

## *The Constitution: Context and History*



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### INTRODUCTION

**T**HE CURRENT JAPANESE Constitution was enacted on 3 November 1946, and has been in force since 3 May 1947. The Constitution was enacted during the occupation after the Pacific War. Adopted under the popular sovereignty principle, it is committed to liberal democracy, with full protection of the rights of individuals as fundamental human rights and the guarantee of representative democracy.

This chapter begins with a discussion of the meaning of the Constitution and moves on to an introduction to the history of

constitutionalism in Japan, especially focusing on modern history beginning with the Meiji Restoration. We then move to examine the sources of constitutional law and the supremacy of the Constitution, and then review fundamental principles of the Japanese Constitution to illustrate some of its basic characteristics. We will see that Japan has had a long history of viewing law as a means of government and that there used to be no notion of law which constrained the government. We will see that it is only when the Japanese Constitution was enacted that the notion of constitutional law which restrains the government was introduced and established. Moreover, the supremacy of the Japanese Constitution is based on the principle of individualism and the notion of human dignity, which were not concepts accepted in the past. Although there are some who argue that these concepts are alien to traditional values, nonetheless Japan has accepted them as constitutional norms.

## **PART I: CONSTITUTIONAL CONTEXT**

### THE MEANING OF THE CONSTITUTION

The term ‘constitution’ in Japan is defined as ‘the fundamental law of the state’.<sup>1</sup> In this sense it is not unlike the constitutions of many other states, most of which have a single document called ‘The Constitution’.

Japan enacted its first modern constitution, the Meiji Constitution, in 1889. The current Constitution was enacted in 1946 as an amendment to this Constitution. Japan therefore has a single document called the Constitution.

The concept of a constitution was developed in Europe and the United States. Even though the original ideas were developed in the United Kingdom, it was the United States that enacted the first document referred to as a constitution after independence, the Constitution of the United States, in 1787. France enacted its first constitution, the 1791 Constitution, after the French Revolution. These constitutions attempted to establish governments based on the power of the people, while at the same time restricting the power of governments. They thus provided

<sup>1</sup> Ashibe, 3; Sato, 3.

for the structure of government and a Bill of Rights. They were meant to be the supreme law of the land. Many other countries followed in their footsteps and enacted constitutions modelled after them. These constitutions are often called 'modern constitutions'.

The Japanese Constitution apparently followed this tradition. The Constitution has made clear that it is the supreme law of the land, it has established that the government is empowered by it and it has declared that these powers are derived from the people. It also sets limits on the power of the government by protecting a Bill of Rights.

### THE BASIC CHARACTERISTICS OF THE JAPANESE CONSTITUTION

Some constitutions were enacted by kings, some by the people and others were based on the compromise between the king and the people. Overall, a majority of the modern constitutions were enacted by the people. In Japan, the first modern constitution, the Meiji Constitution, was enacted by the power of the Emperor, while the current Constitution was based on the power of the people.

Some constitutions are enacted as statutes, and can thus be amended by the legislature in the same way as any other statute. However, many constitutions have been designed to make amendment difficult. In other words, the constitution is 'entrenched'. The Japanese Constitution falls into the latter group. Any amendment to the Japanese Constitution can only 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' (article 96, section 1). Compared with amendments to other ordinary legislation, this requirement is considerably more rigid. Possibly due to this rigid requirement for constitutional amendment, the Japanese Constitution has never been amended since its enactment in 1946.

In socialist countries such as the Soviet Union, the constitution used to be defined as a fundamental law of the 'state' and 'society'. In comparison, many Western democracies define the constitution only as the fundamental law of the 'state'. Consequently, in these countries, the state and society are distinguished from one another and constitutions are not designed to restrain the society. The Japanese Constitution

followed this latter tradition and is defined as the fundamental law of the state. It is designed to restrain the power of the government and not private power.

The Constitution generally establishes the government, empowers it and places limits on its power. Yet, in Japan, it has been assumed that the primary purpose of the Constitution is to guarantee freedom. The Constitution is, in this sense, 'the foundational law for freedom'.<sup>2</sup> Although the modern Constitution consists of the structure of government and the Bill of Rights, it is the Bill of Rights that is the core part of the Constitution and the structure of government is merely a means to serve the primary purpose.<sup>3</sup>

## PART II: HISTORY

### PRIOR TO THE MEIJI RESTORATION<sup>4</sup>

Japan has almost two thousand years of history. Yet it is only fairly recently that the Japanese came to know the notion of the constitution and to enact such a document.

Japan's earliest history dates back to the first century AD, when it consisted of many small countries. The oldest recorded history of the Japanese state was when the 'Na' Country of 'Wa' sent an ambassador to China during this period. During the third century, the early state emerged: the 'Yamatai' state, ruled by Himiko. The Yamatai government was based on the religious authority of Himiko, a female priest, while her brother controlled the mundane affairs of the state. Governmental affairs and religious beliefs were closely connected at that time.

In the fourth century, the 'Yamato' state appeared, ruled by great kings (later called Emperors). Emperor Sujin unified the state and proclaimed himself to be the Emperor. In the official history of ancient Japan written in the eighth century, Sujin claimed to be the tenth Emperor, dating back to Emperor Jinmu, the founder of the country in 660 BC.

<sup>2</sup> Ashibe, 10.

<sup>3</sup> Nonaka I, 4, 19–20 (Takahashi).

<sup>4</sup> Ryosuke Ishii, *A History of Political Institutions in Japan* (Tokyo, University of Tokyo Press, 1980); C Steenstrup, *A History of Law in Japan until 1868* (Leiden, EJ Brill, 1991).

However, there is little historical evidence to support the existence of Emperors prior to Sujin. Thus, the ancient history book was regarded as a tool that created a myth to justify the legitimacy of the imperial rule.

Japanese society at that time was based on a communal lifestyle centred on rice harvesting. The people had to cooperate to plant seeds, take care of the growth and harvest the rice. People's lives were highly community-oriented. Rice harvesting relied heavily on Mother Nature, and the people thus came to respect and fear her. Gradually, a religion of worshipping various nature gods developed: *Shintoism*.

In this archaic period, the Emperor ruled the country through the system of clans, each led by a patriarchal chieftain. The government was based on religious authority—law and Shinto, a native religion of Japan, were inseparable and later Buddhism, which was introduced to Japan in 538, came to have strong influence. Law was basically customary law. The Seventeen-Article Constitution proclaimed by Crown Prince Shoutoku in 604 may be cited as showing the basic philosophy of the government. Even though it is called the Constitution, it was in reality a manifestation of moral principles for public officials. However, its first article may be said as vividly showing the cardinal principle of the Japanese society: it provided that 'harmony should be most respected'.

Gradually, the Emperors came to strengthen their powers. A highly centralized state directly governed by the Emperors emerged. However, after the Emperor Kanmu moved the state capital from Nara to Kyoto in 794, direct rule by the Emperor was gradually eroded by the rise of nobles (*kyūge*). These nobles accumulated large estates (*shoen*) and eventually gained the privilege of immunity from taxes and the ability to bar court officials from entering their estates. Nobles thus came to exercise autonomous government within their estates.

The nobles then found it necessary to employ warriors to defend their estates. Gradually, warriors intermarried with nobles and came to form a new class: *bushi*. Eventually, it was these warriors who took the power, destroying the privileges of nobles, and founded the Bakufu, warriors' government. Under the rule of the warrior class, feudal relationships gradually developed. Although the Emperor retained the authority to grant the title of '*Shogun*' to the leader of the warriors, and the Imperial Court in Kyoto remained the nominal ruling government, all the political powers were exercised actually by the Shogun. The Shogun held the highest position as the leader of all warriors. All other warriors were regarded as retainers of the leader. These retainers swore loyalty to the

leader and offered military service. In return, they were allotted lands and were entitled to proceeds from these lands. Unlike the medieval system in Europe, the relationship between the leader and retainers was unilateral.<sup>5</sup> The leader was not formally obliged to compensate his retainers. All the benefits and protection given to the retainers by the leader were regarded as favours and retainers had no legal rights against the leader.

