rejected the interpretation that the Japanese people and the Japanese race were interchangeable in this context.³⁰⁸ His point is crucial because the internal continuity theory seems to confuse, whether intentionally or carelessly, nation and race, which are essentially different concepts. Nation is more artificial than race.

Tsuneto's argument on the symbolic *tenno* institution is considered an excellent constitutional interpretation of the time because it recognized a serious internal tension between the principle of popular sovereignty and the symbolic *tenno* system and tried to reconcile them in a most rational way. He self-consciously confronted the problems raised by discontinuity and continuity in the two constitutions. The new constitution, on the one hand, shows a significant democratization

³⁰⁵ To compare the discussions of Minobe, Sasaki and Kawamura, see *supra* this Chapter this section.

³⁰⁶ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 51-54.

³⁰⁷ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 65.

³⁰⁸ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 65.

of governmental institutions from the Meiji Constitution but, on the other, maintains the *tenno* system, although fundamentally altered. He offered a perspective on this considerably contradictory new constitution by placing emphasis upon parts of discontinuity.³⁰⁹ He properly pointed out that there had been no occasion since the foundation of the state when the people not only publicly discuss the question of abolishing the *tenno* system or not but also the fate of the *tenno* institution was decided by a Diet that reflects the general will of the people.³¹⁰ In his understanding, the principle of popular sovereignty would emerge from that debate and under the new principle the *tenno* institution should be totally reshaped to symbolize the values the new constitution would solemnly declare. Indeed, Tsuneto regarded the transformation as an unprecedented revolution.³¹¹

By developing the gist of Tsuneto's argument, a more radical contention was made in July 1949. Yokota Kisaburo, a professor of international law at the University of Tokyo and future Chief Justice of the Supreme Court, presented a plainly discontinuous image of the *tenno* in the new constitution.³¹² During the prewar period, he was critical about the Japanese government's policy on China. He did not accept the legitimacy of the state of Manchuria. Thus the military exercised surveillance over what he would say.³¹³

Yokota not only simply admitted that the symbolic *tenno* institution had been completely different from the *tenno* system the Meiji Constitution provided for but also claimed that people should face up to a truth that the *tenno* system had changed in matters of his status, foundation and powers. Whereas the *tenno* under the Meiji constitutional regime was sovereign, based upon the divine right to govern, and vested with a wide range of powerful prerogatives,³¹⁴ Yokota stated in comparison, the *tenno* in the new constitution was the symbol of the state and the unity of the people,

³⁰⁹ See Yokota Koichi, "Seiken zengono tennozo," 56.

³¹⁰ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 71.

³¹¹ Tsuneto, "Shochoteki chii," *Shinkenpo to minshushugi*, 1-2. See also, Tsuneto, "Kaisei kenpo no kakumeiteki seikaku," *Shinkenpo to minshushugi*, 79-101.

³¹² Yokota Kisaburo, *Tennosei (The Tenno System)* (Tokyo: Rodo Bunkasha, 1949).

³¹³ For Yokota Kisaburo, see Yokota Kisaburo, *Watashi no issho (Autobiography)* (Tokyo: Tokyo Shinbun Shuppanyoku, 1976); Takenaka Yoshihiko, *Nihon seijishi no nakano chishikijin (The Intellectuals in Japanese Political History)* (Tokyo: Bokutakusha, 1995).

³¹⁴ Yokota, *Tennosei*, 1-25.

based upon the sovereign will of the people, and invested with no real political powers but the enumerated formal and ceremonial functions for the people.³¹⁵ He rejected the contention that the sovereign people included the *tenno* in the Japanese traditional form of government because togetherness, not confrontation, of the *tenno* and the people that was allegedly unique to Japan was merely a false idea deriving from the lack of consciousness of freedom, equality and above all dignity as an individual.³¹⁶

Yokota emphatically pointed out the change of the *tenno* system in nature. He believed that different institutions should be called by different names thus the symbolic *tenno* institution should not have been named the *tenno* institution because the *tenno* system in the authentic meaning of the word had been abolished under the new constitution.³¹⁷ The facts he laid stress upon were that the principle of popular sovereignty had been clearly established and that the *tenno*'s status had depended upon the general will of the sovereign people.³¹⁸ Unlike the *tenno* who was entitled to govern by the will of the imperial founder and ancestors, he even argued, the new symbolic *tenno* institution could be abolished if the sovereign people wished because its foundation was upon nothing other than their general will.³¹⁹ When we consider the political context immediately after the establishment of the new constitution, Yokota's frank recognition of a possibility of legal abrogation of the *tenno* institution was without doubt outstandingly liberal.

Like Tsuneto, Yokota declared that the idea of the *kokutai* both in the political meaning and in the spiritual sense had changed with the new constitution. The *kokutai* in a political sense as a general understanding, namely that the *tenno* in a line unbroken for ages eternal held the prerogatives to govern as sovereign, had obviously changed because the symbolic *tenno* was no longer sovereign and vested with any political powers. For Yokota, the *tenno*'s status of the symbol carried no positive

³¹⁵ Yokota, *Tennosei*, 27-94.

³¹⁶ Yokota, *Tennosei*, 51-57.

³¹⁷ Yokota, *Tennosei*, 110-116.

³¹⁸ Yokota basically accepted the validity of the August Revolution thesis. See Yokota, *Tennosei*, 71-73 & 74 n. 7.

³¹⁹ Yokota, *Tennosei*, 70, & 103-104.

legal meaning unlike representation.³²⁰ However, it negatively meant important things because the status as the symbol denied the status as sovereign and the head of state. Although it is questionable whether the head of state does not have the function of symbol,³²¹ Yokota's main point rather lied in criticism of the argument of the *akogare* (adored) *tenno*.³²² He stated that the *kokutai* in a spiritual sense derived from the political idea of the *kokutai*. The people admired the *tenno* because the *tenno* in one line unbroken for ages eternal actually reigned and ruled.³²³ As the political idea changed, it was thus at least said, the ethical idea of the *kokutai* would gradually change.³²⁴ He expressed a doubt that a derivative concept that lacks or changes a central element was not the same as an original concept and believed that a derivative depended upon an original. He criticized the government for misusing the term *kokutai* in common usage for the idea of the *akogare* (adored) *tenno*.³²⁵ The government adopted a circular argument, as Yokota claimed, when it presupposed the concept of the *kokutai* that had never changed and then it said that the *kokutai* had never changed.³²⁶ In the first place, he criticized, the argument of the *akogare* (adored) *tenno* should not have necessarily been discussed in the constitutional deliberations of the Imperial Diet because a constitution that concerns political organization of the state was not essentially related to the concept of the *kokutai* in a spiritual and ethical sense. Because the government and many members of the Diet wanted to declare the *kokutai* never changed with the new constitution, in his opinion, an unnecessary issue was on the agenda.³²⁷

Yokota's criticism did not stop here. He continued to analyze the symbol *tenno* system itself to show that it was inconsistent with democracy by nature. Yokota understood that equality in dignity for the individual was the fundamental idea that supports democracy. Human development,

³²⁰ Yokota, *Tennosei*, 57-63.

³²¹ See Yokota Koichi, "Seiken zengono tennozo," 58-59.

³²² The government repeated that the new constitution never changed the *kokutai* in the sense that the *tenno* as the center of national adoration. See Chapter 3 section 5.

³²³ Yokota, *Tennosei*, 215.

³²⁴ In this respect, Yokota agreed with Sasaki. See Yokota, *Tennosei*, 116; Sasaki, "Kokutai ha henkou suru," 12.

³²⁵ Yokota, *Tennosei*, 215.

³²⁶ Yokota, *Tennosei*, 220.

³²⁷ Yokota, *Tennosei*, 237-239.

in his belief, brought people to recognition of this equality sooner or later.³²⁸ Democracy based upon a universalistic value of equality conflicted with the *tenno* system based upon lineage that is beyond the efforts of individuals. The making of the new constitution formed a far delayed reflection of the ideal of democracy.³²⁹ In his view, the symbolic *tenno* institution greatly ameliorated defects deriving from a traditional *tenno* system harshly contradictory to democracy.³³⁰ However, he still saw two problems with the new institution: lineage and mysticism. Because the symbolic *tenno* institution is hereditary,³³¹ he argued, it was not deniable that there was always a danger that a person who is not sufficiently qualified for the position might succeed to the throne. The *tenno* system might be also possibly utilized for illegitimate purposes because it had been surrounded with mysticism. Yokota sharply rejected the argument that the disastrous failure of the Meiji constitutional regime was attributed not to the *tenno* but to the people who supported him. Yokota straightforwardly admitted that the *tenno* was more responsible for the collapse than his aides because if he as sovereign had been strong enough to control the supporting institutions, such a result could have been avoided.³³² The principle of no responsibility on the part of the monarch was an irrational system, he added, because, on the one hand, the monarch enjoyed a wide range of political powers but, on the other hand, he escaped from responsibility for the results of the exercise of them.³³³ The argument for no fault of the *tenno* vividly showed mysticism made even rational people unable to face up to the truth. Yokota warned of the effect of irrationalization the mysticism surrounding the *tenno* system had had.³³⁴ In his view, conservative and feudalistic forces tended to appeal to this mysticism for their

³²⁸ Yokota, *Tennosei*, 243-247.

³²⁹ Yokota, *Tennosei*, 248.

³³⁰ Yokota, *Tennosei*, 251.

³³¹ The Constitution of Japan, art. 2.

³³² Yokota, *Tennosei*, 263-264.

³³³ Yokota, *Tennosei*, 264-265. Yokota precisely examined the war responsibility of the *tenno*. *Ibid.*, 267-276.

³³⁴ Yokota took for an example Sasaki Soichi's argument that the *tenno* could play an important role in the political process. Sasaki believed that the *tenno* alone would be the institution for the general public good, while politicians, political parties and people pursued private interests. Yokota criticized Sasaki's argument for confusing what it is and what it ought to be. As a matter of principle, everyone should try to realize the general interests in politics. The *tenno* could not be exceptional in this respect. Because Sasaki was generally famous for rational thinking, Yokota saw how influential the mysticism on the *tenno* was. Yokota, *Tennosei*, 254-260.

political causes.³³⁵

Therefore, Yokota concluded that there was no logical reason to retain the *tenno* system. In consideration of the feeling of a majority of people, however, he did not deny its maintenance. Rather, he pointed out the necessity of eliminating the thorough evils of the *tenno* system. In his proposal for constitutional revision, the *tenno* would absolutely stay away from political matters. Although Yokota understood that the new constitution was in this direction, some provisions such as appointments of the prime minister and the chief justice and dissolution of the House of Representatives raised a question of the non-politicalness of the *tenno* due to their political nature. Even the slightest doubts of its relation to politics should be removed from the constitutional text. His twice new *tenno* system would perform only matters of state on the awarding of honors, receiving foreign ambassadors and ministers, and performance of ceremonial functions.³³⁶ In conclusion, Yokota remind his readers of the essential incompatibility between the *tenno* system and democracy.

This frank analysis of the *tenno* institution well presented the arrival of a new age. People could not imagine themselves hearing such a harsh criticism of the *tenno* system only four years before. On the one hand, eternity of one line of *tennos* was seriously believed to be beyond all kinds of criticism and, on the other hand, that idea was preserved with severe punishment. It is true that Yokota belonged to an absolute minority on the issue in light of the atmosphere of the time for retaining the *kokutai*. Many intellectuals including legal scholars wanted to see continuity in the two constitutions. However, it is important to realize that one of a few such arguments was actually made. Yokota's status in orthodox academism made the thing more significant. The discontinuity Yokota tried to show in a convincing way does exist, whether people were willing or reluctant to recognize it.

In this section, we have seen that there were various discussions over the symbolic *tenno*

³³⁵ Yokota, *Tennosei*, 266.

³³⁶ Yokota, *Tennosei*, 279-284.

institution immediately before and after the establishment of the Constitution of Japan. This new constitution seemed to guarantee rich public discourse on the issue at least for the time being. As a matter of principle, in fact, the *tenno* institution has, with popular sovereignty, been incorporated into the constitutional system itself, which was the most essential task for constitutional design in light of the collapse of the Meiji constitutional regime.³³⁷ The next problem was how the Japanese people would strike a balance between the principle of popular sovereignty and the symbolic *tenno* institution, which are, as Yokota showed, essentially incompatible.

9. The Interpreted Symbol

So far, we have seen several discussions on the relationship between popular sovereignty and the symbolic *tenno* system from the viewpoint of discontinuity and continuity. Although there were wide attempts to recognize some kind of continuity between the two constitutions, their discontinuity was defended by clear and frank, though few, comments. No matter how important the discussions might be, however, there was another issue to discuss as well: the very status of symbol in the constitution. Problems over sovereignty and symbol are categorically different in nature.³³⁸ Because the symbolic *tenno* institution has been constitutionalized, whether people like it or not, the meaning of the symbol should be examined in a way that interpretation would be most consistent with the spirit of the new constitution.

