

THE CONSTITUTION OF JAPAN: PACIFISM, POPULAR SOVEREIGNTY, AND FUNDAMENTAL HUMAN RIGHTS

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I

INTRODUCTION

Japanese constitutional theory is built on the proposition that pacifism, popular sovereignty, and the guarantee of fundamental human rights are the foundations of the Constitution. This article shows that these principles lie at the heart of an understanding of both the Japanese Constitution and Japan's democracy. For four decades, Japan has witnessed no constitutional crisis; that is, no political, governmental, or social issue has appeared that has either threatened the constitutional order or revealed a serious defect in it. The proof of this statement is that there has been no constitutional amendment, although many have been proposed. There has been constitutional controversy but no crisis. This stability demonstrates much about the actual operation of Japan's constitutionalism and provides a basis for a reading of the state of democracy in Japan in this last decade of the twentieth century.

This article examines the role of these three principles in Japanese constitutional culture. In addition, it illustrates how the principles have affected the course of the Constitution in action. Finally, the article shows how the principles serve as a guide for speculation about the future of the Japanese Constitution.

II

PACIFISM AS A CONSTITUTIONAL PRINCIPLE

Pacifism as a constitutional principle is most peculiar. It has nothing to do with the structure of government, the powers of its constituent elements, the role of the people, or the relationship between the government and the people, all of which are primary constitutional concerns. Pacifism does, however, have every right to its position as a fundamental principle.

The principle of pacifism is expressed in the Constitution's second chapter, consisting of the single famous Article 9. The basic points of Japan's pacifism expressed therein are: the renunciation of war and the threat or use of force as a sovereign right of the nation in settling international disputes; the perpetual nonmaintenance of land, sea and air forces; and the non-

recognition of the right of belligerency. Article 9 is buttressed by both Article 66, which requires that the prime minister and all ministers of state be civilians, and the lack of provisions relating to the responsibility of citizens either to bear arms in defense of the nation or to serve in a peacetime militia.

How did such an unequivocal statement of pacifism get into Japan's fundamental law? A great deal of effort has been expended in attempts to ascertain the exact details, but the answer is to be found in the broad picture, not the details. Article 9 arose out of a lost war and a military occupation controlled by a policy calling for a complete disarmament of Japan and, for whatever reasons, determined to bring about a revision of the nation's fundamental law.

It was war that fathered constitutional pacifism in Japan, and it was war that began its erosion. In June 1950, a few weeks after the third birthday of Article 9, the Korean War, a white-hot development of the Cold War, broke out. One side was rabidly anti-communist and the other side fervently communist. One side was supported by American/United Nations armed forces, while the other side was supported by Chinese military forces and the Soviet silent partner. Battles raged only a few hundred miles from Japan, which, by being a vital American base, had become passively involved.

For Japan's pacifism, the result was a departure from both the letter and the spirit of Article 9. With the active encouragement of the United States, the Japanese government took the following steps: First, in 1950, it established the paramilitary National Police Reserve ("NPR"). Then, in 1951, it simultaneously concluded both a general treaty of peace that recognized Japan's inherent right of self-defense and a security treaty with the United States that recognized Japan's right to enter into collective security arrangements and to assume responsibility for its own defense. In 1952, after the Occupation, it converted the NPR into the National Safety Force that would have more obvious military characteristics. Finally, in 1954, it created the present Self-Defense Forces ("SDF").¹ Although the Japanese government willingly took all of these steps, it was confronted with intense opposition from those concerned with preserving Article 9.

Why has the principle of pacifism survived such considerable pressure? One significant reason is something that did not occur. Fortunately or unfortunately, according to one's own point of view, Article 9 did not include General MacArthur's original recommendation that the proposed constitution contain a renunciation of war "as an instrumentality for settling [Japan's] disputes and even for preserving its own security."² That omission opened the way for the development of the official Japanese position that, even though Article

1. For an account of Japan's rearmament in the early stages of development of the 1947 Constitution, see Maki, *Japan's Rearmament: Progress and Problems*, 8 W. POL. Q. 545 (1955). The text of the Jieitai Hō (Self-Defense Forces Law) can be found in the current edition of ROPPŌ ZENSHO (THE COMPLETE SIX CODES), the basic unofficial collection of Japan's national laws.

