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## FOREWORD

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### I

#### INTRODUCTION

Since Japan regained its sovereignty in 1952, many of the Japanese people have debated whether to revise Japan's 1947 Constitution, which was imposed by foreign powers and transferred the sovereign power of the emperor to the people. The argument for revision has centered on the role of the emperor. Prior to the current Constitution, the emperor was the head of state and obtained his legitimacy for ruling Japan from his status as a Shinto *kami* (godlike being). The 1947 Constitution abolished the old emperor system and transformed the emperor into a symbol of the state with no power to govern. The state funeral of Emperor Hirohito in 1989 and the succession ceremonies of Crown Prince Akihito in 1990 have intensified the debate over the proper role of the emperor and the validity of the Constitution. The state funeral and the accession ceremonies included traditional Shintoist rituals thought by many to be prohibited by the Constitution.<sup>1</sup>

More than forty years have passed since the adoption of the 1947 Constitution. This Constitution was a new and somewhat radical change for

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The views expressed in this foreword are those of the Special Editor alone. They in no way reflect agreement or consensus among the participants of the symposium.

1. For example, Emperor Akihito's accession to the throne involved a public coronation and a Shinto rite known as *daijosai* or Great Food Offering Ritual. In the *daijosai*, the new emperor communes with Amaterasu, the sun goddess and ancestor of the royal family, and emerges transformed into a godlike being. Conservative persons call for a restoration of the emperor's old powers and status and protest the government's hesitation to fund the *daijosai*. Others, however, question whether the Constitution permits state support of a religious ritual rooted in the emperor's role as the Japan's chief Shinto priest rather than his role as the ceremonial head of state. They also question whether such rituals violate the Constitution's strict separation of church and state. 1947 CONST. arts. 20, 89.

the Japanese. Many observers were pessimistic about its success because there was a certain reluctance within the culture, politics, and administration of Japanese government and its decisionmaking hierarchies to accept a document imposed by the Supreme Commander of the Allied Powers ("SCAP") that included rather alien concepts. Japan had been forced to abandon a system of government based on the divinity of the emperor in favor of a democracy based on the sovereignty of the people. Many wondered whether an authoritarian and traditionalist society could adapt to principles of democratic self-government. There was a great fear that as soon as Japan assumed full autonomy after the Peace Treaty of 1952, conservative Japanese would regain control of the government and amend the Constitution. So far, this fear has proved unfounded. After four decades under the new Constitution, the Japanese people have successfully made the transition to popular sovereignty and a democratic government. However, as noted above, conservative advocates for revising the Constitution also exist.

Although much has been written in English on the American influence during the Occupation of Japan after World War II, there is little scholarship in English on the development of Japanese constitutional law over the last forty years. In comparison, the more than 1000 members of the Public Law Association of Japan (Koho gakkai) and the Constitutional Study Society (Kempo kenkyukai) have written extensively on the subject in Japanese.

In the fall of 1989, Duke University School of Law hosted a three-day symposium on the Constitution of Japan. Leading Japanese and American scholars of the Japanese legal system and Japanese constitutional law reviewed the direction and development of constitutional law in Japan during the past four decades, focusing on the status of the emperor, reappraisal and revisionism, judicial review, and the balance between constitutionally protected individual liberties and the public welfare. They examined how the 1947 Constitution had been woven into the institutional framework of the traditional Japanese society, how the courts have exercised the power of judicial review over legislation and government acts, and how personal rights have or have not been protected. The articles and comments in these two volumes of *Law and Contemporary Problems* were delivered at this symposium.

Prospective readers will come to these volumes with varied knowledge of and interest in Japan, its legal system, and Japanese constitutional law. They may question the value for them in delving into these issues. Let me respond by saying that the issues addressed in these articles are of importance to persons interested in Japan because they examine trends in constitutional law that indicate the future legal framework in which businesses and Japanese government ministries must operate in future decades. For those persons who lack a basic knowledge of the Japanese legal system, I have provided a brief history of Japan's constitutional development and legal system in this foreword before introducing the reader to the authors and articles.