From the beginning, the symbol has been generally understood as the embodiment of what is invisible and abstract by a concrete thing.³³⁹ It is a way to acquire sensuously a clear image of a vague ideal through its expressive function. For example, it is common to symbolize a country by a crown or a national flag. However, what is unique to the symbolic *tenno* system is that what

³³⁷ See Chapter 1 section 9.

³³⁸ See Kuroda Kaku, "Tenno no kenpojyo no chii (The Constitutional Status of the *Tenno*)," *Koho Kenkyu* no. 10, 1954, 1-19, 1-2 (hereinafter cited as Kuroda, "Kenpojyo no chii").

³³⁹ See Sasaki, *Tenno no kokkateki shochosei*, 175-193; Minobe, *Kihongenri*, 66; Minobe, *Genron*, 220-221; Kawamura, *Shinkenpo to minshushugi*, 99-100; Tsuneto, "Tenno no shochoteki chii nituite," 9-12; Yokota, *Tennosei*, 57-60; Ukai Nobushige, "Kenpo niokeru shocho to daihyo (Symbol and Representation in the Constitution)," *Hyoron*, no. 14, September 1947, 11-17, 11-12 (hereinafter cited as Ukai, "Shocho to daihyo").

symbolizes the state is the *tenno*, a living person. Unlike a lifeless thing, the *tenno* has his own life and personality. He, who acts with his will, is the symbol of the state and the unity of the people. Furthermore, the institution of the symbolic *tenno* was occupied by the same person who had been believed to be a living god until only a few years before. These circumstances around the new constitution have made the symbolization even more complicated than usual.

Something symbolized and something symbolizing have also been understood as different in nature. This is in sharp comparison with representation that presupposes sameness in nature between the representing and the represented.³⁴⁰ Since the *tenno* declared himself to be a human being, the relationship between the people and the *tenno* has become characterized as one of sameness. Thus one could say that a symbolic relation between the two could not be valid and then the *tenno* could not be a symbol in the authentic meaning of the word.³⁴¹ Even though the *tenno* is now human, however, he has a special qualification based upon lineage. Further, a popularly elected president can be at once the representative of a people and symbol of their unification. Therefore, the *tenno*'s symbolization should be examined carefully.

Commentators agreed that a symbol had the function of integrating the people.³⁴² But there was no consensus on how the symbolic *tenno* did and should perform an integrating function. The provision of the symbolic *tenno* institution in the postwar constitution, most commentators agreed, has no legal meaning but a socio-psychological meaning.³⁴³ An interesting controversy occurred over this function of integration when Kuroda Kaku, a former professor of constitutional law at Kyoto

³⁴⁰ See Tsuneto, "Tenno no shochoteki chii nituite," 9-12; Yokota, *Tennosei*, 57-60; Ukai, "Shocho to daihyo," 11-12.

³⁴¹ See Ukai, "Shocho to daihyo," 13-14.

³⁴² See Ukai, "Shocho to daihyo," 12; Kuroda, "Tennoron niokeru shochosei no kajyo (The Excess of Symbolicness in the Discussions on the *Tenno*)," *Kaizo*, August 1952, 10-15 (hereinafter cited as Kuroda, "Kajyo"); Sato Isao, "Shocho niokeru shokyokusei to sekkyokusei (Negativeness and Positiveness in the Symbol)," *Kokka Gakkai Zasshi*, 66: 10-11 (1953), 12-28 (hereinafter cited as Sato, "Shokyokusei to sekkyokusei").

³⁴³ See Sasaki, "Tenno no kokkateki shochosei," 168; Kawamura, *Kokuminshuken to minshushugi*, 99-100; Yokota, *Tennosei*, 62. However, for example, Minobe interpreted the provision of the symbolic *tenno* institution as having a legal effect that the people were under obligation to respect the *tenno*. Minobe, *Kihongenri*, 66; Minobe, *Genron*, 221.

University, wrote an essay on the oversimplification of problems over the *tenno* institution in August 1952. He pointed out there was a great discrepancy between the constitutional principle of the symbolic *tenno* institution and the sociological function of integration the *tenno* had actually played because he believed that while the Constitution of Japan had not offered appropriate forums for the *tenno*'s function of integration, people heatedly welcomed the *tenno* when he toured all over Japan.³⁴⁴ Kuroda examined the integrating function in monarchy and drew conclusions that this function had nothing to do with his or her political powers and abilities, that this function was well performed in ceremonies, that his or her qualities and historical tradition as background were closely related but that monarch had to hold at least the status of monarch to perform this function well.³⁴⁵ In Kuroda's view, a monarch played a symbolic role in integrating the people, like a national flag or historical monuments. Unlike them, however, the monarch appeared as not a thing but a personality before the people. The great personality of a monarch could lead to integrating the people well and this was called charismatic rule. Kuroda saw the symbolic and the charismatic as conflicting with each other because charismatic rule came down to the rule of man, not law.³⁴⁶ The *Tenno Showa* in the Meiji constitutional system was typical of charisma. In his understanding, reflection of that system had come to remove all political powers vested in the *tenno*.³⁴⁷ In the new constitutional system, however, he argued, the *tenno* was neither a monarch nor the head of the state nor the source of legitimacy of political power. Because the *tenno* had neither reigned nor governed, he continued, the matters of state listed in the new constitution that the *tenno* plays were merely formal and ceremonial.³⁴⁸ Thus Kuroda concluded that while the whole constitutional structure had placed emphasis upon denial of the *tenno*'s power, it did not increase the symbolic function of the *tenno*.³⁴⁹ In this understanding, as a

³⁴⁴ Kuroda, "Kajyo"; Kuroda, "Kenpojyo no chii."

For the strategy of the *tenno*'s visit on all over Japan in order to settle the newly established symbolic institution, see Sakamoto Kojiro, *Shocho tennosei heno pafomansu*.

³⁴⁵ Kuroda, "Kajyo," 12-13.

³⁴⁶ Kuroda, "Kajyo," 13-14; Kuroda, "Kenpojyo no chii," 7-13.

³⁴⁷ See the Constitution of Japan, art. 4.

³⁴⁸ Kuroda, "Kajyo," 14.

³⁴⁹ Kuroda, "Kenpojyo no chii," 16.

matter of constitutional logic, whereas the *tenno* is supposed to be the symbol of the state and the unity of the people, there is no substantial room for him to play a symbolic function for integrating the people. But as a matter of fact, the *tenno* plays an important role in social and political processes.

Sato Isao raised a question about the premise Kuroda had set.³⁵⁰ Kuroda assumed that a symbolic function of monarch was well performed only when the monarch was even nominally vested with the power to reign. Sato first disagreed with Kuroda that the integrating function of the symbol involved the status of monarch.³⁵¹ Sato believed that the symbolic function was well performed all the more because a symbol was unable, powerless and passive. In this respect, Sato argued, the current *tenno* was more appropriately symbolic than a *tenno* with absolute authority and the wide political powers of the Meiji constitutional system.³⁵²

While he admitted the positive side of a symbol Kuroda argued for, Sato contended that when what a symbol symbolizes had an undisputable and unequivocal meaning, it was worth a real symbol. On the other hand, when what a symbol symbolized was unstable and contestable, various people expected the symbol to have a positive effect in different ways and thus the symbol could not integrate the people as it was supposed to do.³⁵³ In this respect, Sato argued, the *tenno* as the symbol of the unity of the people was considered unstable and understood as carrying many different meanings divided by people who saw the symbol. Furthermore, although the *tenno* in the new constitution had been deprived of all political powers and vested with formal and ceremonial roles, he continued, there were ample dangers that the authority of the *tenno* from the prevalent image of the old *tenno* might be abused in the political process. Because of the failure of the Meiji constitutional system, Sato inferred, the new constitution rejected integration through the *tenno*'s personality as a dangerous phenomenon.³⁵⁴ In conclusion, the matters of state enumerated in the

³⁵⁰ Sato, "Shokyokusei to sekkyokusei"; Sato Isao, "Shocho no kinou ni tsuite," *Koho Kenkyu*, no. 10 (1964), 20-23.

³⁵¹ Sato, "Shocho no kino nitsuite," 20.

³⁵² Sato, "Shokyokusei to sekkyokusei," 18.

³⁵³ Sato, "Shokyokusei to sekkyokusei," 22-23.

³⁵⁴ Sato, "Shokyokusei to sekkyokusei," 26.

postwar constitution offered no small room for performing the symbolic function of the *tenno* well.³⁵⁵

This controversy has again clarified the socio-psychological nature of the symbolic *tenno* institution.³⁵⁶ The constitutional provision itself does not guarantee the institution to function well.³⁵⁷ To be sure, it is always the case with constitutional law, which is inevitable as the fundamental law of the state. However, it is truer of the clauses on the symbolic *tenno* institution because a lot of attention had been paid to its very existence since acceptance of the Potsdam Declaration. Whatever position one might take toward the newly introduced symbolic *tenno* institution, its emotional cost was extremely high because the idea of the *tenno* in one line unbroken for ages eternal had controlled every aspect of the values of an individual's life.³⁵⁸ The controversy has well shown the necessity of exploration of a question of under which conditions what has provided for the symbol in the new constitution can display adequately its function.

The twist the debate has indicated has also revealed a complicated feature of the problem. Whereas Kuroda understood that the symbolic *tenno* could play a positive role in integrating the people under certain conditions, Sato was pessimistic about its positive function due to the division of images the symbol brought. While Kuroda did not understand that the new constitution expected the symbolic *tenno* to perform a function of integration on a socio-psychological level, moreover, Sato recognized that the constitution expected the symbolic *tenno* institution to play an integrating function. Kuroda believed that the integrating function of the symbol could work only upon the minimum premise that the *tenno* even nominally held the status of monarch and the head of state and thus pointed out that the constitution had provided the symbolic *tenno* with no room for playing the integrating function. Believing so, he placed emphasis upon socio-psychological conditions around the symbol. He argued that constitutional provisions on the symbol would produce no

³⁵⁵ Sato, "Shocho no kino nitsuite," 21.

³⁵⁶ Sato Isao, "Tenno no shochosei: Tennosei giron (Symbolicness of the *Tenno*: Debates on the *Tenno* System)," *Jurist*, May 15, 1957, 2-7, 4-5; Yokota Koichi, "Shocho tennosi (The Symbolic *Tenno* System)," *Horitsu Jiho*, no. 481, May 1969, 29-35, 33.

³⁵⁷ Article 1 of the Constitution of Japan reads: "The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power."

³⁵⁸ See Chapter 1.

integrating function by themselves.³⁵⁹ Meanwhile, Sato stated that the matters of state the new constitution has vested with the symbolic *tenno* were the ultimate forms of nominal powers a monarch usually enjoys.³⁶⁰

Both Kuroda and Sato agreed that it had to be avoided that the symbolic *tenno* institution would become charismatic in the postwar constitutional system. They disagreed with each other on the conditions under which the *tenno* institution could play a healthy function of integration as the symbol. The written constitution was not believed to help much in exploring such conditions. The political circumstances of the time inevitably influenced the conditions under which the symbol actually functioned. Although there were a few efforts to minimize the charismatic influences of the symbolic *tenno*,³⁶¹ the predominant nostalgic conservative forces attempted to interpret to the maximum the matters of state the symbolic *tenno* was supposed to perform so as to emasculate the spirits of the new constitution. For example, the government tried to treat the *tenno* in the diplomatic context as if he were the head of the state. As discussed above,³⁶² the *tenno* has no powers related to government and can perform only the matters of state enlisted in the constitution with the advice and approve of the cabinet.³⁶³ Thus the *tenno* can play a formal and ceremonial role. In the area of foreign affairs, the cabinet assumes responsibility for substantial decision-making.³⁶⁴ After decisions made by the cabinet and with its advice and approval, the *tenno* attests the full powers and credentials of ambassadors and ministers.³⁶⁵ As a matter of constitutional logic, it is the cabinet that issues the full powers and credentials of diplomats. As a practice, however, it looks like the *tenno* creates the documents.³⁶⁶ Indeed, there has always been great temptation for the conservative

³⁵⁹ Kuroda, “Kajyo,” 14-15; Kuroda, “Kenpojyo no chii,” 17-18. When he lived in Germany in 1927-28, Kuroda witnessed that while few houses raised the flag for the Weimar republic, many did the flag for the first German empire.

³⁶⁰ Sato, “Shocho no kino nitsuite,” 21.

³⁶¹ As we have discussed, Yokota Kisaburo represented this school of thought. See this Chapter this section.

³⁶² See this Chapter section 2.

³⁶³ The Constitution of Japan, arts. 4 & 3.

³⁶⁴ The Constitution of Japan, art. 73 (ii).

³⁶⁵ The Constitution of Japan, art. 7 (v).

³⁶⁶ For the format, see Yokota Koichi, *Kenpo to tennosei (The Constitution and the Tenno System)* (Tokyo: Iwanami

government to utilize the symbolic *tenno* institution for political causes.

In the next section, we will examine an interesting legal case that is understood as a good example of how great an influence even the symbolic *tenno* institution had upon the exercise of the precious right of free expression. The case reflects the complicated mixed components of the presumably democratic political process in postwar Japan: the reasons and passions of the people.