2. SUPREME COMMANDER FOR THE ALLIED POWERS, REPORT OF GOVERNMENT SECTION, THE POLITICAL REORIENTATION OF JAPAN, SEPTEMBER 1945 TO SEPTEMBER 1948, at 102 (1949) (emphasis added).

9 is silent on the matter, the nation enjoys the inherent right of self-defense, an argument given substance by its inclusion in both the security and peace treaties mentioned above.

The law establishing the SDF carefully avoids open conflict with Article 9. For example, "Ground, Air and Maritime Self-Defense Forces" is a verbal attempt to avoid violation of the Article 9 prohibition against the maintenance of "land, sea, and air forces." Other provisions clearly limit both the SDF's military mission to the defense of the nation through the establishment of firm civilian control over mobilization in emergencies, as well as prohibiting political activity (save voting) by SDF members.³

The apparent unconstitutionality of the SDF has not been resolved, but in the first important case involving the problem of national security, the Supreme Court ruled in the famous Sunakawa decision of 1959⁴ that the U.S. security treaty did not contravene Article 9 because the government, in concluding the treaty, and the Diet, in ratifying it, were exercising the inherent right of self-defense. The SDF was not at issue in this case, but the Court's reasoning would seem to apply to it as well as to the security treaty. In addition to using the self-defense doctrine, the Court reasoned that defense measures were acts of state, which were exempt from judicial review unless they were clearly unconstitutional. It seems fairly safe to predict that the Supreme Court will not rule on the constitutionality of the SDF until a concrete legal dispute arises out of the question of whether the government has developed the strength of the SDF to the point where it is clearly unconstitutional.

Will the SDF ever develop beyond its present defensive state? It may be impossible to predict the answer, but it is possible to sketch out the forces that will influence the direction of the growth of Japanese military strength.

The basic determining factor in the growth of Japan's military strength is the nation's strategic geographic position. The nation's island nature transforms its surrounding seas into a defensive moat. This fact has two major implications for defense. First, Japan has no long land frontiers to defend. Second, any potential invader would have to possess major land, sea, and air forces, as well as the will to suffer the losses that even a limited defense could inflict. Thus, it would appear that the defensive moat creates a difficult problem for a potential invader with a consequent decrease of Japan's defensive problem.

Throughout the first half of the twentieth century, the absence of military power in East and Southeast Asia was an open invitation to an armed and aggressive Japan. Today the situation is dramatically different. Two of Japan's near neighbors and earlier victims—Russia and China—are great military powers. The third near neighbor, Korea, once a defenseless victim,

3. Maki, *supra* note 1, at 555-57.

4. *Sakata v. Japan (The Sunakawa Case)*, 13 Keishū 3225 (Sup. Ct., G.B., Dec. 16, 1959). For an English translation of this decision, see J. MAKI, *COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS 1948-60*, at 289-361 (1964).

now has two military forces, either of which would be a formidable opponent. Such nearby military strength means that if Japan were ever seriously to consider using military force as it once did, it would have to aspire to becoming, again, a military giant.

It would seem that the combination of the defensive moat and the current military superiority of Japan's neighbors will provide some built-in restraints on the growth of the SDF. But at least two other factors operate to limit the growth of the SDF. One factor is that Japan is not attractive as a potential target. The other factor is the memory of Japan's history of aggression.

Japan has none of the traditional attractions for foreign aggression. Its territory is already crowded with people. Its lack of natural resources, once a powerful drive behind its own aggression, is no temptation. The nature of the weapons, both conventional and nuclear, of contemporary war insures that an aggressor would destroy precisely those things it might covet, namely Japan's industry, technology, consumer base, trained labor force, and store of technical and scientific personnel.

The historical memory of the victims of the now-vanished Japanese military provides political, psychological, and economic brakes on the expansion of Japanese military strength. Even after official Japanese apologies for the past, China, Korea, and the southeast Asian nations have reacted vigorously against revisionist accounts of the country's past aggression in Japanese domestic textbooks. Thus, it is easy to imagine their reaction against a significant growth of Japan's military establishment. Japan takes very seriously the fact that yesterday's victims are today's highly valued (and profitable) customers.

Two other external circumstances will help to determine the future of Japan's constitutional pacifism. For more than twenty years, the United States Government has been exerting steady pressure on Japan to assume more responsibility for its own defense. The argument of the United States is simple: The buildup of the SDF will reduce U.S. involvement in Japan's security and, as a consequence, reduce the drain on U.S. military and economic resources. The Japanese government has yielded slowly but apparently not unwillingly, judging by the gradual growth in its defense budget and the lack of contentiousness on its part over the issue. Only future events will determine the degree of continuing pressure by the United States and the consequent impact on pacifism as a principle.