After the battle of Sekigahara in 1600, Ieyasu Tokugawa finally established the stable Bakufu in Edo (now Tokyo), which lasted until 1867. Ieyasu received the title of Shogun from the Emperor and became the leader of the warriors. He was thus given political power to govern the country.<sup>6</sup>

The political system under the Tokugawa Shogunate was a combination of direct rule by the Shogunate and autonomous domains ruled by territorial lords. The Tokugawa Shogunate enacted laws dealing with fundamental issues of government and matters which required nationwide regulation. It banned Christianity and prohibited territorial lords from directly contacting the Imperial Court. In 1637, the government also implemented isolation policies that prohibited Japanese from leaving the country and also denied foreigners entry into Japan. Further, the government restricted foreign trade to the port of Nagasaki, where trade with the Netherlands and China was allowed. The government also solidified the hierarchy of social status. Aside from the Imperial Court and nobles, there were four social classes: samurai warriors were at the top, followed by peasants, artisans and merchants. Only samurai warriors were allowed to carry swords. Outside this social caste system, or rather below it, there was the class of people referred to as 'non-humans'. They were the *Buraku* people (village people).

The government consisted of senior councillors (*rojyu*), junior councillors (*wakadoshiyori*), chief censors (*ometsuke*) and commissioners (*bugyo*). Chief censors were responsible for supervising territorial lords, while three commissioners dealt with finance, supervision of temples and shrines and the administration of Edo.

The law under the Tokugawa Shogunate was largely customary law. Nevertheless, the government enacted some important codes. For

<sup>5</sup> Hiroshi Oda, *Japanese Law* 2nd edn (Oxford, Oxford University Press, 1999) 15; CF Goodman, *The Rule of Law in Japan: A Comparative Analysis* (The Hague, Kluwer Law International, 2003) 12–13.

<sup>6</sup> Ishii, above n 4, 59–89; MB Jansen, *The Making of Modern Japan* (Cambridge, Belknap Press, 2000) 32–62.

instance, in 1615, the government enacted the Law on the Imperial Court and Nobles and the Law on Military Households (*buke-sho-batto*). The Law on the Imperial Court and Nobles was designed to severely limit the political power of the Imperial Court and nobles: both were prohibited from leaving Kyoto. On the other hand, the Law on Military Households was aimed at controlling territorial lords: it prohibited territorial lords from forming political alliances, moving troops outside their territory, maintaining more than one castle and marrying without the approval of the Shogunate. The code also mandated that they spend alternative years living in Edo and their local territory.

There was no comprehensive code regulating the general public at the beginning of the Tokugawa Shogunate period. Disputes were adjudicated based on precedents and on individual bases. However, in 1742, a comprehensive code was enacted, the *Kujikata Osadamegaki*. The code was a compilation of Acts and precedents and consisted of two volumes: the first volume was a compilation of various Acts and the second was a compilation of civil and criminal law. The second volume was not published.

Therefore, until the end of the Tokugawa period, law used to be primarily a means used by government officials to govern the people. There was no notion of superior law that constrained the Emperor or the government. The relationship between the government and local lords or the government and the people was not governed by notions of rights and obligations. Indeed, there were no Japanese words corresponding to 'rights', 'freedom' or 'liberty' until the end of the Tokugawa period. It is noteworthy that the Tokugawa government emphasised Confucianism as the most fundamental philosophy for samurai warriors.

## THE MEIJI CONSTITUTION

The Tokugawa Bakufu lasted almost three centuries. In 1853, Commodore Matthew Perry of the United States Navy came to Japan and demanded that Japan should open to foreign trade or face the threat of attack. Fearing an attack, the Tokugawa Shogunate decided to sign a commerce treaty. The treaty was grossly unfair to Japan, as it granted extraterritoriality to foreigners and denied Japan the power to impose customs duties. Many people felt uncomfortable with the treaty. The Tokugawa Shogunate sought imperial sanction over the commerce

treaty but the Imperial Court declined. The Tokugawa Shogunate had to ratify the commercial treaty on its own and such direct conflict with the Imperial Court severely impaired its prestige. Consequently, some of the lords came to demand the overthrow of the Bakufu and the restoration of political power back to the Emperor in order to cope with the threat of foreign powers.

In 1867, imperial permission to attack the Tokugawa Bakufu was issued and the fifteenth Tokugawa Shogun, Keiki Tokugawa, surrendered his power to the Emperor and resigned as Shogun. On 3 January 1868, Emperor Mutsuhito declared the restoration of imperial rule.<sup>7</sup> Although some supporters of the Tokugawa Bakufu refused to obey the Imperial Court, they were ultimately defeated by its supporters. In the same year, the commemorative year<sup>8</sup> was changed to Meiji. As a result, these events were generally referred to as the Meiji Restoration (1868).

Territorial lords surrendered their lands to the Emperor and were appointed as governors in their domains. In 1871, the system of domains was replaced by the system of prefecture, directly ruled by the Emperor through officials appointed by him.

On 5 April 1868, the government announced a new fundamental law attempting to revamp the governmental system<sup>9</sup> and restored the archaic *dajokan* system, which dated back to the eighth century.<sup>10</sup> Under this system, the Emperor was assisted by the Prime Minister (*dajo-daijin*), ministers and councillors. However, it was not long before leaders of the government realized that a modernization of the government and society, accepting Western technology, knowledge and culture, was necessary.

The Meiji Government set out to build a modern society ruled by a modern legal system, accepting a Western-style legal system.<sup>11</sup> This

<sup>7</sup> Ishii, above n 4, 91–126; Jansen, above n 6, 294–413.

<sup>8</sup> The commemorative year is used in Japan to denote the period of reign of the Emperor. Although the Emperors used to change the commemorative year quite often in the old days, the Meiji Government established the system of using just one commemorative year to denote the entire reign of one Emperor. The government followed this tradition even under the Japanese Constitution. All public documents are written using the commemorative year.

<sup>9</sup> Jansen, above n 6, 337–41 (Charter Oath).

<sup>10</sup> Ishii, above n 4, 98, 101–06.

<sup>11</sup> *Ibid.*, 117–18. See also Kenzo Takayanagi, 'A Century of Innovation: The Development of Japanese Law 1869–1961' in AT von Mehren (ed), *Law in Japan: The Legal Order in a Changing Society* (Cambridge, MA, Harvard University Press, 1963) 5–40.

modernization was necessary to cope with the threat of colonization by Western countries and to renegotiate the unfair commerce treaties. The government thus invited French scholars to draft codes for Japan. The government must have believed that France was a leading European country, which had comprehensive legal codes, and that it could enact codes modelled after those in France, with necessary modifications. It therefore enacted major codes, such as the Civil Code and the Criminal Code, modelled after the French codes. The drafters had to invent the Japanese words for 'right', 'freedom' and 'liberty'. The government also had to create the notion of property rights over land in order to introduce a modern tax system.

However, the Civil Code, especially its family law part, triggered strong criticism from conservative scholars, who thought it was destroying the tradition of Japan; thus, the government decided to postpone its enforcement. Then, the government decided to rely more on German law. Ultimately, Japan established the whole legal system modelled on Germany, while retaining some influences from French legal codes. Japan has thus become a civil law country.

The Meiji Government initially did not have any plan of enacting a constitution. However, the government gradually came to be criticised as too despotic and, in 1874 a call for establishment of the legislature was voiced by opposition groups and received support chiefly from former samurai warriors who had come to feel dissatisfaction with the government. The rising demand for the establishment of a representative body ultimately forced the government to announce the establishment of the Diet. The government thus decided to enact a constitution in order to establish the Diet.

Hirohumi Itoh, the leader of the new government, went to Europe to research the subject of constitutions. He came back particularly impressed with the Prussian Constitution in Germany, where the king had a very strong hold on power. Ito decided to enact a constitution based on the Prussian Constitution.