## II

## HISTORY OF THE JAPANESE LEGAL SYSTEM

There are three distinct periods in the development of the Japanese legal system. In the first period, prior to 1860, the legal system supported Confucianism and a feudal social order. During the second period, which began with the arrival of Admiral Perry's American fleet, Japan was opened to the West and subsequently was influenced by Western civil and common law traditions. Finally, during the Occupation of Japan following World War II, Japan adopted common law legal principles and an American-style constitution. In each period, the former legal tradition was merged with the new, rather than being rejected entirely.<sup>2</sup>

During the third and fourth centuries, the Shinto religion strongly influenced Japanese social life and hierarchy. Confucianism as a philosophy of life was added to this Shinto tradition in the fifth century and provided a strict hierarchical social order serving political purposes. Buddhism arrived in the sixth century, and its religious doctrines were adapted to serve existing political purposes. At that time, law was indistinguishable from social rules, the only foreign influence was China, and political and economic power were concentrated in the imperial government and the powerful feudal clans. By the beginning of the seventh century, Japan had followed the Chinese model and developed a centralized government under the emperor.<sup>3</sup> Legal codes incorporating Confucian ideals and values governing social life were borrowed from China.<sup>4</sup> As a result, Japanese culture emphasized and continues to emphasize group identity and conformity in a uniform social structure. The goals of the group, which may be the family, school, neighborhood, company, village, city, region, or nation, take precedence over the needs of the individual group members.

Under this regime, Japanese law was nonjudicial; it emphasized administrative law and practice for governing society through the imperial government. By the ninth century, the emperor's power had weakened and the power of a military class/clan society structure had correspondingly risen. The military class gained control of the imperial government by the twelfth century; at that time, the emperor reigned in name only. The resulting feudalistic society was dominated by the samurai warrior class (bushi). The moral rules of conduct governing the bushi were found in the code of chivalry (bushido), which, although basically a customary system of rules, had some

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2. Unlike the United States, but similar to many civil law nations, the Japanese legal system places less stress on judicial law, more systematic reliance on codes and statutes, and greater emphasis on furthering public policies as expressed in legislation enacted by its legislative body, the Diet.

3. See Y. NODA, INTRODUCTION TO JAPANESE LAW 22-26 (A. Angelo trans. 1976).

4. Confucianism sees the world as a single organism governed by certain unchanging laws (dao) that mandate cooperation rather than competition among men. This philosophy stresses social compassion (jen), harmony and concord (wa), and social ties (en). Social relationships are governed by an intuitive understanding of one's place in a larger scheme.

associated written laws.<sup>5</sup> The bushido system of morality was grounded in Confucianism and Buddhism. The older Japanese legal codes based on Chinese law were never formally abrogated, but their influence declined outside the domain of the imperial court.<sup>6</sup>

Feudalism reached its peak during the Tokugawa period, which lasted from approximately 1603 until 1868. During this period, Japan isolated itself, particularly from the Western world. Confucianism was adopted as the official ideology and provided the moral ideals on which the hierarchical social relationships of Japanese feudalism were founded. Customary law and government proclamations supported the existing social order and feudal regimes. Laws, for the most part, were a means of constraint or enforcement used by government authorities to achieve their purposes and to maintain a strict code of social behavior among the Japanese people.<sup>7</sup> An independent, judicially created system for dispute resolution between private parties existed,<sup>8</sup> but individual rights were not well respected by government and Japanese citizens were expected to obey government without question.

Following the Tokugawa period and Admiral Perry's historic visit to Japan, a time of transition known as the Meiji era (1868-1912) commenced. Lacking knowledge about Western law, Tokugawa officials were forced by Western nations to sign treaties prejudicial to Japan's national interests. Political power was returned to the emperor, and Japan struggled to maintain its independence in the face of Western pressure to open itself to foreign economic interests and influences. Japan sought to discourage Western imperialism by rapidly modeling its legal and political systems on those of European nations. Such changes were also a precondition to renegotiating the disadvantageous treaties with Western nations.<sup>9</sup> In restructuring its legal system, Japan also sought to modernize its social and political institutions, and to facilitate its participation in the international economic marketplace and political arena. From the Japanese perspective, Japan lacked sufficient time to allow the law to change spontaneously to satisfy the demands and needs of an emerging industrial society.<sup>10</sup>

Looking to Europe for a model on which to base its new legal and political system, Japan was introduced to Western civil and common law traditions. Japan adopted the civil code system, which was more advantageous than a common law system that necessarily relies on the passage of time and the natural evolution of case law. Familiarity with authoritarian forms of government administration, the Confucianism tendency for obligation to one's group and respect for government authority, and the hierarchical nature

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5. Y. NODA, *supra* note 3, at 30.

