

COMMENT

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I

I have been asked to comment on the papers of Professors Okudaira,¹ Higuchi,² Urabe,³ and Maki.⁴ I will focus on one salient point developed by Professor Okudaira, namely judicial review, which is the linchpin of the rule of law. The 1947 Constitution is the first justiciable constitution in Japanese history; it creates justiciable rights, which in turn make citizens out of the emperor's former subjects. No matter how formal these changes may be, they are of prime importance to the growth of popular governance in Japan.

Professor Okudaira states that judicial review is an Americanism, now found in Article 81 of the Japanese Constitution. This article might be thought of as a codification of *Marbury v. Madison*.⁵ However, its timid implementation by the Japanese Supreme Court has disappointed Professor Okudaira and many other Japanese, as well as many Americans. It seems that the Supreme Court of Japan does not heed Chief Justice John Marshall's famous words in *McCulloch v. Maryland*: "[W]e must never forget that it is a constitution we are expounding."⁶

I agree with this view and suggest that there are many reasons for the Court's restraint. Two reasons stand out: (1) within the legal establishment, there persists a prewar Germanic, public-law orientation, inadequate for effective American-style judicial review; and (2) there is a predominance in Japanese governance of a powerful, elitist bureaucracy, which is still able to operate largely outside the field of law. Professor Okudaira estimates that 85

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* Professor of Law and Director, Asian Law Program, School of Law, University of Washington. Duke University School of Law and Professor Percy Luney deserve a word of thanks for making possible this symposium on the first forty years of the postwar Constitution of Japan. It has been twenty years since a similar English-language symposium was held in Seattle to celebrate the Constitution's twentieth anniversary in 1968. Five of the original eleven authors in 1968 were present for this symposium: Professors Isao Sato, John Maki, B.J. George, Lawrence Beer, and myself. See *THE CONSTITUTION OF JAPAN: THE FIRST TWENTY YEARS, 1947-1967* (D. Henderson, ed. 1969).

1. Okudaira, *Forty Years of the Constitution and its Various Influences: Japanese, American, and European*, *LAW & CONTEMP. PROBS.*, Winter 1990, at 17.

2. Higuchi, *The Constitution and the Emperor System: Is Revisionism Alive?*, *LAW & CONTEMP. PROBS.*, Winter 1990, at 51.

3. Urabe, *Rule of Law and Due Process: A Comparative View Between the United States and Japan*, *LAW & CONTEMP. PROBS.*, Winter 1990, at 61.

4. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, *LAW & CONTEMP. PROBS.*, Winter 1990, at 73.

5. 5 U.S. (1 Cranch) 137 (1803).

6. 17 U.S. (4 Wheat.) 316, 407 (1819).

percent of Japanese governance remains, in practice, beyond the law.⁷ Ordinary citizens, under Japanese law, simply cannot bring the bureaucracy into court to measure administrative action by statutory or constitutional standards. Even if they could sue, the remedies are quite inadequate. The problem is purely that the Japanese legal establishment is an entrenched carry-over from the prewar days when the imperial bureaucracy was responsible only to the emperor. In essence, this situation meant that the bureaucracy was responsible only to itself. There is nothing wrong with such an attitude in the world of Confucius. Since World War II, however, the entire elitist corporate management and the network of business associations, combines, and cartels have also been a part of the "bureaucracy" in the broader sense and similarly operate in large part beyond the law in concert with public officials. This structure, as a whole, forms Japan's unwritten constitution, which is run excessively by the convergence of money and power at the top, and is perpetuated by the skewed electoral system.

Power is thus primarily outside the legal system; it is exercised extraconstitutionally in many important spheres. In other words, Japan is in large part socially, rather than legally, governed. As several scholars at the symposium noted, this problem is essentially political. The position of all courts, including the Supreme Court, is weak in the presence of a politically powerful bureaucracy that continues to operate by way of so-called "administrative guidance" with little basis in law. This compounds the courts' longstanding tradition of judicial restraint, which stems from their historically close control by the prewar Ministry of Justice. Today, judicial conservatism also is perpetuated by the appointive powers of the Liberal Democratic Party ("LDP"). Therefore, as timid as the Supreme Court may be in developing its judicial review under Article 81, I think the real problems are the power structure, the prior social practices, and the thought patterns persisting in Japanese politics.