When the Meiji Constitution was enacted in 1889, it was premised upon the sovereignty of the Emperor.<sup>12</sup> The Emperor had the power to govern Japan (article 1) based on the imperial prescript given by the ancient sun goddess Amaterasu. The power to govern Japan had been

<sup>12</sup> Ishii, above n 4, 114–16. See also W Rohl, 'Public Law' in W Rohl (ed), *History of Law in Japan since 1868* (Leiden, Brill 2009) 29.

inherited by Emperors in unbroken lineage. By enacting the Constitution, the Emperor merely proclaimed his will to abide by it. According to the provisions of the Constitution, the Emperor had all the governmental powers (article 4) and he was sacred and inviolable (article 3). His power derived from religious authority and he himself was a living god. His status was closely related to Shinto. As a result, Shinto was treated as the de facto state religion and played a major role as religious justification for the Emperor and his rule.

Even though the Constitution introduced some mechanisms for separation of powers and parliamentary democracy, there were serious limitations. According to the Constitution, the Diet was supposed to assist the Emperor in enacting legislation (article 5). Yet, the Emperor had the power to veto any Bill and to regulate the public by emergency orders (article 8) or independent orders (article 9) without the Diet's authorization. In addition, ministers of state were obligated to assist the Emperor in his exercise of administrative power (article 55). Working within a Cabinet formed under such a Constitution, the Prime Minister was viewed just as one of the ministers of state, and did not exercise any real leadership power. Moreover, as the supreme advisory body to the Emperor, which was supposed to give opinions regarding amendments to the Constitution, affiliated statutes and other important matters, the Privy Council was set up (article 56), consisting mostly of former senior bureaucrats. Even though the Prime Minister and other ministers of state were allowed to participate in the decisions, the Privy Council often interfered with Cabinet decisions. Furthermore, the Emperor had certain sovereign prerogatives, such as commanding the military (article 11), which could be exercised without the Cabinet's authorization. The judiciary was supposed to exercise judicial power in the name of the Emperor (article 57). However, there was no fully guaranteed judicial independence and courts' powers were severely limited.

The Meiji Constitution did protect some individual rights. Yet these rights were merely granted to the 'subjects' of the Emperor by his benevolence. The people did not have any inherent constitutional rights against the government. Moreover, these rights were protected merely within the confines of statute. When the Imperial Diet enacted statutes to restrict rights, the public could not therefore argue for the unconstitutionality of the restriction. Furthermore, the judiciary did not have any power to review the constitutionality of a statute. As a consequence, the protection of individual rights was severely restricted.

Voting rights were granted to a limited number of adult male citizens who had sufficient wealth. Freedom of expression was severely restricted by statutes such as the Publications Act and Newspapers Act, as well as by a ban in the Criminal Code on insult against the Emperor. Freedom of religion was protected only so far as the obligation of subjects to the Emperor was not infringed (article 28) and Shinto was accorded the status of *de facto* state religion. Women were subjected to various forms of sexual discrimination, especially in the family, since the Meiji Family Law was premised upon the supremacy of the 'house' headed by a male 'housemaster'.

Legal control of the government was also seriously limited. The people could not challenge administrative actions before the judicial court, since judicial courts were granted jurisdiction only in civil and criminal and not in administrative cases. There was an Administrative Court to hear complaints, yet only one court was established and the public could file complaints based only on listed grounds. Moreover, the Administrative Court was supposed to be an administrative organ. The people could not seek damages in the judicial courts against the government for illegal exercise of power.

Even under the Meiji Constitution, there existed a possibility that it could be construed to vest political power in the Imperial Diet and the Cabinet, thus practically depriving the Emperor of his political power. In particular, after the death of the Meiji Emperor on 30 July 1912, when his son Yoshihito became the next Emperor and the commemorative year was changed to Taisho, there were increasing calls for democratization and liberalization, and demands for major political reform. In 1918, the Cabinet came to rely on the majority support among the political parties in the Diet for the first time. Despite such potential, however, the government generally used the Emperor's power to secure social stability and to build a 'strong and wealthy state'. The Diet passed many statutes restricting political freedoms of the people. Even after the introduction of universal male suffrage in 1925, the government never allowed the public to actively participate in politics. It thus enacted the notorious Public Peace Preservation Act to tightly regulate public gatherings. In order to maintain a strong military, the government introduced mandatory military service requirements and allotted a large budget to military spending. Moreover, the prerogatives of the Emperor to command the military came to be construed very broadly so as to exclude Diet and Cabinet supervision over the military.

As a result, military forces had practically free reign over their decision making process.

The economy was also heavily dependent on the government. Since there was no modern industry at the time of the Meiji Restoration, the government had to establish such industry, especially heavy industry, in order to develop a strong state. After successfully developing major industries, the government sold them to a small number of economic giants, the so-called '*Zaibatsu*'. The labour movement and socialist advocates were rigorously suppressed. Most of the lands were owned by a limited number of landowners and most of the farmers simply did not own farmland. There was no social basis for creating citizen support for a modern society.

Japan's victory in the Sino-Japanese War (1894–95) gave it control over the territories of Korea and Taiwan. Subsequent victory in the Russo-Japanese War (1904–05) solidified Japanese control over Manchuria and further helped to promote militarism in Japan. Japan annexed Korea in 1910. After the death of the Taisho Emperor in 1926, his son Hirohito became the next Emperor and the commemorative year was changed to Showa. During Hirohito's reign, Japan became an increasingly militaristic state. Japan walked out of the League of Nations in 1933, allied itself with Germany and Italy in 1940 and concluded a neutrality treaty with the Soviet Union in 1941. Meanwhile, the terrorist attack by the radical militarists against the Prime Minister, Tsuyoshi Inugai, who was in favour of limitation of military power, on 15 May 1932 and the attempted coup d'état by radical military officers on 26 February 1936, totally undermined parliamentary democracy.

Subsequently, Japan started a war against China in 1937, invaded other Asian countries and finally attacked the United States to start the Pacific War in 1941. During wartime, the Constitution was almost meaningless. The military government mobilised all available manpower for war purposes through the Total Mobilization Act and did not tolerate any resistance or criticism against it, under such statutes as the Public Peace Preservation Act.

Although the military invasion was successful at the beginning, the Allied Powers gradually came to dominate the battles. In the end, most of the major Japanese cities were burned down by repeated bombings and Japan was devastated by two atomic bombs in Hiroshima and Nagasaki, which killed several hundred thousand civilians. Fearing the near certain destruction of the entire country, and faced with attacks by the Soviet Union despite the neutrality treaty, the government was forced to accept

the Potsdam Declaration and surrendered unconditionally on 15 August 1945.

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After the Pacific War, Japan was placed under occupation by the Allied Powers. General Douglas MacArthur arrived in Atsugi to head the occupation as the Supreme Commander for the Allied Powers (SCAP) on 30 August 1945.<sup>13</sup>

The purpose of the occupation was to democratise Japan and to ensure that Japan would never become a threat to the world as a military power. Thus, the SCAP dismantled the imperial military (November 1945), abolished legislation that restricted individual rights (Direction on Removal of Restrictions on Political, Civil and Religious Liberties, October 1945), dismantled *Zaibatsu* to democratise the economy (November 1945) and implemented large scale land reform to take lands from landowners and redistribute them to individual farmers (1947).<sup>14</sup> The SCAP also made the Emperor proclaim that he was a human being, not a living god (January 1946) and prohibited any governmental support for Shinto (December 1945).

The SCAP also purged all ultra-militarists from governmental positions in January 1946. The International Military Tribunal for the Far East was established in Tokyo in 1946 to prosecute those responsible for the invasions. Twenty-eight political leaders and leading soldiers were prosecuted as Class A war criminals for war crimes and crimes against peace. Most were found guilty and seven were sentenced to death. More than 10,000 soldiers were prosecuted and found guilty as Class B and C war criminals for war crimes and crimes against humanity, and some 1000 were sentenced to death. Despite the strong opinion outside Japan calling for criminal prosecution of the Emperor, MacArthur defended him as an essential person to implement the occupation policy and he was thus never prosecuted.

The SCAP also started wholesale legal reforms of all major laws.<sup>15</sup> The SCAP was convinced that in order to accomplish democratization,

<sup>13</sup> Ishii, above n 4, 127.

<sup>14</sup> Ishii, above n 4, 128–29; Jansen, above n 6, 667–69.