6. *Id.*

7. *Id.* at 37.

8. Takayanagi, *A Century of Innovation: The Development of Japanese Law, 1868-1961*, in *THE JAPANESE LEGAL SYSTEM* 163, 173 (H. Tanaka ed. 1976).

9. Noda, *Comparative Jurisprudence in Japan: Its Past and Present*, in *THE JAPANESE LEGAL SYSTEM*, *supra* note 8, at 194, 199.

10. Y. NODA, *supra* note 3, at 42.

of Japanese society greatly influenced Japan's decision to adopt the European civil law tradition and a German-style constitution with less emphasis on individual rights.

During the 1870s, the French Criminal and Civil Codes were translated into Japanese, and an institute for the study of European culture was established.<sup>11</sup> European jurists were invited to Japan to assist in modernizing the Japanese legal system. In the early 1880s, the Japanese legislature adopted its first modern legal codes, the Penal and Criminal Procedure Codes, which were modeled on French law and remained in force until 1908 and 1890 respectively.<sup>12</sup> The demise of these first two codes coincided with the failed attempt by the Japanese legislature to adopt a comprehensive French-style civil code. Although Japan wanted a legal system that would enable it to develop a capitalist society, some Japanese feared that the proposed code "did not sufficiently take account of the traditional customs and morality of the Japanese people"<sup>13</sup> and that adopting the French-style code might facilitate the development of a bourgeois society and encourage a class revolution. These opponents favored the formation of an absolutist state and looked toward the German legal system for guidance.<sup>14</sup> What finally emerged in 1898 was a civil code modeled on European code systems, including those of France, Germany, Switzerland, Austria, and Holland. In form and substance, however, the Japanese codes were most influenced by French and German law; indeed, the Japanese Civil Code has been described as a selective combination of French and German legal principles.<sup>15</sup>

Japanese scholars and legislators, who were "imbued with the Confucian concept of law, which is diametrically opposed to the Western conception,"<sup>16</sup> and who lacked adequate preparation or training in Western legal systems, selected by trial and error what they "thought was necessary from among the jumble of laws imported at random from the West and cop[ied] it uncritically."<sup>17</sup> Japan lacked a consistent government policy for the establishment of a new legal system; instead, it improvised to address immediate problems.

With the 1889 adoption of the Meiji Constitution, which was patterned after the monarchical Prussian Constitution, the German influence clearly surpassed the initially stronger French influence in the modernization of the

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11. France, at the time, was viewed as having the most sophisticated and complete codification of laws. Noda, *supra* note 9, at 200. French law was taught in Japanese educational institutions and the Japanese government hired French legal instructors and advisers to teach Japanese government officials, judges, and students about French law. *Id.* at 202-03.

12. Y. NODA, *supra* note 3, at 46.

13. *Id.* at 47.

14. *Id.* at 49-50.

15. *Id.* at 55.

16. Noda, *supra* note 9, at 199-200.

17. *Id.* at 194.

Japanese legal system.<sup>18</sup> The Meiji Constitution declared that sovereignty resided in the divine emperor as the head of state and that the emperor gave the constitution as a gift to his subjects. The Constitution's recognition of imperial sovereignty gave it a firm foundation in Japanese tradition.<sup>19</sup> The Meiji Constitution also introduced the concept of separation of powers for the first time in the history of Japan, providing for independent legislative, executive, and judicial branches of government. However, there was no true separation of powers, and there was no system of checks and balances. Although the legislative power was exercised by the Imperial Diet and the executive power was exercised by the Prime Minister and the other Cabinet ministers, the judicial power was exercised by courts with limited jurisdiction that lacked the constitutional authority to review the acts of the Diet or the Cabinet. The failure of the Meiji Constitution to provide for judicial review of government acts and legislation significantly weakened its guarantees of fundamental human rights and "provided the basis for domination of the governmental process by the executive branch."<sup>20</sup> In practice, therefore, the three branches of government were merely "facets of the unitary imperial sovereignty."<sup>21</sup> After the adoption of the Meiji Constitution, "the development of Japan's government and politics was a blend of the authoritarian elements characteristic of the Constitution—especially the absolute sovereignty of the emperor and the restrictions on freedom—and ameliorative practices leading in the direction of an at least modified democratization."<sup>22</sup>