The other circumstance that will help determine the future of Japan's constitutional pacifism is the development of President Gorbachev's twin policies for a reduction of Soviet military power and for a diplomacy of peace. Gorbachev's words have a ring of sincerity long missing from Soviet international discourse, but it remains to be seen whether his words can be converted into credible action. If his words can be converted, they are bound to influence Japanese thinking on security issues.

As important as strategy and external influences are in determining the future of the SDF, the final decision will be made by the Japanese Government

and will grow out of domestic, psychological, political, and social considerations. Foremost among these considerations is the deep scar left on the national psyche by the tragedy of the lost war with its suffering, death, and devastation. That is why Article 9 was so warmly received. That is why each erosive step was met with such broad opposition. During the 1980s public opinion polls showed an increase in popular acceptance of both the SDF and the security arrangements with the United States. The real test, however, will come when and if the Japanese Government attempts to advance beyond the current situation.

In spite of the strength of pacifism, there has been a visible, vocal, and persistent countermovement. Many Japanese, both leaders and followers, firmly believe that Article 9 is no more than a humiliating reminder of both the bitterness of a lost war and the disgrace of a military occupation. This attitude has been one of the most powerful motivating forces for those who would revise not only Article 9 but other provisions of the Constitution.

There is no denying the strength of this view and its powerful nationalistic appeal. Those holding this opinion are members of the generation that grew up between the two world wars and, as a result, were molded in their youth and early adulthood by the militaristic and authoritarian (to say nothing of antidemocratic) content of both indoctrination and propaganda. It can be argued, however, that it is only a matter of time before this generation and its views become a part of an unhappy history.

The disappearance of a generation inevitably raises the question of the successor generation. How will pacifism fare at the hands of a generation that has lived in ignorance of (and freedom from) war? It can be argued that as war vanishes from the collective memory and becomes a matter of words in history without experiential underpinnings, future generations of Japanese will come under the sway of the fatal attraction of war and, as a result, both Article 9 and pacifism will vanish from the national agenda. In rebuttal, it can be argued that Japan alone, among the principal actors on the international scene, has had the happy experience of having escaped war, either civil or international, for almost half a century. It is conceivable, but not guaranteed, that the preservation of the advantages of a warless society may outweigh the dangerous attraction that war seems to hold for humankind.

Japan's recent warless past has had an important consequence in the decoupling of the military from Japanese society, a striking contrast with the situation that existed in the half century between 1895 and 1945. The firm and pervasive interweaving of the old military into Japanese society was one key to an understanding of the old militarism. Neither the SDF nor the military uniform command anything like the prestige, respect, and honor enjoyed by the old and vanished military. In addition, the SDF has been confined to a very small niche in government, politics and, significantly, the national budget.

Whither pacifism as a constitutional principle? The answer lies in times to come. But the future of pacifism is firmly bound to the fate of both constitutionalism and democracy in Japan.

III

POPULAR SOVEREIGNTY AS A CONSTITUTIONAL PRINCIPLE

As important as pacifism is as a constitutional principle, popular sovereignty and the guarantee of fundamental human rights determine the essential nature of Japan's democracy. These two principles place Japan squarely in the company of the older democracies of the West to which belongs the honor of having developed the theory, content, and practice of one of the major patterns of government and politics in the modern world.

Popular sovereignty was a concept absent from Japan's historical experience. It is not surprising that it was missing from the Meiji Constitution since its drafters were concerned with making the people the objects of government under imperial sovereignty, not participants in or molders of government and politics. In order for Japan to become a democracy, it was necessary to devise a fundamental law that would guarantee the people the broadest possible participation in government.

The general principle is stated, without the use of the term, in the preamble to the Constitution:

Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded.⁵

It is not surprising that this passage looks as though it were translated from a foreign language, as it appeared to both Japanese and foreigners in 1946. The thoughts were indeed strange, even revolutionary, in terms of the history of Japanese political thought. Strictly speaking, however, the preamble's language is mere rhetoric.