<sup>15</sup> AC Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back* (Princeton, Princeton University Press, 1976).

amendments to the Meiji Constitution were inevitable. They thus urged the Japanese government to prepare such amendments, but the government was reluctant. The leaders of the government at the time were convinced that a change in interpretation of the Meiji Constitution would be sufficient. Pressured by the SCAP, the Japanese government decided to establish the Research Committee on Constitutional Issues headed by Jouji Matsumoto. This committee was established, however, merely based on the agreement of the Cabinet, not by an Imperial Order or by an official decision of the Cabinet, and its objective was merely to study the necessity of constitutional amendment. The committee ultimately concluded constitutional amendment was necessary, yet it believed that some minor changes to the Meiji Constitution should suffice. According to Matsumoto's statement to the Finance Committee of the House of Representatives on 8 December 1945, he would not change any underlying principle that the Emperor had full governmental powers, but would increase the power of the Diet, expand the power of ministers of state and expand the freedoms and rights of the people. The committee therefore prepared a draft amendment, which would have only changed the wording of the Meiji Constitution slightly and would essentially have preserved imperial governance.<sup>16</sup>

The SCAP was not informed of this development on the Japanese side. When the draft was published in a newspaper without authorization, on 1 February 1946, the SCAP was shocked by the draft's conservative content.<sup>17</sup> The SCAP felt that such a draft would thwart the aim of occupation and that the SCAP might be subjected to wide criticism from abroad. Moreover, the Far Eastern Commission was to be established on 25 February. The SCAP feared that their judgement on constitutional reform might be restricted after its establishment and the SCAP decided therefore to prepare a new draft of the Constitution and present it to the Japanese government for consideration.<sup>18</sup> The document, entitled 'Reform of Japan', issued on 27 November 1945, from the State-War-Navy Coordinating Committee (SWNCC-228) provided the basic framework for reform.<sup>19</sup> MacArthur insisted on three fundamental

<sup>16</sup> Shoichi Koseki (trans RA Moore), *The Birth of Japan's Postwar Constitution* (Boulder, Westview Press, 1998) 56–60; JW Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York, W.W. Norton, 1999) 353–54.

<sup>17</sup> Koseki, *ibid*, 61.

<sup>18</sup> Koseki, *ibid*, 77; Dower, above n 16, 360.

<sup>19</sup> State-War-Navy Coordinating Committee, Reform of Japan (SWNCC-228): [www.ndl.go.jp/constitution/shiryo/03/059/059\\_002l.html](http://www.ndl.go.jp/constitution/shiryo/03/059/059_002l.html).

principles: popular sovereignty, renunciation of war and dismantling of the feudal system.<sup>20</sup> MacArthur wanted to maintain the imperial system because he believed that its existence was essential for implementation of occupation policy, but he also wanted the establishment of popular sovereignty, the renunciation of war and prohibition of the maintenance of armed forces as a condition for keeping the Emperor. He believed that if Japan renounced war and prohibited armed forces, other Asian countries might not object to the preservation of the Emperor.

The draft of the new Constitution was thus prepared in eight days between 4 and 12 February by SCAP's staff members.<sup>21</sup> This draft was handed over to Japanese officials on 13 February, when they visited the SCAP in order to hear the approval for their draft. They were simply aghast to be informed that their draft had been rejected and that they were being given a new draft of the Constitution. The leaders of the government were deeply astonished as well.<sup>22</sup> They tried to persuade the SCAP to accept their draft but to no avail. The SCAP warned the leaders of the government that if they did not accept this new draft, the SCAP

<sup>20</sup> Koseki, above n 16, 79. The three principles are as follows:

I

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.

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 lives of those now existent.

No patent of nobility will from this time forth embody within itself any National or Civic power of government.

Pattern budget after British system.

Three basic points stated by Supreme Commander to be 'musts' in constitutional revision: [www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html](http://www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html).

<sup>21</sup> Koseki, above n 16, 82, 98; Dower, above n 16, 364–70.

<sup>22</sup> Koseki, *ibid*, 99–101; Dower, *ibid*, 375.

would publish it to the general public.<sup>23</sup> The leaders of the government feared that such publication would make the issue of the enactment of the Constitution the focus of the next election, and that they might lose the election to socialist forces. The government therefore decided to accept the draft on 26 February 1946<sup>24</sup> and published it as its own draft of the Constitution after some minor modifications on 6 March 1946.<sup>25</sup> The official draft was published on 17 April 1946.

Subsequently, amendments to the Constitution were accomplished according to article 73 of the Meiji Constitution. The draft of the new Constitution was submitted to the Privy Council on 22 April 1946 and was approved on 8 June 1946. It was then submitted to the Imperial Diet after the first postwar election, in which women were given the right to vote for the first time, on 20 June 1946. On 24 August 1946, the House of Representatives passed the amendment and on 6 October 1946 the House of Peers passed it after some revisions. The House of Representatives passed the revised Bill on 7 October 1946. After examination by the Privy Council, the Emperor approved it on 29 October 1946. It was then promulgated on 3 November 1946 and took effect on 3 May 1947. This is the current Constitution: the Japanese Constitution.

The Japanese Constitution is a modern constitution premised upon the popular sovereignty principle. It establishes liberal democracy, even though it maintains the Emperor as a symbol without any political power, and protects a panoply of individual rights as fundamental human rights. It is based on individualism, placing individuals over society and the state. It is generally believed that human dignity lies as the basis of this individualism principle. Moreover, the Constitution has a unique clause which renounces war and prohibits the maintenance of armed forces (article 9).

## POSTWAR HISTORY

Japan's major cities were devastated by repeated bombings and the two atomic bombs dropped on Hiroshima and Nagasaki. After the Pacific War, there were no industries left and the people had to endure extreme food shortages. Demonstrations calling for a better life were a common scene.

<sup>23</sup> Koseki, *ibid*, 104–05.

<sup>24</sup> *Ibid*, 108.

<sup>25</sup> *Ibid*, 129.

In 1950, the Korean War erupted and provided an opportunity for Japan to start rebuilding its economy. At the same time, the Korean War brought significant changes in occupation policy. MacArthur had to move his troops to Korea and allowed the Prime Minister, Shigeru Yoshida, to establish the National Police Reserve.<sup>26</sup> The SCAP banned strikes by public employees, and made local governments enact public safety ordinances to strictly regulate public demonstrations. The SCAP also allowed previously purged ultra-militarists to return to government posts and instead pushed out communists and their sympathisers from the government and major industries (the Red Purge). The United States' government had apparently decided to make Japan one of its allies in the fight against communist forces.

In 1951, Japan finally managed to sign a peace treaty in San Francisco with most of the countries of the world.<sup>27</sup> The occupation ended when this treaty took effect on 28 April, 1952, and the Japanese Constitution became the supreme law of the land (except for Okinawa, where the United States had maintained occupation because of the military bases, until it was returned to Japan in 1972). Despite all this, Japan and the United States concluded the Japan-United States Mutual Security Treaty (Treaty of Mutual Cooperation and Security between the United States and Japan) to oblige the United States to cooperate in defence of Japan and to allow the United States to station military forces in Japan even after the end of the occupation. The government changed the National Police Reserve to the National Safety Force and then to the Self-Defence

<sup>26</sup> RB Finn, *Winners in Peace: MacArthur, Yoshida, and Postwar Japan* (Berkeley, University of California Press, 1992) 263.

<sup>27</sup> The Soviet Union never signed the Peace Treaty because of dissatisfaction with the non-participation of the People's Republic of China. The island dispute between the two countries thereafter has prevented the conclusion of a peace treaty. There is still no peace treaty between Japan and Russia. Japan and the Republic of China (Taiwan) signed a separate Treaty of Peace in 1952. Yet, Japan and the People's Republic of China issued the Joint Communiqué of the Government of Japan and the Government of the People's Republic of China in 1972 and recognized the government of the People's Republic of China as the sole legal government of China, thus terminating official diplomatic relations with Taiwan and starting diplomatic relations with the People's Republic of China. Korea did not sign the Peace Treaty because Korea was not among the Allied Powers. However, Japan and the Republic of Korea (South Korea) signed the Treaty on Basic Relations between Japan and the Republic of Korea in 1965 and normalized diplomatic relations between their two countries. There is still no diplomatic relation with the People's Republic of Korea (North Korea).