Between 1890 and 1900, Japan made tremendous strides in modernizing its legal system. Of particular note, the Japanese legislature adopted the Law on Court Organization in 1890, which firmly established Germany as the dominant influence on Japanese legal thinking. German legal theories served as the basic standards of interpretation and application of Japanese law.<sup>23</sup> These new legal systems, however, "were not direct products of the inner demand of Japanese society for the formation of a legal order."<sup>24</sup> Rather, "[they] were imported primarily . . . as tools for serving political purposes of the then ruling circle, the revision of the unequal treaties."<sup>25</sup> Therefore, as a whole, Japanese society had no input in or knowledge of the newly imported European-style concepts of rights and duties that form the foundation of all modern Western legal systems.

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18. Professor Yosiyuki Noda of the University of Tokyo Faculty of Law writes, "Japanese people have an affinity for the German *Geist*, which values *Gemüt*, rather than the French *esprit*, which prizes *précision*." *Id.* at 204.

19. Maki, *The Japanese Constitutional Style*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67*, at 3 (D. Henderson ed. 1968) [hereinafter *CONSTITUTION OF JAPAN*].

20. *Id.*

21. *Id.* at 7.

22. *Id.*

23. Noda, *supra* note 9, at 196, 210.

24. Rokumoto, *Problems and Methodology of Study of Civil Disputes, Part I*, 5 *LAW IN JAPAN* 97, 100 (1972).

25. *Id.*

The modern Japanese codes, like the European codes from which they derived, were predicated on a “society in which every individual is presumed free and equal with everyone else . . . and where loyal relationships are created by the exercise of an individual’s free will.”<sup>26</sup> The Japanese people, who stressed group rights over individual rights, found these new concepts very difficult to understand. In recognition of the deep roots of Confucianism, culture, and social habits, the new legal system was not meant to interfere with or to alter the actual life and morality of the Japanese people. “Even the most progressive [Japanese] intellectuals toward the end of the Edo period expressed this idea, and their motto was ‘Western techniques, Oriental morality’.”<sup>27</sup> The basic nature of the Japanese social order preserved this outcome; “the relationship between the state and the citizen was placed outside the purview of the judiciary.”<sup>28</sup> Professor Yosiyuki Noda describes this philosophy in practice as follows:

Although Japan succeeded in faithfully and skillfully imitating the French and German legal systems, its own culture could not help but give an original character to the system that was received. The rapid Europeanization was limited to the field of state law, which dealt with only a very small section of Japanese society. Further, it must not be forgotten that the modernized law was put into operation by men whose outlook was determined by a peculiar set of geographical and historical factors. . . . Japan was destined to remain a long time subject to social rules that were quite foreign to the received law.<sup>29</sup>

Professor Noda also explains that

[t]here may be a marked difference between the modern and the old law at the level of [written] state law, but at the level of living [practiced and interpreted] law there was no break in continuity. The latter evolved spontaneously and unconsciously. Historical continuity interrupted in the conscious continues in the subconscious, and this subconscious factor plays an important role in the social life of the Japanese people today.<sup>30</sup>

The Meiji era in Japanese history can be characterized as the Westernization of its political and legal systems. During the subsequent Taisho period (1912-1926) and the Shōwa period (1926-1989) before World War II, the Japanese government sought to cultivate a society that, although uniquely Japanese, was on equal standing with those in Europe.<sup>31</sup> Japan achieved industrialization and modernization of its bureaucratic organizations but retained its preindustrial principles of social norms and structure.<sup>32</sup> At first, European legal concepts were foreign to the realities of Japanese society and therefore had only limited impact on the daily lives of most Japanese.<sup>33</sup>

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26. Y. NODA, *supra* note 3, at 58.

27. *Id.* at 59-60.