10. The Placard Case: The Symbolic *Tenno*, Free Speech, and the Emergence of New Politics

The case was about old lese majesty in the new constitutional system. On May 19, 1946, a popular mass meeting to gain rice (so-called the Food May Day) was held. In the demonstration, a communist worker at a machine factory carried a placard that mocked the *tenno*.³⁶⁷ The placard read:

Imperial Edict (Hirohito says)
The *kokutai* has been maintained.
I stuff
myself.
You people,
starve to death.
Imperial sign and seal (in *katakana*)
The Japan Communist Party Tanaka Precision Machine Cell³⁶⁸

He was indicted for lese majesty.³⁶⁹ In a sense, the very indictment was astonishing because the liberation that GHQ had pushed seemed to face severe limitations.³⁷⁰ People were curious to know whether courteous freedom alone deserved celebration or people themselves could define the meaning of freedom in the new era.

On November 2, 1946, just one day before the promulgation of the Constitution of Japan,

Shoten, 1990), 83-84.

³⁶⁷ For the placard incident, see John Dower, *Embracing Defeat*, 266-267. He estimates this incident “captured many of the ambiguities of Food May Day---spontaneity from below, a curious mocking of the emperor while appealing to him, and the emperor worship of the Americans themselves.” *Ibid.*, 266.

³⁶⁸ The back of the placard read “Why are we starving, however hard we work? Answer, Tenno Hirohito!”

³⁶⁹ Penal Code, art. 74 read: “Acts of an insulting and disrespectful nature committed against the Emperor, the Emperor's Grandmother, the Empress Dowager, the Empress, or the Imperial Son or Grandson who is the heir presumptive to the Throne shall be punished with penal servitude for a period of not less than three months and not exceeding five years.”

³⁷⁰ Dower, *Embracing Defeat*, 267.

the Tokyo district court found him guilty of defamation of the *tenno*, not lese majesty, and sentenced him to imprisonment with labor for eight months.³⁷¹ On October 9, after the indictment and before the judgment, in fact, MacArthur made a comment on the decision of the prosecutor's office not to prosecute other cases of lese majesty.

The decision of the Japanese procurators to drop accusations against men charged with lese majeste is a noteworthy application of the fundamental concept, embodied in the new constitution just adopted by the National Diet, that all men are equal before the law, that no individual in Japan---not even the Emperor---shall be clothed in legal protection denied the common man. It marks the beginning of a true understanding of the lofty spirit of the new national charter, which affirms the dignity of all men, and secures to all the right freely to discuss all issues, political, social, and economic, of concern to the people of a democratic nation. For, the free interchange of ideas, the free expression of opinions, the free criticism of officials and institutions is essential to the continued life and growth of popular government. Democracy is vital and dynamic but cannot survive unless all citizens are free thus to speak their minds.

In his new role the Emperor will symbolize the repository of state authority---the citizen. The dignity of the state will become the dignity of the individual citizen, and the protection accorded him as the symbol of the state ought to be no more and no less than the protection accorded the citizen. To hold the contrary would constitute a direct negation of one of the basic principles of democratic government. It would but serve to perpetuate the pattern of feudalism and autocracy and do violence to those basic freedoms acknowledged by Japan and to which the Emperor himself has given most hearty accord.³⁷²

MacArthur emphasized the value of equality in the new political order and denounced lese majesty as special protection for the *tenno*. However, he did not forget to add that "all public officials be protected against unwarranted defamation or vilifications in licentious disregard of the respect to which they as free individuals in a free society and as the public representatives of a free people are fully entitled."³⁷³ MacArthur did not pay due attention to the values of free speech in a liberal democracy.³⁷⁴

The judgment of the Tokyo district court seemed to have followed this guidance of MacArthur. It recognized the fundamental change in the status of the *tenno* after Japan accepted the

³⁷¹ *Saiko saibansho keiji hanrei shu (The Reporter of the Supreme Court Criminal Decisions)*, vol. 2 no. 6, 602-607 (hereinafter cited as *Keishu*).

³⁷² SCAP Statement on lese majeste case, October 9, 1946, *Political Reorientation of Japan*, 759 in RM487.

³⁷³ SCAP Statement on lese majeste case, October 9, 1946, *Political Reorientation of Japan*, 759 in RM487.

³⁷⁴ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Potsdam Declaration. Special legal protection for the *tenno* had been abolished because the *tenno* had been regarded as an individual. Thus, the judgment said, the reputation of the *tenno* as an individual should be legally protected like everyone else's.³⁷⁵ As a result, it saw, defamation instead of lese majesty should be the legal issue there.³⁷⁶ Another problem was that while lese majesty was not, defamation was a crime indictable upon a complaint.³⁷⁷ The judgment ruled that prosecutors as a representative of the public interests could indict defamation cases unless it was against the *tenno*'s especially expressed will.³⁷⁸ On the other hand, the judgment did not attach importance to freedom of expression. Rights should not be abused and had to be exercised to enhance the public welfare. The judgment turned the legal issue into a moral problem when it said that free expression should have been exerted with moderation and courtesy.³⁷⁹ Whatever it might intend, anyway, the fact was important that the Tokyo district court denied lese majesty in postwar Japan.³⁸⁰ Both the defendant and prosecutor appealed to the upper court.

The very next day of the district court's decision, the Constitution of Japan was promulgated. And along with it, an imperial order of general pardon or amnesty was issued.³⁸¹ Those who were accused of lese majesty were amnestied. When amnesty was ordered, the power of public prosecution on pending cases would cease to exist and thus a court should grant a *menso*-adjudication (a kind of dismissal).³⁸²

On June 28, 1947, the Tokyo appellate court rendered a *menso*-adjudication.³⁸³ But the ruling challenged MacArthur and GHQ. Even after the amnesty was ordered, the appellate court continued

³⁷⁵ Penal Code, art. 232 par. 1.

³⁷⁶ *Keishu*, 2: 605.

³⁷⁷ Penal Code, art. 232 par. 2.

³⁷⁸ *Keishu*, 2: 606.

³⁷⁹ *Keishu*, 2: 605.

³⁸⁰ Alfred Oppler, the head of Courts and Law Division of the Government Section, GHQ, was strongly against the legal construction of the Tokyo district court that defamation on the *tenno* could be indicted by a public prosecutor representative of the public interest without complaint. Oppler, *Legal Reform in Occupied Japan*, 143-144.

³⁸¹ Chokurei, No. 511, November 3, 1946, *Keishu*, 2: 531. See also the Constitution of the Empire of Japan, art. 16.

³⁸² See *Onsha rei* (Ordinance of Pardon) (Imperial Order, no. 23, 1912), art. 2; *Onsha ho* (Law of Pardon) (Statute, no. 20, 1947), art. 3. See *keishu*, 2: 531-532.

³⁸³ *Keishu*, 2: 607-612.

a substantial trial. The ruling surprisingly found the conduct of the defendant constituted lese majesty. The ruling believed that lese majesty had two functions. One was to protect respect for the sacred and inviolable *tenno* as the head of the state. This function was related to the protection of the *tenno* as sovereign. In this sense, it said, the people had entertained a deep conviction that to maintain respect for the *tenno* was equivalent to protection of the state itself. The second function of lese majesty was understood as protecting the *tenno* as a person. In this sense, lese majesty was interpreted as a special type of defamation concerning the *tenno*. Although acceptance of the Potsdam Declaration and the establishment of the new constitution had significantly changed the status of the *tenno* and thus abolished the first function of lese majesty, the ruling contended, its second function had not changed because the new constitution had given the *tenno* special status as the symbol of the state and the unity of the people and thus deserved special legal protection. Even under the new constitution, the ruling mistakenly pointed out, the *tenno* as the head of the state occupied a special diplomatic position and granted honors and held ceremonies.³⁸⁴ Guarantee of the *tenno*'s social status made its legal protection different from common citizens, which was tolerated by the new constitution because of its establishment of the symbolic *tenno* institution. As a result, lese majesty as a special crime of defamation of the *tenno* still existed. The Potsdam Declaration and GHQ directive did not affect the power of lese majesty, the ruling continued, because it had not officially been abolished or suspended yet.³⁸⁵

Like the district court, furthermore, the appellate court also despised free expression. It placed emphasis upon a moderate and courteous manner of exercising the right.³⁸⁶ The principle of popular sovereignty was not mentioned with freedom of expression. In conclusion, the appellate court dismissed the case after recognizing lese majesty. While the district court denied lese majesty in the new constitutional system, the appellate court refused to recognize the paradigmatic shift of sovereignty.

³⁸⁴ *Keishu*, 2: 609-610.

³⁸⁵ *Keishu*, 2: 610.

³⁸⁶ *Keishu*, 2: 611.

The defendant appealed to the Supreme Court to seek a judgment of not guilty. On May 26, 1948, a fractionalized Court dismissed the appeal.³⁸⁷ The majority by nine of fifteen justices relied upon a technical reason. They understood that *menso*-adjudication as formal, not substantial, namely if there was a decision of amnesty, which then removed the power of public prosecution, the court had to dismiss the case without examining substantially whether an accused act constituted a crime. The majority thus denied an appeal based upon claims that there were no accused facts or that the fact did not constitute a crime. The majority admitted that the judgment of the appellate court was illegal because it reviewed the substantial contents of the case. Because it eventually dismissed the case as formal adjudication, however, the Supreme Court should not reverse the judgment below.³⁸⁸ One justice maintained that the appeal should be dismissed because he believed that an appeal of *menso*-adjudication was impermissible. Moreover, he contended that it was a substantial judgment and that lese majesty as a special crime of defamation on the *tenno* was still effective until it was clearly repealed.³⁸⁹ Two justices interpreted the appeal as legal but substantially argued that the defendant was guilty of lese majesty.³⁹⁰ These three justices took the same position on merits of the case as the original judgment.

Two other justices agreed with the defendant that the appeal was legal. Like the majority, they understood the original judgment was illegal because it reviewed the case substantially despite the amnesty. Unlike the majority, however, they believed that the illegality of the original judgment was so serious that the Supreme Court should reverse it and render a formal *menso*-adjudication by itself.³⁹¹ One justice explicitly pointed out that acceptance of the Potsdam Declaration had fundamentally transformed the status of the *tenno* and thus he argued that since then lese majesty had been void regardless of a formal procedure of repealing the crime. In his view, this understanding was conformable to the democratic thought that all people are equal before the law.

³⁸⁷ *Keishu*, 2: 529-560.

³⁸⁸ *Keishu*, 2: 533-536.

³⁸⁹ *Keishu*, 2: 547-551.

³⁹⁰ *Keishu*, 2: 551-557.

³⁹¹ *Keishu*, 2: 538-543, 543-547.

The new constitution declared the principle of popular sovereignty and the symbolic *tenno* system based upon the principle. He believed that a feudalistic idea was so obsolete that the dignity of the *tenno* could not be protected without the threat of criminal punishment. Thus he insisted that the Court should reverse the original judgment and declared the defendant's innocence.³⁹²

Resorting to legal technicality,³⁹³ the majority of the Supreme Court avoided the controversial issue on relation of the symbolic *tenno* system to lese majesty. By doing so, as a result, the majority did not reverse the construction of lese majesty as the special defamation of the *tenno* the Tokyo appellate court affirmed. Thus twelve of fifteen justices did not disagree that even the symbolic *tenno* should deserve special legal protection. They did not care about the most profound relationship between the principle of popular sovereignty and freedom of expression. A special legal protection such as lese majesty seriously conflicts with the idea of the precise examination of all kinds of political authority by the people themselves, which must be the basic principle for popular sovereignty. The very idea of lese majesty should have become obsolete under the principle of popular sovereignty. However, the inferior courts and the Supreme Court in this case failed to appreciate fully what free expression means in a liberal democracy. Therefore, this case well shows how powerful the old way of thinking was even in the new era.

At the same time, however, this case also indicates that a new era had come. Thanks to a new system of disclosing the opinions of justices,³⁹⁴ the fractionalized Supreme Court itself became evidence that justices could not reach an agreement. In a sense, the majority might feel uncomfortable about expressing their opinion of punishability of lese majesty in the new constitutional idea and thus might restrain themselves from doing so. Moreover, there were dissenting opinions in the case. An ideological monolith became merely a fading myth. One justice

³⁹² *Keishu*, 2: 557-559.

³⁹³ Before this case, *menso*-adjudication was commonly regarded as a substantial judgment, which dismissed what was found guilty. This Supreme Court decision has changed understanding of nature of *menso*-adjudication to a formal judgment. See Yokota Koichi, "Tenno to fukeizai (The *Tenno* and Lese Majesty)," Kenpo hanrei kenkyukai, ed., *Nihon no kenpo hanrei (Japanese Constitutional Law Cases)* (Tokyo: Keibundo, 1969), 373-394.

³⁹⁴ *Haibanshoho* (Court Organization Law), art. 11.

clearly declared the accused innocent because lese majesty had already lost its legal power to protect the *tenno*. The Japanese people now lived in a world where people disagree with one another over important political matters. Thus politics has to be based upon public discussion. This is fundamentally different from the prewar system in which the idea of the *kokutai*, the sovereign *tenno* in one line unbroken for ages eternal, had deeply restricted people's way of thinking. However influentially the outdated ideas might have lingered, it was also true that public discourse on important political issues had been fundamentally transformed. The very *tenno* institution had become an object of public discussion. Postwar Japan had finally come into a regime of legitimating political power endlessly through making efforts to persuade others by speech.