The principle of popular sovereignty was stated in the text of the Constitution simply as a subordinate clause in Article 1: "The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power." A revolution was embodied in those brief thirty words. In the Meiji Constitution the emperor was sovereign. From that constitution stemmed the system—authoritarian in 1889 and through almost all the first half of the twentieth century—that made the Japanese people subjects of a godlike emperor.

From the last five words of Article 1 flow all the constitutional provisions that convert the words into the structure of an operating democratic government: fundamental human rights that are indivisibly joined to popular sovereignty; the inalienable right of the people to choose and dismiss public

5. 1947 CONST. preamble.

officials; universal adult suffrage; the secrecy of the ballot and non-responsibility for the vote; the right of peaceful petition; the National Diet as “the highest organ of state power”;⁶ the responsibility of the cabinet to the Diet; the popular review of Supreme Court justices; and an amendment process under which amendments must originate in the Diet and be ratified by the electorate.

This array of provisions clearly places the legislative, executive, and judicial branches of the government under the ultimate control of the people. This control is exercised through free elections in which the citizenry is able to cast its vote without government coercion. In view of the key importance of free elections, it is perhaps odd that they are not explicitly guaranteed. The explicit guarantees of universal adult suffrage, the secrecy of the ballot, non-accountability for the vote, and such freedoms as assembly, association, and speech, however, constitute a *de facto* guarantee of free elections.

The history of free elections in Japan since 1946 demonstrates beyond question that there has been no governmental interference in either the elections or their outcomes. The electoral system is unassailably democratic in this sense and stands in striking contrast to authoritarian election systems, including Japan’s under the Meiji Constitution.

Popular sovereignty as a system and as created by the provisions summarized above has worked effectively, but there are shortcomings and defects within the system that bear examination. The defects are remediable, however, not crippling.

Although the Diet is “the highest organ of state power,”⁷ practice has demonstrated that there is a noticeable gap between principle and reality. First, there is the problem of the bureaucracy, which, of course, is both the body and soul of the executive branch. Although the people have the inalienable right to appoint and dismiss public officials, the bureaucracy consists of a body of individuals who, in the normal course of their operations, are held no more accountable for their official acts than the citizenry is for its vote. The nonelective status of bureaucrats insulates them from the vagaries of politics and, within the limits of official discipline, guarantees them permanent enjoyment of a prestigious career.

It is also frequently pointed out that the bureaucracy wields considerable power through its authority to issue administrative rules, regulations, and opinions. The exercise of this discretionary power is not purely arbitrary. It is authorized by legislation, a demonstration of legislative supremacy. The argument that this legislative check is largely meaningless is not without merit. The fact remains, however, that what is granted by legislation can be taken back by legislation. Thus, the issue here is political, not constitutional.

In general, democratic political systems are characterized by competition between or among a diversity of political parties, which is necessary if there is

6. *Id.* art. 41.

7. *Id.*

to be a peaceful transfer of power through free elections. Japan has been an exception. For more than a third of a century, the Diet has been controlled by the conservative Liberal Democratic Party ("LDP"). Yet, that single party has stayed in power through a series of free elections, a phenomenon that decisively separates Japan from typical single-party systems. For whatever reasons, the Japanese people have chosen to live under a government controlled by the LDP. Although the LDP has not been a party without sin, it has not committed the most unforgivable one under democracy—it has not exercised coercive governmental force to keep itself in power.

Today, the LDP is confronting a critical test. A number of factors have converged to create a situation in which the voters may be at long last prepared to desert the LDP. Such factors include the self-erosive effect of a long, unbroken tenure of power; the tainting effect on virtually the entire LDP leadership of the Recruit scandal (involving the alleged manipulation of its stock by the Recruit Company for the benefit of LDP politicians); the unpopularity of a highly controversial consumption tax both sponsored and enacted by the LDP; and a scandal involving sexual liaisons—not normally a political issue in Japan—of a prime minister who, on appointment, seemed to be one of a very small number of politically safe LDP leaders. The LDP's unprecedented losses in the 1989 House of Councillors election were very substantial straws in the wind. The House of Representatives election, scheduled for early 1990, will determine whether or not the LDP will finally lose its grip on the government.

If the election was simply a means of kicking the rascals out, the result would seem to be a foregone conclusion. But elections call for voting for someone, not simply against someone; what of the opposition? First, the opposition is ideological, consisting principally of two socialist parties, a communist party, and a party regarded as being religiously affiliated. Second, no opposition party has had any experience in running a post-occupation government. The LDP opposition is confronted with a difficult double task of blurring its ideological image and persuading voters to make allowances for inexperience.