28. Rokumoto, *supra* note 24, at 100. See also Oppler, *The Reform of Japan’s Legal and Judicial System Under Allied Occupation*, 24 WASH. L. REV. 290-324 (1949); von Mehren, *Some Reflections on Japanese Law*, 71 HARV. L. REV. 1486-96 (1958).

29. Y. NODA, *supra* note 3, at 58.

30. *Id.* at 39.

31. Noda, *supra* note 9, at 215-16.

32. Rokumoto, *supra* note 24, at 98.

33. Kitagawa, *Theory Reception—One Aspect of the Development of Japanese Civil Law Science*, in THE JAPANESE LEGAL SYSTEM, *supra* note 8, at 235, 240.

However, over time, the European-influenced legal system began to intersect and merge with the realities of Japanese culture and society. The resulting merger did not mirror a traditional European-style civil legal system; rather it was the natural product of Japanese tradition and morality that occurred when the customary or living law caught up and merged with the written or book law. Given a moral, social, economic, cultural, and historical background different from that of Europe, the Japanese found themselves applying European legal rules and principles to factual situations and settings that were nonexistent in Europe. When book law conflicted with living law, government and judges tended to interpret the law to fit Japanese morality and government policy. Hence, the newly created Meiji Constitution and Civil Code formed a foundation for a legal system that merged European legal theory with Japanese culture and morality to begin the evolution of a unique Japanese "rule of law."<sup>34</sup>

This evolutionary process was further complicated by World War II and the subsequent occupation of Japan. Japan signed its unconditional surrender to the Allied Powers on September 2, 1945. In compliance with Article 10 of the Potsdam Declaration,<sup>35</sup> SCAP set about to assist the Japanese government in removing "all obstacles to the revival and strengthening of democratic tendencies among the Japanese people."<sup>36</sup> The Declaration mandated that "[f]reedom of speech, of religion, and of thought, as well as respect for the fundamental human rights, shall be established," but SCAP gave the Japanese much autonomy in shaping their new legal system.<sup>37</sup> The Diet drafted the new legislation, which was subject to a SCAP veto only if it ran counter to the objectives of the Occupation as embodied in the Potsdam legislation.<sup>38</sup> The Diet drafted a new American-style constitution, restructured the judiciary and gave it independence from the executive branch, revised the five major civil codes, and enacted "a multiplicity of special implementing new regulatory laws, many of which were previously unknown to Japan."<sup>39</sup> The Constitution

was the center from which most of the other reforms emanated. In the sweeping amendments, the Meiji theocratic construct disappeared with the disestablishment of state Shintoism and the secularization of the emperor's position in the state. National patriarchy was abolished by declaring the people, not the emperor, sovereign, and by destroying the peerage, and on the local scene, by abolishing the legal inequalities of

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34. "The divergence of living law from book law is a phenomenon not confined to Japan. It exists not only in codified, civil-law countries such as France and Germany, but also in common-law countries such as the United States. . . . The reception of Roman law in Germany, for instance, was a gradual process extending over several centuries, and Roman law became a part of German customary law." Takayanagi, *supra* note 8, at 191.

35. The Potsdam Declaration, July 26, 1945, United States, United Kingdom, China, art. X, *quoted in part in* GOVERNMENT SECTION, SUPREME COMMANDER FOR THE ALLIED POWERS, POLITICAL REORIENTATION OF JAPAN (Sept. 1945-Sept. 1948), in *LAW AND THE LEGAL PROCESS IN JAPAN* 157 (D. Henderson and J. Haley eds. 1978).

36. *Id.*

37. *Id.*

38. *Id.* at 159. "The occupying authority, of course, has the power to legislate by prerogative act." *Id.*

39. *Id.* at 155.



individuals in the families and villages—the basic authoritarian units from which the structure of Japanese absolutism had been built over the centuries. Judicial supremacy and cabinet responsibility were two other key constitutional principles novel to Japan.<sup>40</sup>

The process of merging book law with living law that began in the Meiji period continued in the post-World War II period. Under the Meiji Constitution, courts could not adjudicate legal challenges to the constitutionality of statutes and government actions implementing those statutes; the executive and legislative branches alone interpreted the constitution. Law courts were under the administration of the Ministry of Justice and could resolve only disputes between private parties concerning contracts, torts, property, and family matters. Although an administrative court existed to handle claims against government officials for exceeding their authority, its jurisdiction was quite limited; it could not review legislation or government acts in implementing that legislation. Thus, under the Meiji Constitution, constitutional law questions were addressed as political issues by politicians and legal scholars, not by lawyers and judges; discussions were theoretical rather than practical.