11. Conclusion

The public discourse on constituting a political order during the early postwar period is best described as a self-conscious confrontation between continuity and discontinuity between the prewar and postwar constitutional systems. Whatever its origins might have been, the Constitution of Japan is really innovative in respect of sovereignty. The people who once were only subjects of divine rule of the *tenno* are now sovereign.³⁹⁵ The status of the symbolic *tenno* institution depends upon the general will of the sovereign people.³⁹⁶ Conservatives could not receive straightforwardly the alternation the new constitution had brought because they were all charmed with the *kokutai* ideology for a long time. This was true with old liberals such as Minobe and Tsuda. Most of the intellectuals of the time were prisoners of the *kokutai*. Thus arguments for continuity between the two constitutions were influential in public discourse. No matter how limited and weak it might have been, however, frank recognition of discontinuity was also steadily advocated.

In the last section, we discussed the Placard Case, which, among other things, indicated

³⁹⁵ See the Constitution of Japan, preamble par. 1.

³⁹⁶ See the Constitution of Japan, art. 1.

that a new age had come.³⁹⁷ The case arose from the Food May Day activities on May 19, 1946, in which about 250,000 people gathered to participate in a demonstration to get rice.³⁹⁸ They went to the imperial palace to ask the *tenno* for delivery of rice. Such a direct action of people showed the arrival of a new era. This episode also indicated that people had a feeling that the merciful *tenno* might help people in trouble. Although politicians sounding the *tenno* might be self-interested, people somehow believed that the *tenno* as their father would listen to their distress. This feeling was a reflection of prewar ideology of *chu* (loyalty) and *ko* (filial piety). On May 24, the *Tenno Showa* (*Hirohito*) delivered a speech on the food crisis. The food speech was much less influential than his speech on ending the war on August 15 one year before. Social disorder immediately after the defeat in the war caused many people to concentrate on a private life that was very difficult to sustain. The old style of relation of order and subject did not necessarily work well in the new and confusing situation.

In the speech, the *tenno* expressed his desire: “I sincerely desire and expect that on this occasion the people will live in the beautiful tradition as the family state, overcome difficulties of today beyond individual interests, and make their way toward reconstruction of the homeland.”³⁹⁹ However, people who were starving to death could not reverently listen to what the *tenno* said. They wanted not a spiritual speech but something to eat.⁴⁰⁰ They expected the *tenno* as sovereign to present concrete measures to solve the food crisis. Their expectation was betrayed.⁴⁰¹ After the speech, there

³⁹⁷ See this Chapter section 10.

³⁹⁸ For the details of the incident, see Dower, *Embracing Defeat*, 259-267.

³⁹⁹ See Kawashima Takame, “Sengo minshuka niokeru chitsujyo ishiki no keisei (The Formation of Japanese National Integrity in the Postwar Democratization),” *Nihon Seiji Gakkai*, ed., *Nashonarizumu no genzai, Sengo nihon no seiji (The Current Situation of Nationalism, Politics in Postwar Japan)* (Tokyo: Iwanami Shoten, 1994), 139-153, 149 (hereinafter cited as Kawashima, “Chitsujyo ishiki no keisei”)

⁴⁰⁰ Kawashima, “Chitsujyo ishiki no keisei,” 150.

⁴⁰¹ In stead, MacArthur helped the starving Japanese people. On the one hand, MacArthur warned the Japanese people that he would not tolerate mob demonstrations on May 20 and saved from the situation Yoshida Shigeru, who once almost gave up forming a cabinet because of severe popular criticism. Because the demonstration involved no serious violence whatsoever, MacArthur’s announcement helped conservatives to stay in power. On the other hand, he decided to deliver the Japanese people food that was imported from the United States. Many Japanese people now saw an image of father in MacArthur. He developed a charisma during his term in Japan. Japanese people wrote many letters to him. See Sodei Rinjiro, *Haikei Makasa gensui sam: Senryoka nihonjin no tegami (Dear General MacArthur: Letters of Japanese People during the Occupation)* (Tokyo:

disappeared popular appeals and petitions to the *tenno* for actual claims.⁴⁰² Many people had come to realize that the family view of the state was fictitious. This showed that something important was happening in the political system. The Meiji constitutional system was supported by the ideology of loyalty and filial piety. However, they were fading virtues in the new era and had no longer functioned well as reigning ideology. A new idea for a governmental system was desperately needed in the new era.

A new trend also emerged about the role of the *tenno* in an educational context. The *Kyoiku Chokugo* (Imperial Rescript on Education) was issued for the purpose of offering a moral foundation for the Meiji constitutional regime.⁴⁰³ *Chu* (loyalty) and *ko* (filial piety) were regarded as the most important virtues for propping the empire of Japan. “Our subjects ever united in loyalty (*chu*) and filial piety (*ko*) have from generation to generation illustrated the beauty thereof. This is the glory of the fundamental character of Our Empire (*kokutai no seika*), and herein also lies the source of Our education (*kyoiku no engen*).”⁴⁰⁴ The new constitution clearly conflicts with the basic idea of the Rescript. After many twists and turns, on June 19 and 20, 1948, the House of Representatives and House of Councilors voted for resolutions on rescinding and confirming the lapse of the Imperial Rescript on Education, respectively.⁴⁰⁵ On September 22, 1951, in its place, Amano Sadahiro, Minister of Education in the third Yoshida Shigeru cabinet, announced his private plan of an outline of national practices.⁴⁰⁶ He contended that the spirit of morality as an independent state would require individuals to realize the dignity of personality of both themselves and others and that the individual mind, knowing what was fair and square, would require the state to be fair and square,

Iwanami Shoten, 2002, 1985).

⁴⁰² Kawashima, “Chitsujyo ishiki no keisei,” 150.

⁴⁰³ See Chapter 1.

⁴⁰⁴ The Imperial Rescript on Education (*Kyoiku ni kansuru chokugo*), translated in Gluck, *Japan's Modern Myths*, 121.

⁴⁰⁵ For the details of problems over the Imperial Rescript on Education in the new constitutional regime, see Sato Isao, “‘Dotokuteki chushin toshitenno tenno’ toiu kannen (The Concept of ‘the Tenno as the Center of Morality’),” *Kenpo kaishaku no shomondai (Problems in Constitutional Interpretation)* (Tokyo: Yuhikaku, 1953), 24-53, 25-36 (hereinafter cited as Sato, “Dotokuteki chushin”). For the resolution on rescinding the Imperial Rescript on Education, see Political Reorientation of Japan, 585, RM522.

⁴⁰⁶ For the details of Amano’s plan, see Sato, “Dotokuteki chushin,” 36-39.

which would lead to the spirit of harmony. He enumerated various virtues regarding individuals, *ie* (household), society, and state. As expected, Amano emphasized the role of the *tenno* in rebuilding national morality. The outline enlisted the *tenno* and the ethics of the state, among other things. It read: “Japan has the *tenno* as the symbol of the state. The existence of the *tenno* in the long tradition is distinctively characteristic of Japan. The status of the *tenno* holds a character of the center of morality as the symbol of the state.” “The soul of the state resides in moral principles. The essence of the state is deeply based upon its ethical character rather than political and economic character. The *tenno* has unselfish moral character and thus the status of the *tenno* symbolizes the fundamental character of the state.”⁴⁰⁷

Amano’s plan was an attempt to moralize postwar Japan by utilizing the symbolic *tenno*. His argument seemed similar to the thesis of the *tenno* as *akogare no chushin* (the center of adoration) a former minister of state Kanamori Tokujiro had developed in the ninetieth Imperial Diet as a quasi-constitutional convention. However, they were different from each other. While Kanamori as a matter of fact argued that the *tenno* was the center of morality of the people, Amano attempted to introduce guidance that the *tenno* ought to be the center of national morality. The idea that the *tenno* has a moral and ethical character easily led to deification of the *tenno*.⁴⁰⁸ That was why many people were worried about Amano’s outline of national practices. Faced with broad criticisms, Amano eventually withdrew his private plan.

This episode vividly indicates, on the one hand, that the symbolic *tenno* system is different from the sacred and inviolable *tenno* institution and, on the other hand, that there are always temptations for political power to utilize the *tenno* to mobilize the people for certain purposes. Because the cabinet is responsible for matters of state the symbolic *tenno* is supposed to perform,⁴⁰⁹ it depends upon the character of cabinets whether the role of the symbolic *tenno* institution will expand or shrink. Mysterious connotations the word of symbol carries make it much easier for the

⁴⁰⁷ See Sato, “Dotokuteki chushin,” 38.

⁴⁰⁸ See Sato, “Dotokuteki chushin,” 45.

⁴⁰⁹ See the Constitution of Japan, art. 3.

cabinet to manipulate the institution.⁴¹⁰

In such situation, the Constitution of Japan started to regulate political processes. Its basic principle is simple and clear: “Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.”⁴¹¹ Required liberal democratization of politics was only realized through its transformation to mutual persuasion by speech. The postwar constitution has established a base line for it.

Ukai Nobushige once articulated the essence of the *tenno* system provided for in the Constitution of Japan. “The status of the *tenno* as the symbol of the state and of the unity of the Japanese people the Constitution of Japan has provided for depends upon the political will and psychology of the people that decide a role the symbol should play. A problem cannot be determined by the letters of the constitution whether the status of the *tenno* is merely formal or also substantial. If the political will and psychology of the people and the government that now has the status of their representative wanted to give an important role to the symbolic *tenno*, the *tenno* could be substantial in such a way, despite its formal and ceremonial functional provisions of the postwar constitution.”⁴¹²

The constitutional principle of popular sovereignty with the symbolic *tenno* institution is a product of political compromise among complicated internal and external elements after World War II. No matter how similar the new symbolic *tenno* institution might seem to the old one, they are fundamentally different from each other. With the principle of popular sovereignty, the political will of the people, not the *tenno* must prevail. The postwar constitution anyway overcomes the most serious difficulty the Meiji constitutional regime had suffered from.⁴¹³ The new constitution has taken the *tenno* system into a constitutional frame. The substance of the symbolic *tenno* institution

⁴¹⁰ For the mysterious character of a symbol, see Ukai, “Shocho to daihyo,” 12.

⁴¹¹ The Constitution of Japan, preamble, par. 1.

⁴¹² Ukai Nobushige, “Kenpo niokeru tenno no chii,” *Shiso*, no. 336, 1952, reprinted in *Shocho to daihyo*, 14-25, 25.

⁴¹³ See Chapter 1 section 9.

thus all depends upon the political will of the people. The external imposition theory and the internal continuity theory are unable to offer persuasive arguments on these ongoing struggles over the internalization of liberal democratic values in postwar Japan. Rather, the Japanese constitutional experience here is best understood as more dynamic. In fact, making the postwar constitution has been an incomplete constitutional revolution. Its fulfillment has relied upon no one but the Japanese people themselves.

Conclusion

An Unfinished Constitutional Revolution

As of November 2003, the Constitution of Japan has been effective for fifty-six and a half years. The Meiji Constitution was good for the same period. Thus, the postwar constitution has enjoyed a longer life than its predecessor by the end of 2003. This longevity is somewhat amazing when we recall its bizarre origins.

While the Japanese government, enchanted with the *kokutai* ideology, failed to create a new constitutional order that was appropriate for the era after the defeat in war, the intellectuals on the periphery of the established regime presented an innovative idea of popular sovereignty with a ritualistic *tenno* institution. Then, GHQ intervened in the process of constitutional making to protect the *tenno* system from international harsh public opinions and to execute its occupational policy smoothly. The Japanese government had no clear vision without retention of the *kokutai* and thus could not help accepting GHQ's draft, which turned out to serve the government's basic cause. However, the government did not obediently follow it but attempted to japanize it as much as possible, and in fact succeeded in part.¹

The government failure did not necessarily mean that there were no innovative experiences at all for the Japanese people. The Japanese people as a whole were compelled to be confronted with the crucial problem of constituting freedom for the first time in their history, even though GHQ carefully controlled the flow of information by censorship. In the ninetieth Imperial Diet, women and leftists along with traditional conservative men participated in deliberating the fundamental organization of the political order, although GHQ also intervened in clarifying the principle of popular sovereignty because the Japanese government intentionally used ambiguous phrases. The process of making the postwar constitution followed the procedure the Meiji Constitution provided for. The American and Japanese conspiracy deprived the Japanese people of a valuable opportunity

¹ See Chapter 3 section 4.

to participate directly in creating the fundamental order. As a result, the Constitution of Japan was established as a total revision of the Meiji Constitution, even though the two constitutions fundamentally differ in their basic political philosophy. Then the Japanese government tried to pretend that constitutional discourse had continued despite the change of the name of the constitution. Although it was given an opportunity to review the new constitution between May 3, 1948, and May 3, 1949, as a policy of the Far Eastern Commission, further, the Japanese government did not take any substantial actions for review and revise the newly established constitution.²

Conservatives have severely criticized the postwar constitution since Japan recovered her independence. Its bizarre origin definitely makes a considerable contribution to conservative attacks. Conservatives argue that the postwar constitution is made in the USA and that Japan needs a constitution that expresses more indigenous values.³ They insist that the *tenno* should be the head of state and that the guarantee of rights in the postwar constitution is too individualistic to destroy traditional communal virtues. Obligations or the public welfare rather than rights should be emphasized in their opinion. Article 9, with its denunciation of war and armed forces has been always a target of vigorous criticism. For the conservatives, Article 9 is the symbol of the limited sovereignty of postwar Japan.⁴ Wars of self-defense and of international sanctions as the natural right of an independent state should have not been denounced.