Force (SDF). Japan became one of the liberal allies of the Western nations in the fight against communism.

This was not accomplished without opposition. In particular, when the government attempted to renew the Japan-United States Mutual Security Treaty in 1960, more than five million people participated in the nationwide protest, and more than three hundred thousands protesters surrounded the Diet building in order to prevent Diet approval. Even though the Shinsuke Kishi Cabinet managed to renew the treaty, it had to cancel the planned visit of the United States' president amid the chaos and resign en masse. The succeeding Hayato Ikeda Cabinet had to focus the attention of the public on economic development rather than on security issues.

Japan has successfully developed its economy under this new Constitution. In particular, after the 1960s, the government adopted various policies to facilitate economic development. During the 1960s and 1970s, Japan recorded an unprecedented rate of economic growth and became one of the largest economies in the world. Japan was even hailed as the number one country in the world during the 1980s.<sup>28</sup> Although Japan's economy suffered from recession after the economic bubble burst in the early 1990s, it started to gain stability and strength in the 2000s.

Meanwhile, Emperor Hirohito died in 1989 and the current Emperor Akihito succeeded the throne. The commemorative year was changed from 'Showa' to 'Heisei'.

#### THE LEGITIMACY OF THE JAPANESE CONSTITUTION

Ever since its enactment, the legitimacy of the Japanese Constitution has been the subject of heated debate.

It is generally agreed that there is a limit to the power of constitutional amendment.<sup>29</sup> The Meiji Constitution was premised upon the sovereign power of the Emperor while the Japanese Constitution was premised upon the popular sovereignty principle. It is beyond the scope of permissible constitutional amendment to alter the sovereignty principle.

<sup>28</sup> EF Vogel, *Japan as No. 1: Lessons for America* (New York, Harper, 1979).

<sup>29</sup> See below, ch 9, n 5. A few argued that there was no limit to constitutional amendment, and, according to this view, the Japanese Constitution could be valid as an amendment to the Meiji Constitution.

This leads to the conclusion that the Japanese Constitution was invalid as an amendment to the Meiji Constitution.

It is true that the Japanese Constitution fundamentally altered the sovereignty principle of the Meiji Constitution and went beyond the permissible limits of the power of constitutional amendment. Yet the Potsdam Declaration, outlining the terms for surrender, clearly stipulated that '[t]he 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 10) and that Japan should be placed under occupation until 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' (article 12). Japan accepted these terms of surrender in August 1945. Professor Toshiyoshi Miyazawa thus argued that the sovereignty of the Emperor of the Meiji Constitution had already been abandoned via the acceptance of the Potsdam Declaration and thus the popular sovereignty principle had been established.<sup>30</sup> In a legal sense, therefore, there was revolution in the constitutional order: the 'August Revolution'. The Japanese Constitution was legitimised by this 'August Revolution'. It was a new constitution based on the popular sovereignty principle already established, even though it was enacted as an amendment to the Meiji Constitution. Despite some strong criticisms against the August Revolution theory, it is widely supported in Japan.<sup>31</sup>

Some critics also claimed that this constitution was forced on Japan by the occupation forces, and should therefore be invalid. They urged the enactment of a new constitution that was based on the history and tradition of Japanese society. These critics were particularly offended by the renunciation of war and the prohibition of military forces under article 9.

There is no question that the Japanese Constitution was enacted during the occupation. It is also true that it was drafted by officers working in the SCAP and subsequently handed over to the Japanese government. The SCAP, while allowing the Japanese government to make minor changes, did not allow the fundamental principles of the

<sup>30</sup> Toshiyoshi Miyazawa, 'Nihonkoku Kenpou Seitei no Houru' ('Theory on the Birth of the Japanese Constitution') in *Kenpou no Genri (Principle of Constitution)* (Tokyo, Iwanamishoten, 1967) 375.

<sup>31</sup> Ashibe, 30–31.

draft to be altered in any way. These facts were never disclosed during the enactment process. When the draft was handed over to the Japanese government, Courtney Whitney, the chief of the government section in charge of constitutional amendment, made remarks to the Japanese delegates, indicating that while General MacArthur had been defending the Emperor, there was a limit to what he could do; and although the Japanese government was by no means forced to enact this draft, it would be most appropriate for them to do so, if the government wished to protect the Emperor.<sup>32</sup> Leaders of the Japanese government might have taken his remarks as a threat to prosecute the Emperor for war crimes if the government were to refuse the draft. The Japanese government was, therefore, 'forced', in the minds of critics, to accept the draft and enact the Japanese Constitution.

However, the Potsdam Declaration clearly stipulated as a term of surrender that the new government must be 'established in accordance with the freely expressed will of the Japanese people' and must be a 'peacefully inclined and responsible government'. Japan accepted these terms of surrender, and it was quite clear from that point on that the sovereign power of the Emperor under the Meiji Constitution was no longer sustainable.

The Japanese government was given ample opportunity to enact a new constitution in conformity with these terms but failed to do so. Moreover, the draft prepared by the SCAP officers was influenced by various proposals for a new constitution published after the Pacific War in Japan,<sup>33</sup> although we can find a strong influence of the United States' Constitution. Furthermore, the most important reason for the Japanese government to accept the SCAP's draft was the fact that the SCAP indicated its willingness to publish its draft if the government refused to accept it. The leaders of the government feared that if the draft were to be published and receive widespread support, it could become an issue during the coming election, endangering their chances of winning.<sup>34</sup> Indeed, when the draft was published as an official government Bill, it did receive widespread support from the public.<sup>35</sup>

<sup>32</sup> Koseki, above n 16, 101; Dower, above n 16, 374–75.

<sup>33</sup> The draft published on 26 December 1945, by the Study Group on Constitution, headed by Iwasaburo Takano, had a great influence on the draft prepared by the SCAP.

<sup>34</sup> Dower, above n 16, 377.

<sup>35</sup> *Ibid.*, 387.

The Bill was examined by the Diet after the general election, which was conducted with universal male and female suffrage, together with political freedom for the first time in the history of Japan. The examination and deliberation in the Diet also took almost 50 days and there were significant revisions during these examinations.<sup>36</sup> The Japanese Constitution was adopted by a two-thirds majority in both the House of Representatives and the House of Peers, according to article 73 of the Meiji Constitution.

Lastly, the MacArthur gave the Japanese government an opportunity to re-examine the Constitution one year after its enactment, but the government decided not to do so, a decision made without any outside influence.

In light of these circumstances, it would be unfair to say that the Constitution was 'forced' upon the Japanese people and was thus invalid.<sup>37</sup>

### **PART III: SOURCES OF CONSTITUTIONAL LAW**

#### THE MEANING OF SOURCE

'Source of law' usually refers to different forms of law.<sup>38</sup> In general, sources of law can be divided into textual documents, customs and precedents.

If we use the phrase 'source of law' to mean different forms of law, then 'constitutional law' can consist of many forms of law. Aside from the document called the Japanese Constitution, there are many statutes and treaties that have constitutional relevance. The Diet Act, the Cabinet Act and the Judiciary Act are such examples. Moreover, some statutes, such as the Fundamental Act on Education, are closely related to constitutional law. The Japan-United States Mutual Security Treaty has a close relationship with the national defence issue. We may even be able to include some unwritten forms of constitutional law, such as customary law, as sources of constitutional law.

<sup>36</sup> *Ibid*, 388–89.

<sup>37</sup> Sato, 77.

<sup>38</sup> Ashibe, 32.

However, if we use the term ‘source of constitutional law’ as a norm, which can be invoked by the judiciary to evaluate the constitutionality of government conduct, there is no doubt that other statutes or treaties cannot be a source of constitutional law. It is the textual document, the Japanese Constitution, which should be the authoritative source of constitutional law. However, there are questions as to whether some parts of the Constitution could be properly referred to as sources of constitutional law. Moreover, there exists a significant issue as to whether custom or precedent could be considered a ‘source of law’ in this sense.