The 1947 Constitution, however, was a constitution for politicians, legal scholars, lawyers, judges, and the Japanese people. The new Constitution officially replaced “rule by law” with “rule of law” and gave Japanese courts, not legal scholars and politicians, the power to review legislation and government actions for the first time. This Constitution’s guaranteed rights for the people were justiciable and subject to legally authoritative meaning unknown under the Meiji Constitution. “Soon followed a body of Supreme Court decisions from which for the first time lawyers could get detailed and authoritative guides to answer constitutional questions. This required, in turn, the adoption throughout the legal profession of a new juristic method in public law rooted in case analysis.”<sup>41</sup> The abstract analysis associated with civil law blended with common law case analysis. Thus, common law legal concepts were interpreted by Japanese judges according to civil law theories and principles.

To some, continuity with the Meiji Constitution . . . might seem farfetched until we remember that it had several characteristics in common with the new Constitution: both followed foreign models (German and Anglo-American); both were far in advance of the social realities which they sought to transform; both were thus a product of an elitist ideal and granted from the top down (by Meiji oligarchs and SCAP/Japanese drafters); neither was produced by a social upheaval, or granted in response to popular clamorings for power. Paradoxically, then, in the sweep of a century, the growth of the living constitution has been rather continuous, though there has been a rapid rate of achievement. Emphasis on continuity in this sense is important in focusing on the underlying contribution of the Japanese people to living constitutionalism. . . . Both Japanese constitutions were, in this perspective, exciting

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40. *Id.* at 156. The Law and Courts Division of the Government Section of SCAP, headed by a former German jurist, Alfred C. Oppler, was asked to assist in the implementation of the Constitution by providing guidance to the Japanese government in its reforms of the legal codes and judicial system. *Id.*

41. Henderson, *Introduction: Perspectives on the Japanese Constitution after Twenty Years*, in CONSTITUTION OF JAPAN, *supra* note 19, at xiv.

experiments in a gamble for popular self-fulfillment based on the hope that there would develop enough right consciousness as leverage so that the people could pull themselves up by their own constitutional bootstraps. To an encouraging degree they have.<sup>42</sup>

Perhaps this process of merging Anglo-American legal concepts with a Continental civil law system adapted to Japan was best described by Professor Dan Fenno Henderson when he wrote that "the postwar birth of the new Constitution was necessarily a Caesarean operation attended by an alien midwife which the newborn could probably not have done without nor easily live down."<sup>43</sup>

The Constitution of Japan has many features found in the American Constitution, including an equal protection clause and numerous provisions, similar to the American bill of rights, guaranteeing an extensive list of fundamental human rights. Constitutional provisions define the ceremonial role of the emperor; guarantee rights to accused criminals; establish a parliamentary democracy and legislative supremacy; grant specific autonomy in certain areas to local governmental units; limit Japan's use of military force to a self-defense purpose; and provide for true separation of powers between the legislative, executive, and judicial branches of government.

Despite the new powers afforded the judiciary by the new Constitution, Japanese courts continue to rely on continental notions of judicial power that restrict available remedies to those provided by statute. Therefore, in the area of civil law, "the courts can order specific performance, award damages, or enter declaratory judgments affirming the legal relations of parties in the suit. In most instances, these remedies are effective because of voluntary compliance."<sup>44</sup> But lacking the contempt powers to support injunctive relief, a court has no way to enforce its decrees against noncomplying parties, particularly against government agencies. Instead, the courts still must rely on the Ministry of Justice to initiate criminal proceedings.<sup>45</sup> Such reliance makes one question whether the formal institutional mechanisms for establishing the "rule of law" pursuant to the constitutional mandate have truly succeeded. That is, serious questions have arisen as to whether the "rule of law" is actually functioning and what role the judiciary plays in the realization of the "rule of law."<sup>46</sup>

### III

#### THE ARTICLES IN THIS ISSUE

The articles contained in this special edition of *Law and Contemporary Problems*, which examines the forty-year development of Japanese constitutional law, are divided into six major topics entitled: *Understanding the*

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42. *Id.* at xii-xiii.