The conservative campaigns for constitutional amendments from 1950s have never gained enough momentum to initiate an amending bill in the Diet.⁵ In 1955, conservatives united to form the Liberal Democratic Party. One of main reasons for this realignment was to establish an autonomous and indigenous constitution.⁶ The next year, the LDP took the leadership in creating

² See Chapter 4 section 9.

³ For the conservative attacks upon the postwar constitution, see Watanabe, *Nihonkoku kenpo 'kaisei' shi*.

⁴ See e.g., Eto, *1946 nen kenpo*, 7-101.

⁵ See the Constitution of Japan, art. 96. For the process of constitutional amendment under the postwar constitution, see Chapter 4 section 8.

⁶ For the platform of LDP, see Watanabe, *Nihonkoku kenpo 'kaisei' shi*, 286-287.

the *Kenpo Chosakai* (the Commission on the Constitution) in the cabinet.⁷ The Socialist Party decided not to participate in the Commission because it believed that the Commission was nothing other than a plausible excuse for a conclusion already determined. On August 13, 1957, at length, the Commission on the Constitution started its activities. About seven years later, on July 3, 1964, the Commission finished its work and submitted its final report to Prime Minister Ikeda Hayato. From a revisionist point of view, the final report was disappointing. The report did not recommend the creation of an independent and indigenous constitution but juxtaposed both revisionist and preservationist opinions in the process of enactment and current problems with the postwar constitution. The political intention to revise the constitution at its establishment had disappeared. The Commission had instead become a more academic study institution. The leadership of Chairman Takayanagi Kenzo greatly contributed to this transformation. Takayanagi, a professor of Anglo-American law at the University of Tokyo, in fact participated in deliberation on the postwar constitution in the House of Peers. Interestingly enough, he himself not only strongly opposed the external imposition theory but also proposed a Japanese-American collaboration thesis. His position is well expressed in the following quotation. Though long, it is worth rereading:

If we make a generalized judgment on the basis of the circumstances which have become clear as a result of the investigation of the facts carried out by this commission, then, it is unfair to characterize the present Constitution as having been imposed by an army occupation.

The question of whether or not the Constitution was “imposed” must be discussed from a number of different aspects. The first is that of the acceptance of the Potsdam Declaration. Because there can be no doubt that it can be regarded as the fountainhead of the present Constitution and that it was accepted by the government of Japan as a result of a lost war, it can be said that the declaration was forced on Japan by the Allies. Also it was enforced by the Japanese government under the supervision and direction of SCAP [Supreme Commander for Allied Powers]. Accordingly, because the power to decide whether the draft constitution prepared by the Japanese government was in accord with the provisions of the Potsdam Declaration resided in SCAP and ultimately in the Far Eastern Commission, the fact that the Japanese government was not completely free will be contested by no one. Regarded from this aspect, it can be said that the enactment of the present Constitution was forced on Japan.

The second aspect is that of the so-called transmission of the MacArthur draft.

⁷ For the *Kenpo Chosakai*, see John M. Maki, *Japan's Commission on the Constitution: The Final Report* (Seattle: University of Washington Press, 1980); Watanabe, *Nihonkoku kenpo 'kaisei'shi*, 305-306, 314-321, 364-440.

The emphasis of the “imposed constitution” argument is on whether that draft was imposed, ordered, or recommended. But it is impossible to conclude directly that there was force in this second aspect from a recognition that there were elements of force in the first aspect above.

Thus, the problem here concerns the power of General MacArthur but in this case also a distinction must be made between the legal dimensions of his authority and its actual exercise. Thus, it is a fact that General MacArthur possessed the legal authority to impose orders and force on the Japanese government. But this is a problem of two different dimensions, namely, the fact of legal authority itself and his actual exercise of it.

If we look at the aspect of the actual utilization referred to above, General MacArthur’s actions at the time of the enactment of the Constitution assumed the following form: the presentation to the Japanese government of the MacArthur draft as the first draft, the request for the opinions of the Japanese side in respect to it, and the acceptance and inclusion of the items in house opinions which could be endorsed. This differs from a one-sided imposition of orders; moreover, the fact that GHQ acted in accordance with this strict differentiation between these two forms can be recognized because at the time of the transmission of the MacArthur draft it was very definitely stated that it was not an “order,” but “advice.” Considering the matter thus, it is erroneous to view the MacArthur draft as having been forced on the Japanese side by SCAP. The present Constitution must be termed a result of the collaborative efforts of Japan and America.

Even when we turn our attention to the content of the Constitution, it must be considered a Japanese-American collaborative Constitution. For example, at the same time that politically, a considerable effort on General MacArthur’s part went into the maintenance of the emperor system and on the technical legal side the efforts of the GHQ legal experts were worked in to the present Constitution, also on the Japanese side the efforts of Prime Minister Shidehara must be highly valued both in regard to his expounding to General MacArthur of the principle of the renunciation of war, but also in regard to his decision to follow the line of the MacArthur draft to defend the emperor system. Also on the technical legal side the wishes of the Japanese side were realized. As a reflection of facts like these, the Constitution was not something forced on us by an army of occupation. It was also not something created by the Japanese alone. In this sense, it must be considered as a constitution resulting from Japanese-American collaboration.⁸

In November 1963, Prime Minister Ikeda, a pragmatic conservative, publicly announced that he had no intention to amend the constitution during his term.⁹ In fact, the Socialist Party and other opposition parties occupied one-third of the seats in the House of Representatives,¹⁰ which meant that it was impossible for the LDP to amend the constitution without the consent of the Socialists.

⁸ Maki, *Japan’s Commission on the Constitution*, 224-225 ([...] added).

⁹ See Watanabe, *Nihonkoku kenpo ‘kaisei’shi*, 432-433.

¹⁰ After the general election on November 20, 1960, the LDP gained 300 seats (64.2%), while the Socialist Party the Democratic Social Party, and the Communist Party occupied 144 (30.8%), 17(16.2%), and 3 seats (2.5%), respectively. The opposition parties held 164 seats (35.1%). After the next general election three years later, the situation did not change. While the LDP shared 63% of the seats, the opposition parties occupied 36.8%. See Ishikawa, *Sengo seijishi*, 122-123.

Ikeda realized the postwar constitution had been assimilated by the people. Although the Commission consisted of those who supported constitutional revision more than those who were negative about it, the failure of revisionists might indicate that they were not a majority among the people. Constitutional revision no longer had a high priority over other important political and economic matters in policy selection. This conservative campaign ended in an anticlimax. In any event, the consent of two-thirds of the members of each house in the Diet is a burdensome requirement for partisan movements of constitutional amendment.

If we calmly consider the matter, we reach the conclusion that, in a sense, conservatives have mistakenly attacked the postwar constitution. In light of unavoidable intervention, it is they who gained maximum benefits from the new fundamental law for the time being.¹¹ They could maintain their beloved *tenno* institution anyway. Other scenarios all might have been much more devastating toward the traditional *tenno* system than the current constitution.

In any event, the assertion of the “imposed” constitution could not gain much support. It is important to ask why the conservative campaigns for an autonomous and indigenous constitution have failed so far. Indeed, some member of GHQ who participated in preparing the draft expected in 1946 that Japan would amend the postwar constitution soon after the occupation ended.¹² The expectation remains unfulfilled.¹³ The Japanese people have never amended the postwar constitution. We might say that they have never even taken any serious action for amendment because a law of popular referendum necessary for the amendment process has not been enacted yet for over fifty years.¹⁴ This is in sharp contrast to the experience of postwar Germany. The Bonn Basic Law has been amended more than forty-five times, although its amendment process significantly differs from

¹¹ See Tanaka Hideo, *Kenpo seitei katei obegaki (Notes on the Process of Making the Constitution of Japan)* (Tokyo: Yuhikaku, 1979), 175-178.

¹² For example, Milton J. Esman, who was a member of the executive committee in the Government Section for preparing GHQ’s draft, believed that “the new constitution would not outlast the military Occupation of Japan.” See Theodore McNelly, “Epilogue,” *The Origins of Japan’s Democratic Constitution* (Lanham, Md.: University Press of America, 2000), 173.

¹³ See Theodore H. McNelly, “‘Induced Revolution’: The Policy and Process of Constitutional Reform in Occupied Japan,” Ward & Sakamoto, *Democratizing Japan*, 103.

¹⁴ See Chapter 4 section 8.

the Japanese one in respect of popular referendum.¹⁵

The conservative campaign for an autonomous and indigenous constitution has failed partly because the external imposition theory does not necessarily correspond with what really happened in the process of making the postwar constitution. As I have argued in this dissertation, the process consists of rather complicated interactions. We should not forget that the *Kenpo Kenkyukai* (the Constitutional Research Group) and the *Kokumin No Kokugo Undo* (the People's National Language Movement) played a critically important role in framing the postwar constitution either indirectly or directly.¹⁶ In the thirty-hour marathon drafting meeting of March 4-5, 1946, Sato Tatsuo, a ranking legal bureaucrat, bravely challenged the Government Section to draft a Japanese text modeled upon the GHQ's plan for the conservative cause.¹⁷ The Japanese people with their first authentic universal suffrage elected their representatives for a quasi-constitutional convention. The representatives included, along with traditional conservative men, women who garnered seats in the lower house for the first time, socialists who were moderate but solid reformists, and communists who argued for a republican form of government. In the ninetieth Imperial Diet, representatives argued for and against organization of the fundamental political order. The Japanese people had never had such public deliberation ever before. They experienced freedom in creating a constitution of their own government. Thus, all in all, the Japanese side did important work for either progressive or conservative purposes. In sum, the external imposition theory oversimplifies what Japanese people actually did in the process of establishment of the new constitution during the occupied period.¹⁸

¹⁵ The Bonn Basic Law requires no popular referendum for constitutional amendment. See Chapter 4 section 8.

¹⁶ See Chapter 3 sections 2 & 3 and Chapter 4 section 2.

¹⁷ See Chapter 3 Section 4. See also, Koseki Shoichi "Japanizing the Constitution," *Japan Quarterly* 35: 3 (1988), 234-240.

¹⁸ Theodore McNelly, pioneer of the study of the postwar Japanese constitution in the United States, has expressed the same opinion: "While it cannot be denied that MacArthur's role was decisive in the formulation and ultimate enactment of the constitution, it is an oversimplification to assert that he arbitrarily "imposed" it to Japan. (1) First we note that he was acting on orders from the U.S. government and the Allied Powers to bring about the democratization of the Japanese government system. (2) Second, we note that the timing of his efforts was intended to protect the monarchy, which the overwhelming majority of the Japanese people

In relation to this, the failure of the conservative campaign for constitutional revision is also partly because basic political values embodied in the new constitution have taken deeper root in postwar Japan. The constitutional values are not entirely exogenous. For instance, the *Kenpo Kenkyukai* proposed a constitutional regime not only in which the people would have sovereign power and the *tenno* would be a ceremonial institution with no real governing powers but also in which the Japanese people would enjoy civil rights and civil liberties without reservation of laws. Kato Kanjyu conceived the ceremonial *tenno* as the symbol of harmony of the nation.¹⁹ Further, the *Kenpo Kondankai* (the Constitution Discussion Group) planned to introduce judicial review in its new constitutional system. Even denunciation of armed forces was once provided for in its first draft.²⁰ Three basic principles of the postwar constitution---due respect for fundamental human rights, popular sovereignty, and thorough pacifism---are all indigenous ideas among the Japanese people, although most of them were germinal and needed to be polished with help from outside. Thus the postwar constitution was not a bolt out of the blue but more or less not unfamiliar to the Japanese people. Its basic ideas had a solid ground for developing in postwar Japan. Therefore, many Japanese people are not sympathetic with the conservative accusation that the postwar constitution is foreign in essence.

We can point out another reason for constitutional stability. Immediately after the wartime

desired, from its abolition as demanded by some of the Allies. MacArthur, then was *advising* the Japanese government about the best way to achieve its primary objective in constitutional reform and warning them about the dangers to the monarchy if appropriate action was not taken.