#### SOURCES OF CONSTITUTIONAL LAW AS JUDICIAL NORMS

The Japanese Constitution is the single most important source of constitutional law in Japan. Yet, there are some ambiguities that exist in parts of this document. The preamble is one of these parts.

The preamble of the Japanese Constitution proclaims that it is the people of Japan who enacted the Constitution and show strong commitment to world peace. It is generally believed that this preamble is a part of the Constitution, but could the courts invoke this preamble to evaluate the constitutionality of government actions? The general assumption is no. The preamble is an interpretive provision of the main text and not an independent source that could be relied on by the courts during an evaluation of constitutionality.<sup>39</sup>

Some provisions of the Constitution may pose unique challenges for courts. For instance, article 9 of the Constitution provides for the renunciation of war and prohibition of military forces. Is article 9 a constitutional norm or merely a political principle? The general assumption is that it is a constitutional norm, which binds the government.<sup>40</sup> Could the courts then enforce this provision, or is it merely a declaration of constitutional principle to be enforced in the political process? The Japanese Supreme Court appears to believe that this provision is an enforceable judicial norm.<sup>41</sup> Nevertheless, it has refused to rule on the constitutionality of the SDF and the Japan-United States Mutual Security Treaty.

<sup>39</sup> Ashibe, 38. This issue is mostly debated in relation to whether the courts should enforce the right to live in peace mentioned in the preamble as an individual right. See below, ch 8, n 25.

<sup>40</sup> Nonaka I, 159 (Takami).

<sup>41</sup> See below, ch 8, n 33.

Article 25 of the Constitution provides for a welfare right. Is this really an individual right which can be enforced by the courts, or is it merely a declaration of the duty of the government, which cannot be judicially enforced? The Supreme Court apparently thinks that article 25 does not vest individual constitutional rights in citizens so as to allow them to challenge government actions.<sup>42</sup> On the other hand, if the Diet enacts a welfare statute that entitles an eligible citizen to receive welfare benefits, then, based on this entitlement, that citizen should be able to claim that any infringement on his or her welfare right is unconstitutional.<sup>43</sup>

There are also disputes as to whether custom could be a source of constitutional law as a judicial norm. Many believe that it could be a secondary source of law when followed with uniformity and backed by public support.<sup>44</sup> They do not consider, however, any customs or practices which violate the text of the Constitution to be a source of constitutional law.<sup>45</sup> Unlike in the United Kingdom, no convention is admitted as distinct from customary law, which is admitted.

Precedents are not legally binding in the civil law countries and therefore they have only de facto binding power.<sup>46</sup> Each court can independently interpret the text of the Constitution to solve a dispute. Therefore, precedents have not been regarded as a source of law. Yet, a constitutional holding of the Supreme Court has a tremendous amount of influence over the lower courts. It is quite rare for the lower courts to disregard the holding of the Supreme Court. Usually, a party can seek appeal to the Supreme Court if the High Court decision is against the precedents of the Supreme Court. The Supreme Court can therefore overturn lower court decisions that disregard its precedents. Consequently, it has been argued that precedents should be viewed as legally binding and as a source of law.<sup>47</sup>

The opinions of scholars or academics are not a source of law. However, since Japan is a civil law country, the opinions of scholars or academics have strong authority (they used to have stronger authority

<sup>42</sup> See below, ch 7, nn 110–11.

<sup>43</sup> Nonaka I, 479, 483 (Nonaka).

<sup>44</sup> Ashibe, 33.

<sup>45</sup> Ashibe, 34; Sato, 24. The establishment of the SDF might be interpreted as establishing customary constitutional law to change the meaning of art 9. Yet many doubt whether the SDF is supported by the majority of people as an armed force and many refuse the possibility of changing the meaning of art 9 by unconstitutional custom.

<sup>46</sup> Ashibe, 374.

<sup>47</sup> Sato, 27–29.

over judicial precedents). The judges usually look to opinions of scholars or academics when they face suits before writing judgments. The law clerks of the Supreme Court usually research academic opinions in their memoranda to the Supreme Court. When the government prepares the legislation, it usually hears opinions from scholars or academics. Scholars and academics are also invited by the government to join or chair the study committee or advisory group for giving recommendations to the government. The Justice Minister asks the opinion of the Legal Council, consisting of many academics, for advice on criminal and civil law matters. Therefore, opinions of academics are very important for understanding law in Japan. The opinions of academics are also useful for understanding the meaning of the general structure of the Constitution as well as the meaning of particular provisions, especially when there is no judicial precedent.<sup>48</sup> Quite often, the opinions of scholars or academics are split. In such circumstances, it is the custom in Japan to distinguish a dominant view or prevailing view among scholars or academics from a minority or dissenting view. Usually, the dominant or prevailing opinion is more important than the minority or dissenting view. However, sometimes the minority or dissenting view might prompt the changes in legislation or judicial interpretation. It is impossible to understand Japanese law without references to opinions of scholars and academics; I have therefore, in this book, also made frequent references to the opinions of scholars and academics.

## **PART IV: SUPREMACY OF THE CONSTITUTION**

### **THE CONSTITUTION AS THE SUPREME LAW**

The Japanese Constitution made clear that it is the supreme law of the land and any legislation or acts of the government that would violate the Constitution are invalid. In Chapter X: Supreme Law, the Constitution thus provides that '[t]his Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act

<sup>48</sup> Even though the Japanese Constitution was enacted under the strong influence of the United States' Constitution, constitutional academics still retain the very strong influence of German constitutional jurisprudence. The majority of constitutional academics thus look to Germany for guidance on interpretation of the Constitution.

of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity' (article 98, section 1). It also provides that '[t]he 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' (article 99).

The supremacy of the Constitution is a natural result of its entrenchment. Yet, the supremacy of the Constitution is believed to be derived from the fact that it is the foundational law for freedom.<sup>49</sup> The Bill of Rights, the constitutional provisions protecting freedoms, is the core of the Constitution, since it was meant to protect as positive rights natural rights deriving from human dignity. These provisions are the basic norms which support and constrain the Constitution.<sup>50</sup>

#### LAWS ENACTED UNDER THE MEIJI CONSTITUTION

What about the legal effect of all the statutes and orders enacted under the Meiji Constitution? It is generally believed that article 98, section 1, allows the statutes and orders enacted under the Meiji Constitution to retain their legal validity so long as they do not violate the Japanese Constitution. Of course, any statutes and orders which substantively violate the Constitution should be declared void. As a result, the Family Law and Inheritance Law of the Civil Code<sup>51</sup> were completely rewritten and the Code of Criminal Procedure was newly enacted.<sup>52</sup> Some of the provisions of the Criminal Code, such as those concerning insulting the Emperor<sup>53</sup> and adultery,<sup>54</sup> were repealed in 1947. There were some questions as to the validity of statutes and orders that were enacted in violation of the procedural provisions of the Constitution. The government believed that all the statutes passed by the Imperial Diet could retain their validity. On

<sup>49</sup> Ashibe, 12.

<sup>50</sup> *Ibid.*, 10.

<sup>51</sup> The Family Law and Inheritance Law were premised upon the supreme power of the housemaster to control the internal matters of the house, to be succeeded by the first-born boy. See below, ch 7, pp 178–79.

<sup>52</sup> The previous Code of Criminal Procedure did not grant sufficient rights to suspects and defendants. Torture was also widely used.

<sup>53</sup> The insult against the Emperor was believed to violate freedom of expression.