A problem closely related to the one-party issue is money politics—not necessarily corruption in either government or politics, but simply the capacity for full coffers to skew the political process. The undeniably conservative nature of the LDP has naturally made it the favorite of business. Japan is not alone among the democracies in being confronted with money politics. Again, this is a political, not a constitutional, problem.

Finally, there is the problem of malapportionment in the Diet. No significant changes have taken place in the apportionment of seats in either house since the system was established in the late 1940s. The snail-like pace of reapportionment, despite the great increase of the urban population, has created serious underrepresentation of urban areas.

Malapportionment, as is true everywhere, is a child of politics. One of the principal bases of LDP power has been the conservative rural electorate.

Consequently, the LDP has been blind to the necessity for reapportionment, which would have the inevitable result of increasing the seats in the cities, the locus of the opposition's strength. It is difficult to envisage a situation in which reapportionment would result in anything other than the destruction of the LDP domination of the Diet.

Again, malapportionment is a political problem representing an erosion of the principle of popular sovereignty. But there is a considerable gap between erosion and destruction. Judicial decisions, however, have intimated that only political action can remove this defect.

In 1983, the Supreme Court rejected a plea of unconstitutionality involving alleged malapportionment of seats in the House of Councillors, holding that unconstitutionality would arise only when "population changes result in such excessive inequality in the value of votes as might be regarded as completely unacceptable" and when "no countermeasures have been taken within the discretionary power of the Diet after complex and difficult policy deliberations and decisions."⁸ The Court seemed to argue that malapportionment should be dealt with as a political matter.

A striking feature of Japan's system of government under popular sovereignty is that it has worked successfully. After more than forty years of experience, not a single grave defect in the structure of government has developed, at least not a defect serious enough to have created the necessity (as distinct from the desirability in the eyes of some) for constitutional amendment.

Under the system, Japan has survived situations of considerable stress, such as the massive demonstrations of 1960 against the U.S. security treaty and the student violence of the late 1960s. Japan also has witnessed an historically unprecedented rise in the level of the people's livelihood. Finally, under the system, Japan has escaped any threat to its national security and has become an economic superpower, resulting in an increase in its international stature. This is not to argue that Japan is perfect, but the government, as a manifestation of popular sovereignty, has managed to deal effectively with the problems of its people.

IV

FUNDAMENTAL HUMAN RIGHTS IN JAPAN

An understanding of fundamental human rights is essential in the taxonomy of twentieth century political systems. The guarantee of fundamental human rights is the embodiment of democracy, while the lack of such a guarantee means no democracy. Japan's Constitution, which provides for fundamental human rights, places the country clearly in the democratic

8. See *Shimizu v. Osaka Election Comm'n* (The Osaka Malapportionment Case), 37 Minshū 345 (Sup. Ct., G.B., Apr. 27, 1983). This case will also appear in a volume of Supreme Court decisions edited by Lawrence W. Beer and Hiroshi Itoh.

camp. The unorthodox manner in which the guarantee of fundamental human rights became a basic constitutional principle requires brief review.

As is true of popular sovereignty, the principle of fundamental human rights had its origins in the military Occupation. An occupation is by nature a most unlikely vehicle for the development of popular sovereignty because it is the negation of freedom, involving as it does the subjugation of the occupied by the occupier. In addition, any military organization is undemocratic because military discipline requires unquestioning obedience and a consequential suppression of individual freedoms. Nevertheless, democratization was one of the basic objectives of postsurrender policy for a defeated Japan.

The nature of the Occupation in 1945 determined that it would be supportive, not suppressive, of democratic tendencies. The fact that the Occupation was overwhelmingly American meant that the American democratic tradition provided the political and psychological coloration of the Occupation. Out of that framework came the Occupation policy of democratization. By accident, the commander-in-chief of the Occupation was a man who, while being the very model of a general, possessed a complex personality, one strand of which was a philosophical conviction that democracy was the most desirable form of government. Finally, staff personnel responsible for carrying out the policy of democratization were themselves the products and representatives of a democratic political society.