(3) The Japanese cabinet's original proposals were vetoed by MacArthur because they did not meet the Allied criteria for democratic reform. (4) SCAP's Government Section, consulting Allied criteria and progressive Japanese thought, drafted a model constitution which would meet Allied criteria, and it became both by the basis of the new constitution. (5) This draft was modified both by the Japanese cabinet and then by the Japanese Diet. (6) MacArthur resisted efforts of the Allied Powers represented in the Far Eastern Commission to amend the proposed constitution and to make the final determination about whether it should be put into effect. Thus at this stage MacArthur sought to prevent imposition by the Allied Powers of their views." McNelly, "'Induced Revolution': The Policy and Process of Constitutional Reform in Occupied Japan," *The Origins of Japan's Democratic Constitution*, 28

¹⁹ See Chapter 5 section 3.

²⁰ When Inada Masatsugu and Unno Shinkichi, a lawyer and important member of the Socialist Party, prepared a draft of the Constitution Discussion Group, Unno proposed an article that "Japan shall be a cultural state possessing no armament." However, because of further discussion, Inada proposed to omit this article and to write pacifism in the preamble. See Koseki, *Tanjyo*, 76-78.

defeat the Japanese people tended to understand the postwar constitution as something that would bring a bright future to them. The small booklet of the *Kenpo Fukukai* for popularizing the Constitution of Japan was called *Atarashi Kenpo Akarui Seikatsu (The New Constitution, A Bright Life)*, twenty million copies of which were distributed to households throughout the land.²¹ The school textbooks edited by the Ministry of Education also emphasized that the Japanese people who now had a hard time because of their devastating defeat would be led to prosperity by the practice of democracy in every aspect of their life the new constitution tried to expand and strengthen.²² Although conservatives attempted to appeal in public discourse after the war to a nostalgic sense in the people, the Meiji Constitution came to be recognized in relation to war, despotism, and austerity. Although a life under the previous constitution might be described as too dark to correspond objectively to what actually occurred, the Japanese people clearly welcomed the postwar constitution as a prescription for a bright future.²³ It was believed to be connected to breaking off a past most people could not happily identify themselves with.

Charles Kades, deputy chief of the Government Section and one of key persons in making the constitution, expressed the same view on its durability.

[T]he constitution accurately caught the spirit and aspirations of the Japanese people. The people were heartsick and weary with war; they were resentful of military adventures abroad and police repression and thought control at home; they longed for peace and liberty and governmental recognition of the sanctity of life and the dignity of the individual. The constitution struck a responsive chord and answered those yearnings with its renunciation of war, with its declaration of both political and economic rights of both men and women, with its establishment of an independent judiciary to safeguard those rights, and with its proclamation that the people are sovereign. Although the people continued to respect the emperor, their respect ceased to rigid subservience to a sacred sovereign.²⁴

In this context, it is obvious that mere reverting discourse could not convince the people to mobilize

²¹ See Chapter 5 section 2.

²² See Chapter 4 section 3.

²³ See Tanaka Hideo, "The Conflict between Two Legal Tradition in Making the Constitution of Japan," Ward & Sakamoto, *Democratizing Japan*, 125-126.

²⁴ Charles L. Kades, "The American Role in Revising Japan's Imperial Constitution," 104 *Political Science Quarterly* 215-247, 243-244 (1989).

themselves for constitutional amendment.

Meanwhile, however, the claim that the postwar constitution well presents indigenous elements of political culture also has to be confronted by another trap with an easy answer: the internal continuity theory. Another kind of conservative argues that the postwar constitution is the best presentation of the true tradition of the Japanese people. For them, the Meiji Constitution is not a point to which the Japanese people should revert because it was deviant from authentic tradition. Rather, the pre-modern period is their favorite. The *tenno* had nothing to do with governmental power but continuously existed as a spiritual authority among the Japanese people. In their view, the postwar constitution is characterized as a restoration of this good old image of the *tenno*. If the concept of the people includes the *tenno* in the Japanese tradition, they argue, the *tenno* would share sovereignty with the people in the postwar constitutional regime. For them, Japan has been invariably a country of popular sovereignty. In any event, for conservative traditionalists, the symbolic *tenno* institution the postwar constitution has framed perfectly matches the traditional image of the *tenno*. Thus they contend that there is nothing new in the postwar constitution.

However, the formulation of the new constitution was essentially irrelevant to the restoration of a pre-modern system. When it accepted the Potsdam Declaration, the Japanese government agreed that a reconstruction of the political order in the postwar era had to be carried out based upon the ideas and terms of modern constitutionalism. Whether one likes it or not, thus, an analytical tool had to be modern, too. Establishment of a liberal democratic government, then, was an international pledge the Japanese government agreed to realize.²⁵ The postwar constitution is thus evaluated from the viewpoint of liberal democracy in a modern sense. The new constitution is founded upon a profound principle of due respect for human dignity as individuals. This principle is revolutionarily new in Japanese history. Although the Meiji Constitution partially introduced the Western concept of rights, the concept of the *kokutai*, that is, the government by the *tenno* in one line unbroken for ages eternal strictly limited rights because the inner freedom of individuals could not

²⁵ See McNelly, “‘Induced Revolution’,” *The Origins of Japan’s Democratic Constitution*, 28.

be protected under such a governmental system.²⁶ Respect for the human dignity of individuals did not make sense until the postwar constitution took the *tenno* into the constitutional framework. Furthermore, popular sovereignty is inconsistent with the traditional *tenno* institution. The latter did not need justification for its authority. The very notion of continuity to exist for a long time made it legitimate. As far as the symbolic *tenno* institution is based upon the sovereign will of the people,²⁷ this *tenno* institution unlike the old one has to be justified through public discussion. Because the people are plural, the sovereign power of the people must be exercised through the free exchange of ideas. Popular sovereignty and free speech are inseparably connected.²⁸ Thus in the process of creating a postwar constitution that is based upon the principle of popular sovereignty, the *tenno* system was seriously discussed and considered from different angles among the people. There had been no such discussion in Japanese history. Public deliberation on reasons and manners of the *tenno* institution was indeed unprecedented.²⁹ While conservative traditionalists contend that the sovereign people included the *tenno* in the Japanese traditional form of government, moreover, the contention has no solid base because togetherness, not confrontation, of the *tenno* and the people, allegedly unique to Japan might be merely a false idea deriving from the lack of consciousness of freedom, equality and above all dignity as an individual.³⁰ In sum, the internal continuity theory also did not pay due attention to a fundamental gap between the pre-modern *tenno* system and the symbolic *tenno* institution the postwar constitution has adopted and, further, oversimplifies complicated theoretical foundations of the latter. The internal continuity theorists trivialize the precious experience of the first republican moment for the Japanese people.

Therefore, both the external imposition theory and the internal continuity theory fail to

²⁶ See Chapter 1 section 5.

²⁷ See the Constitution of Japan, art. 1.

²⁸ See Alexander Meiklejohn, *Free Speech and its Relation to Self-Government* (New York: Harper & Brothers, 1948). See also, Chapter 4 sections 4 & 5.

²⁹ See Tsuneto Kyo, "Kaisei kenpo no kakumeiteki seikaku (Revolutionary Characters of the Revised Constitution)," *Shinkenpo to minshushugi (The New Constitution and Democracy)* (Tokyo: Iwanami Shoten, 1947), 80.

³⁰ Yokota Kisaburo, *Tennosei (The Tenno System)* (Tokyo: Rodo Junposha, 1949), 51-57.

appreciate the distinctive features of forming the new constitution in postwar Japan. The governing elite might feel MacArthur and GHQ imposed the postwar constitution upon them. If important constitutional writing occurs after extraordinary political achievements,³¹ a new constitution is a document for confirming the achievements that are more or less the break in political values with the old regime. Thus, leaders in the previous regime always tend to feel the imposition of a new constitution upon them. In this respect, the case of the Constitution of Japan is no exception. And, thus, the story about the formulation of the postwar constitution from the people's side could be very different from the official narrative. No matter how weak it might be, the creation of the constitution was an undeniable republican moment in history of the Japanese people. They as a whole were confronted with the fundamental problem in a political community of constituting freedom for the first time. They publicly discussed the organization of political power. They argued for and against the *tenno* institution, even its abolition. The publicly deliberated *tenno* institution is completely different from the traditional form of the institution. Through public deliberation among themselves, the Japanese people faced up to a difficult task of making the traditional authority relative. They had to turn something they had unconsciously accepted for a long time into an object of choice. Self-conscious confrontation with the object was necessary to achieve this. Here rationalization of politics has just begun. That is why I understand the process of making the postwar constitution as an unfinished constitutional revolution in Japan.

It was fair to say that the Constitution of Japan was framed in extraordinary circumstances. Undeniably, the postwar constitution was born under the enormous influence of MacArthur and GHQ. In fact, Japan was militarily occupied by the Allied Powers, especially the United States.³² That was the rough situation for the Japanese people, particularly the governing elite who had to negotiate with GHQ. However, Japan was defeated in a war she started. She accepted the Potsdam

³¹ See Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991); Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass.: Harvard University Press, 1998).

³² Even West Germany, which unlike the Japanese case, was directly occupied, had a more autonomous process of making the basic law.

Declaration, which meant that she imposed on herself the international obligation to liberally democratize the governmental process. Unfortunately, the Japanese government failed to come up with a reform plan that lived up to international expectations. For the government, the retention of the *kokutai* was identical to the fate of the state.³³ The particularistic value of the *kokutai* could not prevail over universalistic liberal democratization in the context of international pledges.

Perhaps a thought experiment may be suggestive here. What would have happened if MacArthur and GHQ had not directly intervened the process of framing the postwar constitution but only kept giving guidance to the Japanese government? Could the Japanese people have successfully created a liberal democratic constitution anyway? Initial reform for liberal democracy, which also came from GHQ's occupation policy for executing the Potsdam Declaration, was definitely important. Although the Liberal Party and the Progressive Party made the first Yoshida Shigeru coalition cabinet, they together held only 239 of 464 seats (51.3%) in the House of Representatives when the ninetieth Imperial Diet was convoked on May 16, 1946.³⁴ A majority of more than two-thirds of all the members had to agree on a successful amendment of the Meiji Constitution.³⁵ Decisive power belonged to the Socialist Party, which held 93 seats (20%).³⁶ Thus to achieve constitutional amendment, the conservatives would had to compromise with the Socialists. At that time, the Socialists covered a wide range of the political spectrum. Its constitutional plan expressed an eclectic attitude among different positions in the party. On February 23, 1946, it published the outline of a new constitution, which provided that "Sovereignty shall reside in the State (a cooperative body of the people, including the *tenno*). Governing power shall be divided, the more important part shall be assigned to the parliament and one part shall be assigned to the *tenno*

³³ See Chapter 2 sections 4 & 5.

³⁴ See Ishikawa Masumi, *Data Sengo seijishi (Data Postwar Political History)* (Tokyo: Iwanami Shoten, 1984), 115.

³⁵ See the Constitution of the Empire of Japan, art. 73.

³⁶ The *Kyodoto* (the Cooperation Party), another conservative party, occupied only 14 (later 45) seats. Before the session ended, yet another conservative party, the *Kokuminto* (the Nation Party) was formed and consisted of 45 representatives. See Ishikawa, *Sengo seijishi*, 115. These two parties merged to form the *Kokumin Kyodoto* (the National Cooperation Party) for the next general election. For the reformation of conservative parties in postwar Japan, see Uchida Kenzo, "Japan's Postwar Conservative Parties," Ward & Sakamoto, *Democratizing Japan*, 306-338.

(largely reducing the *tenno*'s prerogatives). The *tenno* shall be retained."³⁷ Takano Iwasaburo and Morito Tatsuo, both important members of the Constitutional Research Group joined the party's drafting committee.³⁸ On one point in the deliberation, the drafting committee discussed something like a symbolic *tenno* institution as the draft of the Constitutional Research Group.³⁹ The final outline of a new constitution was more regressive than the conception on one point of the symbolic *tenno* system but much more progressive than the drafts of the Liberal Party and Progressive Party, both of which claimed to maintain the *kokutai*.⁴⁰ If the Socialists had been realistically influential, the somewhat conservative draft of the Socialist Party might have been a plan of the government. If so, the most serious problem in the Meiji constitutional system would have been anyway, though not completely, solved in a way that the *tenno* would have been taken into a constitutional framework. Further, we must not ignore the fact that the Socialist Party was growing as a party at that time. In the second general election in the postwar period, the Socialists became the leading party and the center of the Katayama coalition cabinet. As we have discussed, Katayama Tetsu took the impact from the Constitution of Japan seriously and cultivated his constitutional thoughts based upon the impact.⁴¹ He and his Socialists might become more progressive in the process of making the postwar constitution.

It is true that the difference between the theory of state sovereignty and the concept of popular sovereignty with the symbolic *tenno* system is not a matter of degree but of quality. This hypothesis may paint a rosy picture of the Socialists. The conservative parties might have not made an easy compromise in respect of the status and power of the *tenno*. Besides, we should not forget that the political party balance in the early postwar period was crucially influenced by GHQ's policy

³⁷ See Chapter 3 section 2. For the Socialist draft, see also, Sato Tatsuo, *Seiritsushi*, 2: 778-783.

³⁸ Katayama Tetsu, Hara Hyo, Suzuki Yoshio, Unno Shinkichi, Matsuoka Komakichi were also members of the drafting committee.

³⁹ *Minpo*, February 16, 1946 in Koseki, *Tanjyo*, 68.