<sup>54</sup> The adultery provision punished adultery as sexual relationships only with married women, and it was believed that this was unreasonable sexual discrimination. The government could have retained the adultery provision by amending it to be a gender neutral provision. Yet, it decided that this provision should be repealed.

the other hand, the Diet passed a statute on the validity of orders which were enacted without legislative delegation on matters to be decided by the Diet, extending their validity until 31 December 1947, and then enacted a statute in 1947 authorizing their legal validity, specifically listing 23 orders. As a result, those orders not specifically authorized by this statute lost effect.<sup>55</sup> Yet, some of the orders and regulations which were not enacted by the Diet still retain their legal validity.<sup>56</sup>

An interesting question was raised in the *Placard Case*.<sup>57</sup> The defendant in that case participated in a rally demanding food, carrying a placard saying that ‘Emperor Hirohito said, “The body politic was saved. I am full of food. You, the poor people, die of hunger”’. He was then prosecuted for an insult against the Emperor. The District Court held that the insult provision lost effect after the acceptance of the Potsdam Declaration and found the defendant guilty of defamation and not for an insult against the Emperor. After the District Court’s judgment, the Japanese Constitution was promulgated and the government gave pardons to all prisoners and defendants accused of committing insult against the Emperor. Yet the High Court believed that the insult provision was still legal and found the defendant guilty for the insult against the Emperor. It dismissed the prosecution, however, because the government pardoned all defendants who were prosecuted for the insult against the Emperor. The defendant appealed to the Supreme Court arguing that he should be acquitted because the insult provision was unconstitutional. The Supreme Court, believing that since the prosecution for the insult lost effect because of the pardon, overturned the guilty verdict of the High Court, holding that the court should dismiss the prosecution without reaching a decision on whether the defendant was guilty as charged. It thus refused to rule that the defendant should be acquitted because the insult provision was unconstitutional and lost effect.

<sup>55</sup> Supreme Court, grand bench, 24 December 1952, 6 *Keishu* 1346 (Gun and Fire Arms Control Regulation, which punished violations without legislative authorization, lost effect).

<sup>56</sup> There is no statute, for instance, on the method of execution of the death penalty. The Proclamation of Dajokan issued prior to the Meiji Constitution stipulates hanging as the method of execution and the government has relied on this proclamation to execute the death penalty. This proclamation was treated as equal to statute under the Meiji Constitution and is still valid even under the Japanese Constitution. Supreme Court, grand bench, 19 July 1961, 15 *Keishu* 1106.

<sup>57</sup> Supreme Court, grand bench, 26 May 1948, 2 *Keishu* 529.

## OCCUPATION ORDERS

During the occupation, the orders of the SCAP had superior power over the Constitution. It was only after the end of occupation that the Constitution came to occupy the status of the supreme law of the land. Therefore, the Supreme Court has rejected constitutional attack on an order issued by the SCAP during the occupation. It thus rejected the constitutional attack against the Red Purge under article 14.<sup>58</sup>

The most interesting question was raised in the *Cabinet Order 325 Case*.<sup>59</sup> During the occupation, the SCAP used two different measures to implement its occupation policy. One was to use an individual national law, such as a statute passed by the Diet. The second was a general authorization under the national law. The Japanese government thus enacted Imperial Order 542, which authorized the government to issue an order to punish criminal violation of all orders enacted to implement the policy of the SCAP. The government then enacted Cabinet Order 325 to punish any conduct which prevented the implementation of occupation policy. These orders were unconstitutionally delegated, since they did not specifically define the crimes to be punished. The Supreme Court upheld the orders, however, since SCAP orders had superior authority over the Constitution during the occupation.<sup>60</sup>

The question was then raised as to the legality of these orders after the end of occupation. When the occupation ended, the Diet repealed Imperial Order 542 and extended the validity of orders issued under this Order for an additional 180-day period. Then the Diet enacted a statute repealing Cabinet Order 325, while authorizing the criminal punishment of violations that took place prior to its repeal. In this case, the defendant was prosecuted under Cabinet Order 325 for a violation of the order of the SCAP prohibiting the publication of the leftwing newspaper *Red Flag* and similar papers. During the proceedings, the occupation ended. The defendant thus argued that Imperial Order 542 and Cabinet Order 325 were unconstitutional, that the SCAP order was an unconstitutional violation of freedom of expression stipulated in article 21 and that the prosecution should be dismissed since both Imperial Order 542 and Cabinet Order

<sup>58</sup> Supreme Court, grand bench, 2 April 1952, 6 *Minsbu* 387; Supreme Court, 3rd petty bench, 3 December 1963, 156 *Hanreitimes* 205. See below, ch 7, n 7.

<sup>59</sup> Supreme Court, grand bench, 22 July 1953, 7 *Keisbu* 1562.

<sup>60</sup> Supreme Court, grand bench, 8 April 1953, 7 *Keisbu* 775.

325 lost effect when the occupation ended. The Supreme Court upheld the validity of Imperial Order 542 and Cabinet Order 325 during the occupation since they had superior authority over the Constitution. Yet, the majority of the Supreme Court dismissed the prosecution by a 10 to 4 vote. Six members of the Court believed that the Cabinet Order lost effect when the occupation was ended and it was unconstitutional for the Diet to extend its validity after the occupation under article 39, which prohibits retrospective punishment on legal conducts. Four members of the Court did not believe that the punishment under Cabinet Order 325 after the end of occupation was totally precluded. Yet they believed that the SCAP order was an unconstitutional violation of article 21 and criminal punishment for violation of this order under Cabinet Order 325 after the end of occupation was thus unconstitutional.

#### TREATIES

There is a dispute over which is superior, the constitution or a treaty. Article 98, section 1, is not clear whether a treaty contrary to the Constitution is void and, in section 2, it stipulates that '[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed'. Some have thus argued that treaties should have superior authority over the Constitution.

The relationship between domestic law and international law has been subjected to continuing discussion. The monists argue that domestic law and international law belong to the same legal system. The dualists argue, however, that domestic law and international law belong to different legal systems, and that international law cannot have domestic legal effect unless it is transformed into Japanese state law. The dualists hold the predominant view in Japan. According to the dualist theory, a treaty is international law and does not have any legal effect unless it is transformed into domestic law or is somehow self-executing and could be enforced directly by the courts as a domestic law.

Even when it has effect as domestic law, a treaty may be concluded by the Cabinet with the approval of the Diet (article 73). The House of Representatives is allowed to approve it even when the House of Councillors rejects it (article 61) while, with respect to statute, a two-thirds majority of the House of Representative is required to override the rejection of the House of Councillors (article 59, section 2). A treaty

can be concluded far more easily than a constitutional amendment, which requires a two-thirds majority in both Houses and majority support in a public referendum (article 96). It is thus hard to allow that a treaty has superior authority over the Constitution.<sup>61</sup>

This issue has been debated in the context of the Japan-United States Mutual Security Treaty. If we allow the superior authority of treaties over the Constitution, it may be possible to argue that the Japan-United States Mutual Security Treaty overrides article 9 of the Constitution. Yet, such an override was rejected by many academics.

## **PART V: FUNDAMENTAL PRINCIPLES OF THE JAPANESE CONSTITUTION**

### **POPULAR SOVEREIGNTY**

The first fundamental principle of the Japanese Constitution is the popular sovereignty principle. The first paragraph of the preamble of the Japanese Constitution declares that '[w]e, the Japanese people, acting through our duly elected representatives in the National Diet . . . do proclaim that sovereign power resides with the people and do firmly establish this Constitution'. Therefore, it is abundantly clear that it is the people who have sovereign power in Japan.

Yet, there have been controversies as to the precise meaning of this popular sovereignty principle and its implications. The Emperor is no longer sovereign. He is merely a symbol and does not have any political powers. Yet, his existence presents some complicated issues regarding the relationship between his own role and the popular sovereignty principle. We will discuss these issues in chapters two and three.

### **RENUNCIATION OF WAR AND PACIFISM**

The second principle of the Constitution is the renunciation of war and prohibition of the maintenance of military forces. It is the pacifism principle.

<sup>61</sup> Kiyomiya, 451. It is generally believed that a treaty has superior authority over a statute as domestic law.

The international community had struggled for a long time in the attempt to prohibit war and secure peace. However, before the Japanese Constitution was proclaimed, most attempts were aimed at deterring countries from invading others. No attempt was ever made to prohibit war itself, regardless of its possible justifications. The Japanese Constitution was therefore a bold attempt in this regard, since it could be interpreted as prohibiting war and the maintenance of military forces, even for the purposes of self-defence. Interpreted this way, the so-called 'pacifism clause' of the Japanese Constitution may have made a highly significant contribution to constitutionalism.