Thus, a serendipitous combination of policy, personality, and personnel tempered the military nature of the Occupation and supported the introduction of the principle of fundamental human rights. The implantation of fundamental human rights in the immediate postwar period, then, was facilitated by an occupation that was committed to the destruction of an old authoritarian order intimately linked with war and aggression and inimical to the establishment and guarantee of fundamental human rights. It was in the destruction of the old order that the element of subjugation was most apparent in the Occupation.

That fundamental human rights were not imposed on a defeated, sullen, and resistant Japanese people has been demonstrated by the phenomenally rapid rooting of those rights in Japanese society. If Americans were responsible for introducing fundamental human rights as a basic principle of democratic constitutionalism, then it was the Japanese who in practice adopted and cultivated them and have harvested the fruits.

As is true of popular sovereignty, there is nothing in the centuries of premodern Japanese history that nurtured the concept of fundamental human rights as it has developed in the past few centuries of Western democratic experience. The concept did not appear in Japan until just over a century ago. The Meiji Constitution of 1889 recognized their existence by listing a number of them, which was a huge concession in view of their historical absence from the Japanese political vocabulary; but these rights were not guaranteed. For each right, the Constitution stated that it could be enjoyed

only “within the limits of the law,” which made restrictions on them constitutional.

Even before the Meiji Constitution, there was a battery of restrictive laws on human rights. From the beginning there was tension between the tiny minority of Japanese who supported the enjoyment of human rights and the existing constitutional (as well as the subsumed political, governmental, and legal) restrictions on them. The restrictions easily prevailed, as illustrated by the dark valley of wartime authoritarianism. The destruction of the repression of the old regime cleared the way for the introduction of fundamental human rights.

Central to the creation of a new democratic constitutional order was the recognition of a new role for the individual, not as the passive object of an authoritarian order, but as the active repository of fundamental human rights. The Constitution provides that all of the people “shall be respected as individuals”⁹ and be “equal under the law”¹⁰ and shall be free from discrimination “in political, economic or social relations because of race, creed, sex, social status or family origin.”¹¹ An imposing structure of freedoms and rights is built on this basic framework. The rights to petition and to sue for redress for damages caused by illegal acts of public officials¹² temper the direct impact of government on the private citizen. The Constitution guarantees individuals an impressive list of freedoms, including freedom of thought, religion, assembly, association, speech, press “and all other forms of expression,” as well as freedom to choose and change one’s residence and occupation and academic freedom.¹³ Marriage is based on “equal rights of husband and wife,” and laws relating to marriage are to be based on “individual dignity and the essential equality of the sexes.”¹⁴

In the economic sphere, the people have the right “to maintain the minimum standards of wholesome and cultured living” and the right “to an equal education correspondent to their ability.”¹⁵ In addition, the right and obligation to work, the right of workers to “organize and to bargain and act collectively,” and the right to own and hold property are all guaranteed.¹⁶ Finally, ten Articles¹⁷ protect the rights of those charged with criminal acts.

Although these guarantees might appear to be unrestricted, Article 12 sets forth the responsibilities that accompany the enjoyment of all rights and freedoms. It provides that the freedoms and rights must be maintained by “the constant endeavor of the people.” In other words, they are not to be

9. 1947 CONST. art. 13.

10. *Id.* art. 14.

11. *Id.* art. 24.

12. *Id.* arts. 16, 17.

13. *Id.* arts. 19-23.

14. *Id.* art. 24.

15. *Id.* arts. 25-26.

16. *Id.* arts. 27-29.

17. *Id.* arts. 31-40.

accepted passively. This injunction has certainly been heeded, as anyone acquainted with the resistance to constitutional revision is aware.

Article 12 links "constant endeavor" to two potentially restrictive responsibilities. First, the people must refrain from "any abuse of these rights and freedoms." Second, the people must "always be responsible for utilizing them for the public welfare." "Abuse" and "public welfare" are imprecise and elastic terms open to a range of interpretation. Although both are limiting, a narrow interpretation would make them permissive, while a broad interpretation would make them restrictive. "Public welfare" has become constitutional doctrine, but "abuse" has not because it is subsumed under the doctrine of public welfare.

There is no account of how and why the public welfare doctrine was introduced into the Constitution.¹⁸ Hence, the following remarks are only speculative. First, the doctrine may be implicit in democratic theory. It may spring from the fact that human society is made up of individual human beings, and consequently a natural limitation on individual freedom of action is the possibility that it may result in positive injury to fellow individuals or to the collective well-being. Americans involved in the drafting process must have been aware of this limitation on absolute freedom.