43. *Id.* at xi.

44. Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 387 (1978).

45. *Id.*

46. See Rokumoto, *supra* note 24, at 100.

*Japanese Constitution, Government Process and Separation of Powers, Judicial Review, Socioeconomic Rights, Protection of Human Rights, and Important Constitutional Issues.*<sup>47</sup> The first section, *Understanding the Japanese Constitution*, addresses the development of constitutional law in Japan after 1947. Professor Yasuhiro Okudaira examines the foreign influences on the development of Japanese constitutional law over the last forty years. Professors Yoichi Higuchi and Isao Sato examine the movement to revise the Constitution by conservatives, whose chief motivations for revision have been concerns for the Constitution's alien origin, development of the military, enhancement of the emperor's status, and reduction of individual rights.<sup>48</sup> Professor Noriho Urabe examines the status of "rule by law" from the Meiji Constitution and the "rule of law" from the 1947 Constitution. He traces their development and the development of due process in Japanese law under the 1947 Constitution, and compares the status of these three legal concepts under Japanese and American law. Professor John Maki explores Japanese constitutional theory and the proposition that pacifism, popular sovereignty, and the guarantee of fundamental human rights are the foundation of the 1947 Constitution and of Japan's successful democracy. In his comment, Professor Dan Fenno Henderson provides scholarly insight on the specific subjects addressed in the articles in this section and offers his thoughts on the development of Japanese constitutional theory.

The second topic, *Government Process and the Separation of Powers*, focuses on the constitution's establishment of three separate and independent branches of government. Professor Kazayuki Takahashi examines Japan's democracy and its parliamentary system. He questions whether Japan actually has a democracy since there has not been a change of government since 1955 when the ruling Liberal Democratic Party ("LDP") came to power. Professor Yoshiaki Yoshida's article addresses the autonomy of local governments in Japan. He compares the Constitution's delegation of autonomy to local governments with the reality of the relationship between the national and local governments. In my article, I review the history and organization of the Japanese judiciary, examine the status and independence of the judiciary in the parliamentary system under the Constitution, and discuss the effect of the judicial bureaucracy on judicial independence. Finally, Professors Taisuke Kamata and John Maki comment on the separation of powers, autonomy of local governments, and judicial independence.

In the third section, entitled *Judicial Review*, Professors Hiroshi Itoh and Taisuke Kamata examine the use of judicial review in Japan. Professor Itoh discusses judicial activism and the limits of judicial review. Professor Kamata

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47. Given the distinctive style of Japanese prose, it is sometimes necessary for the reader to grasp that which is only implied as well as that which is explicitly stated.

48. "Ironically, the pro-American, conservative and dominant Liberal Democratic Party has constantly sought revision of the American-style constitution, whereas the anti-American socialist and communist left has staunchly defended the Constitution and has been able to maintain slightly more than 1/3 of the seats in the Diet, thus blocking a conservative revision." Henderson, *supra* note 41, at xiv.

examines the areas of political questions and legislative discretion, which the Japanese Supreme Court considers outside the scope of judicial review or subject to the most lenient judicial scrutiny. In his comment, Professor John Haley provides some additional insights on the exercise of judicial power by the Japanese judiciary.

In the fourth section, *Socioeconomic Rights*, Professor Mutsuo Nakamura examines economic liberties and property rights and Professor Akira Osuka examines welfare rights provided by the Constitution. The 1947 Constitution presumes to deliver positive rights, such as the right to a minimum standard of living, the right to work, and the right to health care. Professors Nakamura and Osuka consider, among other things, whether these enumerated constitutional rights impose affirmative obligations on government that can be judicially enforced. Professor Nakamura first distinguishes social rights from economic rights and then discusses the economic rights provided under Articles 22 and 29 of the Constitution. Professor Osuka outlines the social rights guaranteed by the Constitution in Articles 25, 26, 27, and 28, and contrasts the poverty law systems under the Meiji Constitution and the current Constitution. He concludes that social rights as well as civil liberties constitute fundamental human rights guaranteed by the Constitution. Professor Osuka then explores whether the right to a decent life guaranteed by Article 25 provides a constitutional basis for challenging threats to a decent life, such as environmental pollution, and for forcing government to assist citizens in maintaining a decent life. Professors Hiroyuki Hata and J. Mark Ramseyer provide insightful comments on these articles.