Despite this clause, the government established the National Police Reserve, and ultimately the SDF. The government also concluded the Japan-United States Mutual Security Treaty, allowing American military forces to be stationed in Japan after the end of the occupation. As a result of these decisions, Japan has, in reality, maintained one of the strongest military forces in the world. These developments have very serious constitutional implications, and we will discuss these issues in chapter eight.

#### PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

The Japanese Constitution also protects the rights of individuals as 'fundamental human rights', as set out in Chapter III: Rights and Duties of the People.

The fundamental human rights guaranteed by the Constitution are generally construed as rights inherent in all human beings, as rights accorded to all human beings by the law of nature. Thus, according to the prevailing interpretation, they are not first granted by the Constitution. The Constitution merely affirms the existence of these rights.

This is a radical departure from the Meiji Constitution, under which rights of individuals were merely granted by the benevolent grace of the Emperor to his 'subjects'. Moreover, constitutional protection of individual rights under the Meiji Constitution was limited only within the confines of statutes. Therefore, if the Diet and the Emperor enacted statutes to restrict individual rights, no constitutional violation claim was possible.

On the other hand, under the Japanese Constitution, these rights are constitutionally protected. Since the Constitution is the supreme law of the land, the Diet cannot enact a statute that violates the Constitution.

Therefore, even though the Diet can still pass legislation that restricts individual rights, such restrictions cannot be unreasonable, otherwise the legislation must be viewed as invalid. The Constitution vests the power of judicial review in the judiciary to determine whether individual rights are unjustifiably infringed (article 81).

We will discuss the mechanisms of constitutional protection of individual rights in chapter six, and specific protections afforded to each right in chapter seven.

## RULE OF LAW

Rule of law is a constitutional principle which requires the government to be restrained by impersonal rule. The Constitution can be viewed as embodying this principle. As stated above, the Constitution is the supreme law and any legislation or other governmental acts which violate the Constitution are invalid.

Moreover, in order to provide a remedy when the legislature or the executive branch infringes upon the Constitution, the Japanese Constitution entrusts the courts with the power of judicial review (article 81). The Supreme Court can review the constitutionality of legislation or any other governmental act and invalidate it if it is found to be infringing upon the Constitution. The system of judicial review is vital to compliance with the Constitution. Yet, if judges use this power to strike down legislation based on their personal values, then the courts will be acting above the law. We will explore the delicate issue of conditions and limits placed on the court's power of judicial review in chapter five.

The rule of law also demands that government action be authorized by a statute passed by the legislature and that it obeys the statute. It also stipulates that governmental action is subject to judicial review. Under the Meiji Constitution, the Emperor could enact independent orders and emergency orders without authorization by the Imperial Diet and he also had sovereign prerogatives, which were not subject to any legislative scrutiny. Moreover, the courts did not have any authority to review the legality of governmental exercise of power. On the other hand, the Japanese Constitution clearly assumes that the executive branch must be authorized by a statute passed by the Diet and that the executive must obey the statute. The Japanese Constitution also ensures that executive

action is subject to judicial review. We will review these requirements in detail in chapter four.

## SEPARATION OF POWERS

The separation of powers principle divides the governmental powers into separate categories and entrusts them to different branches of the government. The Japanese Constitution is premised upon this principle. It vests legislative power in the Diet (article 41), executive power in the Cabinet (article 65) and judicial power in the courts (article 76).

There are some ambiguities regarding the precise nature of this separation of powers principle and its implications. Japan's political system is based on the Westminster model and adopts the Cabinet system. As a result, the Prime Minister is chosen from the Diet members and he or she appoints other ministers of state to form the Cabinet. The Cabinet is jointly responsible to the Diet for its exercise of executive powers. The ties between the Diet and the executive branch are much closer in Japan than in other countries where the president is the head of the executive branch chosen by the people.

Moreover, the executive power of the Cabinet has been construed to mean all the governmental powers except legislative power and judicial power. As a result, the executive branch in Japan enjoys wide-ranging powers to govern the country. Moreover, the separation of powers principle was sometimes invoked to preclude judicial interference with the executive power.

We will discuss the precise meanings of the separation of powers in chapter four.

## CENTRAL GOVERNMENT AND LOCAL AUTONOMY

Japan is not a federal state. The Japanese government is a centralised government. The Constitution guarantees local autonomy and provides for local government. The Constitution provides, in Chapter VIII: Local Self-Government that '[r]egulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy' (article 92). Local public entities shall establish assemblies as their deliberative organs, in accordance with

law. The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities (article 93). According to article 94, '[l]ocal public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law'. 'A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law' (article 95).

There are 47 prefectures and some 1720 cities, towns and villages in Japan and each prefecture as well as municipal government is granted the power of local autonomy under the Local Government Act.

The power of local government is seriously limited, however, and its power to tax is also seriously limited. Despite the attempt to decentralise by the Decentralization Act and to promote further decentralization through the Decentralization Reform Promotion Act, the fact still remains that many of the tasks of the local government are the tasks of the central government, and local governments are performing these tasks under the supervision of the central government. With a total population of more than 127 million, Japan is one of the countries that maintains highly centralised government. In this book, I will focus on the structure of the central government.

## JAPANESE SOCIETY AND THE CONSTITUTION

Japanese society is generally believed to be a more group-oriented society than Western societies, with more emphasis on harmony and cooperation due to the strong influence of Confucian tradition, and less on individual autonomy. The relationships between people were not regulated by the concepts of rights and obligations. Rather, favours (*on*) and debts (*giri*) meant much more to ordinary people. One can thus wonder whether the concept of a constitution with full protection of individual rights fits with traditional Japanese societal norms.

It is true that there was no tradition in Japan of creating a constitution to restrain the government. Rather, law used to be a means by which the government governed the public. Moreover, individualism and protection of human dignity, the core substantive principles underlying the Japanese Constitution, were alien to traditional Japanese society. Japanese society

used to place more emphasis on groups rather than on individuals. Yet, the Japanese people came to support the principles of individualism and protection of human dignity under the Japanese Constitution.

There are conservative people who still believe that the Constitution protects individual rights to the detriment of public welfare and common interests, thus ignoring Japanese tradition. The notion of the constitution, with its strong protection of individual rights, is, for them, rooted in the Western, Judaeo-Christian tradition and is not suited to Japanese society, which is regulated by Shintoism and Buddhism. Human dignity, the core value of individualism, may be unfamiliar to Shintoism and Buddhism. Yet, respect for the living can be also found in Buddhism and there is no reason to believe that the commitment to human dignity should be limited to the Christian tradition. Moreover, the tradition of giving priority to the group over individual autonomy does not necessarily mean that this is better than individualism. In light of the international protection of human rights, it may be better to discard the old tradition to accomplish individual dignity and autonomy.

Nevertheless, Japanese society still seems to be oriented to group harmony rather than individual autonomy. There are many restrictions on individual freedoms under statutes passed by the Diet. In particular, there are hundreds of statutes requiring government permits or licences to engage in any kind of business, and the public must obey government regulations as well as administrative guidance. These restrictions have been upheld by the courts in almost every instance. Japanese society does not facilitate development of individual autonomy or tolerate much diversity. In light of the actual implementation of the Constitution, therefore, Japan has shown unique development. These issues will be covered in chapters six and seven.

## CONCLUSION

Japan did not have a notion of constitution or any notion of law which constrained the Emperor or the government. The first modern constitution, the Meiji Constitution, modelled on the Prussian Constitution, was premised upon the sovereign power of the Emperor, giving all governmental powers to the Emperor and providing only limited protection of individual rights. Yet, the current Constitution, the Japanese Constitution, is an entirely modern constitution premised

upon the popular sovereignty principle, committed to liberal democracy, with the codification of the rule of law and the separation of powers principle and giving full protection to individual rights as 'fundamental human rights'. Individualism and human dignity are basic foundational principles of the Japanese Constitution.

Even though these principles are alien to traditional Japanese society, the Japanese people came to accept them. Moreover, although the Japanese Constitution was enacted under the strong influence of the United States' Constitution, strong German influence also remained. The modern constitutional history of Japan can be said to be an implantation of American jurisprudence on a German foundation, modified by Japanese tradition. Furthermore, during the 60 years after its enactment, the Constitution showed development quite unique to Japan.

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