⁴⁰ For the constitutional plans of the Liberal Party and the Progressive Party, see Sato, *Seiritsushi*, 2: 736-771, 773-778.

⁴¹ For Katayama Tetsu, see Chapter 4 section 10.

of a purge of nationalists and militants.⁴² Then, however, the work of constitutional revision would have come to a deadlock. The two-thirds majority requirement was a troublesome burden. MacArthur's and GHQ's intervention might have been necessary.⁴³ The harsh reality of international politics might have also made intervention at an early stage inevitable.⁴⁴

The Japanese power elite did not have any idea that they, profoundly infatuated with the *kokutai* ideology, would willingly amend their beloved Meiji Constitution to a substantial extent. Surely, MacArthur's suggestion on constitutional reform stimulated intellectuals on the periphery of the power center to engage themselves in framing a new political order in the new era. But the overwhelming majority of common citizens were passive because they suffered serious damage in the wartime defeat. First of all, they were starving. At that time, they desperately wanted rice far more than a constitution. Therefore, there is no doubt that the Japanese people did not carry out constitutional reform by themselves.

In the first part of this conclusion, we have discussed Takayanagi Shinzo's theory of Japanese-American collaboration. By following Alfred Oppler's terminology,⁴⁵ further, McNelly has understood constitutional reform in postwar Japan as an induced revolution.⁴⁶ Koseki Shoichi has emphasized seeking a new perspective "that goes beyond the nation-state" and "that stresses the

⁴² Interestingly, however, the situation quickly changed. After removal of the purge, purged former representatives returned to the political world as candidates. 95 such candidates were elected in October 1952. They shared only 20.4% of the total 466 seats. See Ishikawa, *Sengo seijishi*, 30. Postwar politics did not revert to type but started an autonomous movement.

⁴³ Sato Tatsuo, who carried out activities of constitutional revision as a ranking legal bureaucrat, pointed out that unless GHQ's plan had been presented to the Japanese government, a constitutional revision would have been realized upon the plan of the Matsumoto Committee, the Liberal Party, or the Progressive Party which would have taken the Socialist plan into account. He stated that the general tendency of the day was formed along opinions in the Matsumoto Committee, the Liberal Party, and the Progressive Party. See Sato Tatsuo, "Kenpo shiko no jittai (The Constitution as Applied in Practice)," *Koho Kenkyu*, no. 19 (1958), 23-42, 40.

⁴⁴ McNelly has pointed out that the Far Eastern Commission could have not reached its conclusion because the USSR strongly opposed the retention of the *tenno* system and veto power. He has speculated that if the FEC had had a unanimous policy toward Japanese constitutional revision, it might have supervised the process of drafting a constitution and text more or less similar to the actual one might have been submitted to national referendum. But he has doubted such a would-be constitution could avoid the stigma of "imposition". See McNelly, "'Induced Revolution,'" Ward & Sakamoto, *Democratizing Japan*, 100-101. Indeed, Allied forces were in Japan.

⁴⁵ See *Political Reorientation of Japan*, 2: 662-666.

⁴⁶ McNelly, "'Induced Revolution,'" *The Origins of Japan's Democratic Constitution*, 29.

clash of legal ideas”.⁴⁷ Recently, John Dower also has pointed to constitutional writing as a hybrid Japanese-American legacy full of contradictions and mixed messages. “[N]othing better exemplified these tensions and complexities than the debates that continued to swirl around the remarkable new constitution.”⁴⁸ Moreover, Ray Moore and Donald Robinson have argued that constitutional making was profoundly a joint achievement of Japan and the United States. They have estimated that “Neither side could have produced this constitutional revolution alone.”⁴⁹ The simple imposition theory has been rejected and a view of postwar constitutional writing as a joint enterprise has become popular. In relying upon recent developments, my argument focuses more upon a republican moment of the Japanese people. Without any doubt, this precious opportunity was granted to them. Most of them were passive observers. In the first public debate on constitutional making, however, they did listen to what was said about a new fundamental political order. A tradition became an object of discussion, consideration, and choice. The Japanese people as a whole experienced what they had never experienced before. Even after the establishment of the postwar constitution, they were forced to face up to the ambiguity deriving from the political compromise over the relationship between the principle of popular sovereignty and the symbolic *tenno* institution, to try to clear it and to manage to strike a delicate balance between the two. The Japanese people, whether conservatives or progressives, whether royalists or republicans, shared in the creation of a new political order with one another for the first time in their history. This experience should not be underestimated.

⁴⁷ Koseki, *Tanjyo*, 13; *Birth*, 3. Koseki has pointed out complicated features of the provisions of the postwar constitution. “In the Japanese Constitution there are provisions, for example, that were merely products of compromise, inserted without sufficient discussion; other provisions that are vestiges of the Meiji Constitution that Japanese legal bureaucrats, unnoticed by the Americans, succeeded in retaining; completely new provisions, not in the American draft, that Japanese officials or Diet members inserted; and provisions that, even though they were important in retrospect, ran counter to the trend of the times and disappeared at the early drafting stage. In short, the Japanese Constitution has the appearance of a mosaic.” *Ibid.*, 3-4.

⁴⁸ Dower, *Embracing Defeat*, 561. In a broader context, Dower has also argued that American occupation intensified Japanese bureaucratic capitalism. “[M]uch of what has been characterized as a postwar ‘Japanese model’ proves to be a hybrid Japanese-American model: forged in war, intensified through defeat and occupation, and maintained over the ensuing decades out of an abiding fear of national vulnerability and a widespread belief that Japan needed top-level planning and protection to achieve optimum economic growth. This bureaucratic capitalism is incomprehensible without understanding how victor and vanquished embraced Japan’s defeat together.” *Ibid.*, 558.

⁴⁹ See Moore & Robinson, *Partners for Democracy*, 337.

On the other hand, the extraordinary process of framing has also caused serious problems. First, as we discussed earlier in this conclusion, the Japanese people overwhelmingly welcomed the postwar constitution because they felt that the constitution would bring a bright and prosperous life to them. Among other things, the ideal of peace the new constitution has adopted infatuated them. The value of peace, which is understood in relation to the concept of a culture state, indeed has characterized postwar Japan. At some point in history, obviously, the Japanese people regarded peace, freedom, and democracy as all directly related to prosperity and a bright future. However, identification of the constitution with prosperity and a bright future easily obscures serious reflection on the past. The bad life of the old days tends to fall into oblivion. What is obscured includes war responsibility, particularly to Asian peoples.⁵⁰ The commitment of the Japanese people to peace unfortunately does not lead to mostly needed reconciliation with the peoples of the areas Japan invaded. The “desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth” must remain as mere desire with such an attitude.⁵¹

Second, the lack of mobilization of the people has diluted the liberal democratic values of the constitution. The Japanese-American joint enterprise deprived the Japanese people of opportunities to express themselves decisively.⁵² The Japanese government wanted to avoid a direct appeal to the people because thorough discussion of the *tenno* system and popular ratification were essentially inconsistent with its image of the constitution as an instrument of the elite for ruling the people. MacArthur and GHQ wanted to have a new constitution as a *fait accompli* as soon as possible to avoid the intervention of the FEC. Both of them shared a common interest in not having popular ratification. Therefore, the rights and liberties guaranteed in the postwar constitution were characterized as something rationed from above at the beginning. Their internalization has been a

⁵⁰ See Koseki Shoichi, *‘Heiwa koka’ nihon no saikento (Reconsideration of ‘Peace State’ Japan)* (Tokyo: Iwanami Shoten, 2002) (hereinafter cited as Koseki, *‘Heiwa Kokka’*).

⁵¹ The Constitution of Japan, preamble, par. 2.

⁵² See Chapter 4 section 9.

pressing problem for the Japanese people.

Third, because the Japanese-American hybrid of constitutional writing soft-landed on the planned destination, the postwar constitution inheres a serious essential contradiction. While it has declared that respect for human dignity as individuals is the underlying principle,⁵³ it has also provided for a hereditary *tenno* as the symbol of the state and of the unity of the people.⁵⁴ A political community based upon the principle of respect for human dignity as individuals is characterized as having a horizontal relation of its members as equals. Rule of the community should be built upon a fundamental value of mutual respect as individuals. Thus it should not be naturally symbolized by a person who holds a special status different from common citizens. A hereditary institution respects lineage and conflicts with recognition of equal value among individuals.⁵⁵ However, the Japanese-American joint enterprise has approved two institutions in essential tension. Although this tension was well understood at the beginning of the postwar constitutional system,⁵⁶ it has been a difficult task for the Japanese people to strike a balance between universalism and particularism. To face up self-consciously to the tension is necessary to strike a critical balance. The debate over the symbolic *tenno* institution in the early postwar period indicated that once the tension is lost, there is a danger that the particularistic value might erode even the underlying principle. The *tenno* institution that was deified and mystified under the Meiji regime is apt to easily be an object of manipulation for political causes. Although the postwar constitution has adopted a system in which there is a guarantee of fundamental human rights, popular sovereignty, and thorough pacifism to secure respect for human dignity as individuals, nonetheless, it is undeniable that its introduction of the *tenno* institution with the same *tenno* has given a misleading impression of continuity between the two constitutional regimes. The lack of popular mobilization here again works negatively.

These problems deriving from the Japanese-American collaboration have to be solved for

⁵³ The Constitution of Japan, art. 13. See also *ibid.* art. 97.

⁵⁴ The Constitution of Japan, art. 1.

⁵⁵ See Takahashi Kazuyuki, *Rikkenshugi to nihonkoku kenpo (Constitutionalism and the Constitution of Japan)* (Tokyo: Hoso Daigaku Kyoiku Shinkokai, 2001), 302-303.

⁵⁶ See Chapter 5.

furthering constitutional values. Because now the GHQ's intervention ended long time ago, the Japanese people can decide how to respond to these problems by themselves with the principle of popular sovereignty.

Meanwhile, both domestic and international environments have significantly changed from those surrounding Japan at the establishment of the postwar constitution. Starvation is a relic of the past. An affluent society has emerged. The self-recognition of a fourth class country has become an old story. Defeat in the war is now far away. When the postwar constitution was established, the Cold War was in the germ. Now it has ended. As time has passed, memories of defeat and occupation are fading. There is no doubt that a constitution is an outcome of a time. As environments change, thus, cry for change is in a sense necessary.

Among other things, Article 9 has been a central target of harsh criticism. Denunciation of war and of armed forces has been criticized ever since its establishment. However, attacks on Article 9 have been more severe than ever since the Japanese felt internationally ridiculed when Japan decided to offer money, not troops, for the Gulf War by following the spirit of the postwar constitution.⁵⁷

The challenge to the constitutional principle itself should be welcomed because criticisms usually contribute to an expansion of the legitimacy of the system. Especially, comparison with the Meiji Constitution indicates their importance. In fact, the very criticisms on the postwar constitution prove its superiority over its predecessor because the Meiji constitutional system had never tolerated critics accusing the constitution itself. Criticisms were excluded from the process of framing the Meiji Constitution.⁵⁸ With the *Chian Iji Ho* (the Peace Preservation Law), further, the concept of the *kokutai* suppressed any criticism of the constitutional regime in public discourse. The notion of *kintei kenpo* (a constitution created by the *tenno*) deterred criticism. The Meiji constitutional regime was

⁵⁷ See Glenn D. Hook & Gavan McCormack, *Japan's Contested Constitution: Documents and Analysis* (London & New York: Routledge, 2001).

⁵⁸ See Chapter 1 section 1.

essentially a closed circle for the established elite. On the other hand, the postwar constitution was committed to an open system. Unlike the Bonn Basic Law, which adopts the idea of fighting democracy,⁵⁹ even a challenge to the liberal democratic fundamental order is constitutionally protected as far as it remains an advocate of critical thought. Freedom of expression is guaranteed without any reservation on the face of a constitutional text.⁶⁰ The postwar constitutional system tries to protect the public space for rich debate and robust exchange of ideas among the people.

In the case of Article 9, the problem is complicated. The Japanese government first stated that Japan could not wage even a war of self-defense. Although paragraph 1 of Article 9 does not necessarily deny the right of self-defense as a state, the government explained, its second paragraph prohibits her from having armed forces and the right of belligerency and thus she cannot fight a self-defense war as a matter of fact. Since then, the government has come to interpret the armed forces the second paragraph prohibits Japan from maintaining as forces by which modern warfare can be executed. Under this interpretation, the Self-Defense Forces have been organized and steadily upgraded with weapons and equipments. Many people doubt that the government's interpretation is constitutional but the Supreme Court of Japan has avoided this controversial issue by resorting to interpretive technicalities.⁶¹ Nonetheless, the government still claims that the right of collective self-defense cannot be exercised without conflicting with Article 9.⁶²

This expansive but still somewhat restrictive interpretation of Article 9 by the government, on the one hand, has eroded the normative power of Article 9 but, on the other, clearly succeeded in

⁵⁹ See Bonn Basic Law, art.21 par. 2.

⁶⁰ See the Constitution of Japan, art. 21. In this respect, the postwar Japanese constitution is more similar to the U.S. Constitution than to the postwar German Constitution. See the U.S. Constitution, first amendment.