In the fifth topic, *Protection of Human Rights*, the authors address a continuing question in constitutional democracies: What is the proper balance between individual liberties and the public welfare? From the Meiji Constitution to the current Constitution, this balance has changed and is likely still changing. Professor B. J. George examines the constitutional rights of criminal suspects and defendants. Professor Lawrence Beer discusses the constitutionally guaranteed right of freedom of expression. He contends that the quality of a constitutional democracy can be determined from the extent to which freedom of expression is constitutionally and culturally permitted. Professor Hidenori Tomatsu describes the concept of equal protection, its specific expression in Articles 14, 24, 26, and 44 of the Constitution, and its judicial development. Professors Frank Upham and Yasuhiro Okudaira comment on these papers and present their opinions on the current balance between individual liberties and public welfare in Japan.

For the final topic, the authors address three very important and current constitutional law issues. Professor Masahiro Usaki first describes that when the right to elect public officials contained in Article 15 and the freedom of expression guaranteed in Article 21 are read together, they provide a constitutional guarantee of political freedom. He then questions the constitutionality of statutory restrictions on political campaign activities during elections. He concludes that these restrictions prevent Japan from

achieving a true democracy as envisioned in the Constitution. Professor Hiroyuki Hata examines malapportionment of representatives in the Diet, one of the most serious political problems confronting Japan. The ruling LDP has drawn its main support from the rural areas of Japan. Over the last thirty years, however, population migration to urban areas has shifted the majority of the population to urban areas, which tend to support the opposition parties. Consequently, there has been no incentive for the LDP to reallocate the Diet seats to coincide with these demographic shifts. In the next article, Professor James Auer reviews the history and present status of the controversial Article 9 of the Constitution, which is known as the "renunciation of war clause." Under Article 9, Japan retained a right of national self-defense but denounced the right to wage war or to maintain an armed force. Professor Auer describes the current debate on whether Japan's Self-Defense Forces, which have been maintained since 1950, are prohibited by the Constitution. Finally, Professors Kazayuki Takahashi and Margaret McKean provide some insightful comments on these current areas of debate in Japan.

#### IV

#### CONCLUSION

Among the nation states, Japan's Constitution stands out as one of the most long-lived and stable. Of the nearly 160 nations possessing written constitutions, only thirty-two were in effect prior to 1960. This 1947 American-style Constitution represents a constitutional revolution for Japan and has provided an institutional and conceptual framework for the prosperity and successful democracy that Japan has enjoyed for the last forty-three years. Under this Constitution, Japan adopted the principles of popular sovereignty, protection of fundamental human rights, judicial independence, and pacifism. Japan's constitutional renunciation of war permitted it to concentrate on economic growth.

What becomes clear after reading the contributions to this volume is that Japan adopted this American-style Constitution in a far different historical context than that in which the United States enacted its own Constitution. Unlike its American counterpart, the Japanese Constitution was not the product of a revolution and was not a contract between the different immigrant peoples and the government. Japan was already a very long-lived nation with a common heritage and culture. In the United States, the Constitution was the recognition of the state; in Japan, however, the state had been in existence for many years and the Constitution was not the first adopted.

American law has had a significant impact on the development of the Japanese legal system; certain areas of Japanese law have developed similarly to corresponding areas of American law. Nevertheless, striking differences remain. During the process of drafting the Constitution, Japanese government officials adapted many provisions to Japanese custom, tradition,

and existing law. Similarly, in the process of interpreting the Constitution, judicial and government decisions lean in the direction of custom and tradition. "As in any other healthy democracy, sharp tensions persist between ideals and reality, between formal law and customary law, and between groups representing various value emphases both domestic and foreign in origin."<sup>49</sup> These tensions are addressed in the following pages as the authors review and interpret the history of constitutional law in Japan over the last four decades and project its development in the fifth and future decades.

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49. Beer, *Japan's Constitutional System and Its Judicial Interpretation*, in *LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES* 7, 29 (J. Haley ed. 1988).

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