On the Japanese side, two other considerations may have led to the inclusion of the public welfare doctrine. First, Japanese history and tradition were lacking an emphasis on the role of the individual. It would have been easy for the Japanese drafters to accept the public welfare limitation as a natural social balance for the rights and freedoms being newly granted. Second, the Japanese individual exists as a part of society in a mutually supportive relationship, not as an isolated individual independent of or resistant to the pressures and responsibility of society.

The lurking danger in the public welfare doctrine is the inherent possibility that it might be used much as a within-the-limits-of-law general and constitutional limitation on the enjoyment of rights and freedoms. This danger, however, has remained submerged.

Lawrence W. Beer, in his monumental study¹⁹ of the freedom of expression in Japan, provides a clear picture of the application of the doctrine in such important areas as the freedoms of speech, assembly, association, and expression. Beer's study shows a sizable collection of limitations on freedoms of expression as they involve specific groups, circumstances, and events. Under democracy, general limitations on basic freedoms are impermissible, but episodic limitations under clearly defined circumstances are a far cry from systematic and systemic suppression of freedom as was the case under the Meiji Constitution.

18. Conversation in July, 1989, with Charles L. Kades, former Deputy Chief, GHQ, SCAP (General Headquarters, Supreme Commander Allied Powers, Occupation Headquarters, Tokyo). Kades was a principal in the drafting of the 1947 Constitution.

19. L. BEER, *FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS AND SOCIETY* (1984).

move toward revision politically unacceptable. In summary, the Commission's work revealed how firmly the Constitution had been woven in two short decades into the fabric of Japanese society. Nothing has occurred in the intervening quarter of a century to alter that conclusion.

VI

CONCLUSION

Pacifism, popular sovereignty, and the guarantee of fundamental human rights have served the nation well. Pacifism, coupled with powerful assistance from an international situation that has not produced a credible threat to Japan's security, has spared the country involvement in war and the staggering costs of becoming a military superpower, thus freeing resources for the betterment of national life. Popular sovereignty has resulted in a system of government and politics that has maintained domestic tranquillity, enabled the government to work effectively, if not perfectly, in addressing domestic and foreign problems, and spared the country from the debilitating effects of political instability. Fundamental human rights have permitted both individuals and groups to function with an unprecedented degree of political, social, and economic freedom.

The rhetoric, surely not empty in this instance, of the preamble provides the means for a broader evaluation of the three principles. The Japanese people have not been "visited with the horror of war through the action of government" for virtually half a century. They have preserved their "security and existence" and in the process have come to "occupy an honoured place in international society." Government has been treated as "a sacred trust of the people," in spite of a far from flawless performance, through the firm rejection of revision of its constitutional basis. Political parties, competition among them, and free elections have assured that the government and its leaders have derived "their authority from the people," that the powers of government "are exercised by representatives of the people," and that beyond challenge the benefits of such a government have been "enjoyed by the people."

The three fundamental principles have operated powerfully to make a Constitution, which originated from a military occupation and was based on concepts arising in a radically different political, social, and historical environment, into the broadly accepted and firmly rooted fundamental law of a viable democracy. The people of Japan made the Constitution their own, and thus carried to completion one of the most successful and significant political transformations of the twentieth century.

One determination that has yet to be made is whether the Constitution will endure into the future. We can predict with considerable confidence that as long as the pattern of Japanese national life remains roughly as it has been for the past four decades, the nation will remain stable, and its Constitution will flourish. We cannot predict the shape of the forces that may change the course: the shifting patterns of world politics, both near and far from Japan's

island redoubt; the state of the Japanese and world economies; the social, political, and economic consequences for Japan of the global environmental crisis; and the molding influence on constitutionalism of possible fundamental shifts in the deep currents of Japanese politics.

The year 2005 will be appropriate for reexamining Japan's constitutionalism. In that year, the Shōwa Constitution will witness its fifty-eighth anniversary, marking the same span of years covered by the Meiji Constitution. The national tragedy of a physically and spiritually devastating lost war brought the old constitutional order to an end. It is not unreasonable to hope that the fifty-eighth year of the current constitutional order will witness not a destructive tragedy but a confirmation of the brilliance of the achievement of the Japanese and American founding fathers in building a strong, durable, and democratic Constitution based on pacifism, popular sovereignty, and the guarantee of fundamental human rights.