⁶¹ The Supreme Court has said nothing about the constitutionality of the Self-Defense Forces. See the Naganuma Nike Missile Site Case, Supreme Court Judgment, September 9, 1982, *Minshu* 36: 2, 1679 in Lawrence W. Beer & Hiroshi Itoh, *The Constitutional Case Law of Japan, 1970 through 1990* (Seattle, University of Washington Press, 1996), 122-130; the Hyakuri Air Base Case, Supreme Court Judgment, June 20, 1989, *Minshu* 43: 6, 385, *ibid.*, 130-141. See also the Sunagawa Case (a case of constitutionality over Article 9 of the United States bases in Japan), Supreme Court Judgment, December 16, 1959, *Keishu* 13: 2, 3225 in John M. Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions, 1948-60* (Seattle, University of Washington Press, 1964), 298-361.

⁶² For the government's interpretation of Article 9, see Nakamura Akira, *Sengo seiji ni yureta kenpo kyujyō (Article 9 of the Constitution that Has Been Swayed by Postwar Politics)*, 2nd ed., (Tokyo: Chuo Keizaisha, 2001).

evading excessive military costs in the intense Cold War situation, which enabled Japan to pursue economic growth in the postwar era. However, the government's position has been criticized not only by progressives who stick to the constitutional principle of thorough pacifism but also by conservatives who want Japan to be a "normal" country with full armed forces. The concept of peace without armed forces is now on trial.

However, the problem of Article 9 is more intricate than the conservatives argue. Article 9 was created principally to protect the *tenno* himself from his war criminalization and its institution from abolition.⁶³ Thus it related to not just the provision of denouncing war and armed forces, but also the whole structure of the postwar constitution. A real question the Japanese people have to answer now is whether Japan has been successful in the liberal democratization of politics independently of the influence of the *tenno* and, even more importantly, whether the liberal democratization of politics in the postwar era has won trust from foreign countries, especially the Asian countries Japan invaded and colonized in her imperialist era.

Unfortunately, the postwar government has failed to fully assume war responsibility. Political utilization of the *tenno* has never ceased. This is not only the case with traditional conservatives. In the summer of 1993, the LDP lost power for the first time in thirty-eight years and Hosokawa Morihiro was designated as prime minister in the Diet and formed his non-LDP and-communist seven-party coalition cabinet. The members of this new cabinet wanted to authorize itself through the *tenno*. According to the postwar constitution, the *tenno* formally appoints the prime minister,⁶⁴ but he was abroad at that time. In such cases, the *kotaishi* (the crown prince) is delegated to perform matters of state.⁶⁵ As a matter of constitutional principle, the *kotaishi* should have appointed Hosokawa as the prime minister. As a matter of fact, they waited for the *tenno*'s return because they believed that an epoch-making new start in government after the long reign of the LDP

⁶³ See McNelly, "'Induced Revolution,'" Ward & Sakamoto, *Democratizing Japan*, 102; Koseki, '*Heiwa Kokka*', 47-48.

⁶⁴ See the Constitution of Japan, art. 6 par. 1.

⁶⁵ See the Constitution of Japan, art. 4 par. 2.

should be celebrated by the direct appointment of the *tenno* himself.

Thus we cannot say that the goal the Japanese people set after the defeat has been achieved. The liberal democratization of politics is developing, not developed. In such a situation, Article 9 is still a reminder of what Japan did in the pre- and mid-war period and the symbol of how the Japanese people can gain trust from other peoples.

One question that should be asked now is how the Japanese people can achieve a constitutional promise, the liberal democratization of politics, which is still needed after fifty-seven years. Recently, Kato Norihiro, a literary critic, argued for the choice of the same constitution.⁶⁶ His argument basically relies upon criticism on the imposed constitution as a starting point of postwar democracy. He praises the opposition of Minobe Tatsukichi to the proposed constitutional revision by the government in the Privy Council.⁶⁷ Kato mentions the meeting of February 13, 1946, between Japanese government representatives and officials in the Government Section as a symbolic episode of the imposition.⁶⁸ Unlike conservatives, however, Kato contends for a progressive cause that the Japanese people should look squarely at the fact that the peace constitution they now highly approve of was established by an occupying force and had lacked their subjective commitment. Thus Kato proposes to choose the postwar constitution again to promote its progressive values.⁶⁹

As this dissertation has showed, Kato's foundation of argument is not persuasive. Minobe later argued for constitutional revolution and seemed to deny his own academic achievement for the liberal democratization of the Meiji Constitution in his postwar writings.⁷⁰ Kato does not understand why the postwar constitution was written in such an extraordinary way.⁷¹ Even more importantly, he

⁶⁶ Kato Norihiro, *Haisengo ron (An Essay on the Post Defeat in War)* (Tokyo: Kodansha, 1997).

⁶⁷ Kato, *Haisengo ron*, 25-31.

⁶⁸ Kato, *Haisengo ron*, 19. Kato quotes the following: "At 10:10 o'clock General Whitney and the undersigned left the porch and went out into the sunshine of the garden as an American plane passed over the house. After about fifteen minutes Mr. Shirasu joined us, whereupon General Whitney quietly observed to him: 'We are out here enjoying the warmth of atomic energy.'" Takayanagi, *Seitei Katei*, 1: 324.

⁶⁹ Kato, *Haisengo ron*, 22-23.

⁷⁰ See Chapter 2 section 6.

⁷¹ See Chapter 2 sections 4 & 5.

does not appreciate Japanese initiatives for creating a new political order.⁷² He fails to understand that the Japanese-American conspiracy deprived the Japanese people of a precious opportunity to express themselves decisively, which has without doubt diluted the liberal democratic values of the postwar constitution.⁷³ In addition, Kato also fails to pay attention to the fact that denunciation of war and of armed forces was closely related to the retention of the *tenno* institution.

This dissertation has indicated that even within the granted political space of the extraordinary circumstances of occupation, the Japanese people experienced a republican moment for the first time in their history. They self-consciously faced up to the fundamental question of political legitimacy. No matter how limited the choice might have been, the Japanese people did choose the postwar constitution.

Thus, the real question is rather whether to reinforce the choice of the past or to discard it, not to choose the same postwar constitution. What is questioned is, then, the meaning of defeat and the ensuing creation of a fundamental political order for the Japanese people. The message of the original choice is clear: the principles of popular sovereignty and thorough pacifism have been adopted to realize due respect for human dignity as individuals. Have freedom, democracy, and peace been fully realized in the last fifty-seven years? Rather, the making of the postwar constitution around the limitations has marked a mere starting point of internalizing the liberal democratization of politics. It was indeed an unfinished constitutional revolution. If the liberal democratization of politics has not been completed yet, then the original choice is still relevant fifty-seven years later. To reinforce constitutional values and promote their internalization further, commitment to politics by the people should be on trial. That is because whether they are active or passive, enlightened or ignorant, positive or cynical, the very people play a central role in a postwar constitutional system where popular sovereignty has been solemnly declared.

We should recall what Morito Tatsuo, an important member of the *Kenpo Kenkyukai* (the

⁷² See Chapter 3 sections 2, 4, & 5 and Chapter 4 section 2.

⁷³ See Chapter 4 section 9.

Constitutional Research Group) and the Socialist Party, and the Minister of Education of the Katayama and Ashida cabinets, pointed out in the process of making the postwar constitution.⁷⁴ The most important thing about a new constitution was, Morito argued, not making a consistent system of legal doctrines but reforming old power relations. Morito clearly understood the necessity that the Japanese people themselves should further the political and social reforms GHQ's occupational policy originated. To reform power relations in society, he thought, it was necessary to enhance the political and social consciousness of the people. The new constitution should be characterized as principles for guiding the people to promoting the political and social reforms that had started. Morito thus appealed to the priority of politics as a source of reform for peace, freedom, and democracy.⁷⁵ What Morito stated in January 1946 is still significantly stimulating. In the liberal democratization of politics, the Japanese people continue to undergo a constitutional revolution. The priority of politics is desperately needed to realize the constitutional promises.

In a sense, however, the poverty of politics might be prepared in the postwar constitution. It entails the essential contradiction that while the constitution places human dignity as individuals as the most fundamental value, the state and the people the constitution plans to regulate are symbolized by the *tenno*, the institution of which reflects a dynastic virtue conflicting with fundamental values. A static view of the constitutional order might misunderstand that it is the *tenno* who integrates the people.⁷⁶ Then political integration tends to be downplayed because it might be understood as being already embodied by the *tenno*. However, we should be cautious not to get caught up in the continuity thesis. When the Meiji Constitution was established, its founders sought the center of a new governmental system for the *tenno*. It was partly because religion had no influence upon integrating the people in Japan. It was also because, unlike Western peoples, the

⁷⁴ See Chapter 3 section 2.

⁷⁵ Morito Tatsuo, "Kenpo kaisei no kadai (Problems over Constitutional Revision)," *Tokyo Shinbun*, January 9-13, 1946, in Kizokuin Jimukyoku Chosabu, ed., *Kenpo kaisei ni kansuru shoron shuroku (A Collection of Articles and Essays on the Constitutional Revision)* (1946), 122-127.

⁷⁶ See Chapter 5 section 9.

Japanese people were unfamiliar with constitutional politics.⁷⁷ But the ultimate reason why the founders resorted to the *tenno* lay in the elitist distrust, or fear, of politics by the people. It was convenient for the *hanbatsu* leaders to utilize the *tenno* for national integration because morality attached to the *tenno* could be directly connected to the political legitimacy all governmental systems need. For them, after all, the constitution was nothing other than an efficient instrument for ruling the people.

In the postwar constitution, however, the status of the symbol of the state and the unity of the people the *tenno* holds derives from the sovereign will of the people.⁷⁸ Unlike the Meiji constitutional regime, the postwar system has made the authority of the *tenno* relative and rational. The morality which used to be attached to the *tenno* has become irrelevant to political legitimacy in the postwar constitutional system. If national integration by the *tenno* reflects the elitist distrust of popular politics, such a way of securing political integration should not be applicable to the postwar political regime. The postwar constitution relies upon the people the *hanbatsu* leaders were afraid of. As a matter of constitutional principle, the people are integrated through politics before the *tenno* system performs its function. In short, political integration of the people comes first and then it is symbolized by the *tenno*.

In this constitutional structure, therefore, a picture of political integration is more dynamic because the people are essentially plural and thus always tend to be diversified. Thus, popular sovereignty is also a dynamic idea. Unlike the solo sovereign in monarchy, popular sovereignty with the presupposition of plurality has to ask how to create a sovereign will. As we have repeatedly discussed, the principle of popular sovereignty is profoundly connected to free expression.⁷⁹ The human dignity, popular sovereignty, and thorough pacifism the postwar constitution has tried to

⁷⁷ The idea of the *tenno* as the center of the state is found in the opening speech for deliberation in the Privy Council by Ito Hirobumi as its president. See Inada Masatsugu, *Meiji kenpo seiritsushi (A History of Making the Meiji Constitution)* (Tokyo: Yuhikaku, 1962), 2: 567-568. See also, Chapter 1.

⁷⁸ See the Constitution of Japan, art. 1.

⁷⁹ See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (New York: Harper & Brothers, 1948).

realize as the crucial political values should be the center of the political integration of the Japanese people. However, even with the full protection of free expression, we cannot secure agreement on important matters among the sovereign people. These basic constitutional values are all controversial political concepts. Disagreement rather than agreement is perhaps normal in popular engagement in politics. Thus agreement is always tentative. The idea of popular sovereignty invokes challenges to the status quo partly because political decisions in a community are inevitably provisional and partly because a minority is as a general trend apt to govern a majority even in a democracy. But it is mostly because the concept of popular sovereignty inspires the people to bring reality close to the ideal. Because of this inherent dynamism of popular sovereignty, robust public debate makes it really workable. Political integration can be achieved only through popular commitment to such open discussion.

Then we realize that the postwar constitution has transformed politics from an old system based upon a vertical order-subject relation to a more horizontal relation of mutual persuasion among equals by speech. As a result, the Japanese people have been invited to “replace the notion of a regime governed by laws, of a legitimate power, by the notion of a regime founded upon the legitimacy of a debate as to what is legitimate and what is illegitimate---a debate which is necessarily without any guarantor and without any end.”⁸⁰ In such a regime, the priority of politics is essentially inevitable. Politics based upon “uninhibited, robust, and wide-open”⁸¹ public debate alone can realize the constitutional promises by integrating the people. Thus, the postwar constitution gains more brilliance in vigorous discussion.⁸² The constitutional revolution does indeed continue for the Japanese people.

⁸⁰ Claude Lefort, *Democracy and Political Theory*, trans. by David Macey (Cambridge: Cambridge University Press, 1988), 39.

⁸¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

⁸² The commissions of investigation of the constitution have been established in both houses of the Diet since January 2000. They are planned to perform broad and comprehensive investigations into the Constitution of Japan for a period of five years. See the *Kokkai Ho* (the Diet Law), arts. 102-6, 102-7. Robust public discussion will further strengthen the foundation of the postwar constitution.

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