Because of these power relationships and the political and social structure that operates outside of the legal system, it seems doubtful that the courts will develop an activist stance, or that a bold expansion of judicial remedies by an activist court could be successful. In the final analysis, the voters could tip the balance towards justiciable rights (*jinken*) and a rule of law. However, they would have to get the legislature to strengthen the statutes authorizing administrative suits by introducing a private bill rather than the usual cabinet bills drafted in the bureaucracy. With the support of such a popular revolt, the courts could afford a bolder stance and achieve a more balanced relationship with the dominant bureaucracy and plutocracy. We should remember, however, that judicial activism in American history has been at best controversial and at worst undemocratic. In addition, marshaling and focusing popular support on an issue such as judicial review would indeed be politically difficult in Japan. Ironically, the reason for this difficulty may be

7. Address by Professor Yasuhiro Okudaira, Symposium, "The Constitution of Japan—The Fifth Decade," Duke University School of Law (Sept. 14-16, 1989).

that the extralegal social governance of Japan seems to provide enough equality and civil liberties to satisfy most Japanese. Moreover, in terms of prosperity, the results are good and apparently acceptable to the people.

II

Professor Higuchi raises the question of whether Emperor Hirohito's death increases the risk of a stronger imperial role in government by way of constitutional revisionism, either through outright amendments or by concealed revision in practice.⁸ His paper reminds me of the autumn of 1945 and my first arrival in Tokyo. I was a young lieutenant in the United States Army, serving as a Japanese language officer in a minor censorship role. I was assigned to the Pictorial, Press, and Broadcast Section of the Civil Censorship Detachment of the Supreme Commander Allied Powers ("SCAP"). However, I ended up doing very little censoring because the Japanese media were soon able and quite willing to censor themselves, and I could not sense any disposition on the part of the press or radio under my supervision to violate our simple code against militarism and against maligning the Occupation or allied powers. But my position provided a good spot from which to observe the constitutional changes unfold, in much the same way as the Japanese public saw them. To us, as newspaper readers, much of the inner workings of the constitutional drafting process remained obscure until they were later revealed.⁹

The debate about Emperor Hirohito was most exciting. Some felt that Hirohito might be tried as a war criminal, and that the Imperial House might be abolished. The issue, however, was soon resolved—some have said with embarrassing haste—by the present constitutional formula found in Chapter I: The emperor reigns, but does not rule.¹⁰ This Chapter seemed to telescope for Japan several centuries of bloody European monarchism into eight simple articles of the new Constitution.

I had some minimal background on the subject of imperial authority because at Whitman College in 1943 I had written my senior thesis on Japanese political philosophy. In retrospect, my paper was quite an amateurish work based on scarce material such as Shin'ichi Fujii and the like.¹¹ The experience left me in 1945 feeling that a fair analysis of the imperial system should separate the man from the role. Simply because Hirohito played the role of emperor did not make him personally a war criminal because the role was that of a religious and ritualistic symbol formally, and he was, arguably, a puppet. Playing this role, however, did not

8. See Higuchi, *supra* note 2.

9. For a recent authoritative example, see Kades, *The American Role in Revising Japan's Imperial Constitution*, 104 *POL. SCI. Q.* 215-47 (1989).

10. 1947 *CONST.* arts. 1-8.

11. S. FUJII, *THE ESSENTIALS OF JAPANESE CONSTITUTIONAL LAW* (1940); D. HOLTOM, *NATIONAL FAITH OF JAPAN: A STUDY IN MODERN SHINTŌ* (1938); N. MATSUNAMI, *THE JAPANESE CONSTITUTION AND POLITICS* (1940); T. NAKANO, *THE ORDINANCE POWER OF THE JAPANESE EMPIRE* (1923); H. QUIGLEY, *JAPANESE GOVERNMENT AND POLITICS* (1932).

preclude the possibility of his personal involvement in the war. That issue was never tried because the Emperor's fate was resolved out of open court. In court, the extent of his involvement in war decisions made about such matters as Manchuria, China, and Pearl Harbor might have been scrutinized and decided one way or the other on the evidence brought forward. Such a determination did not occur, though the Emperor's fate was quite controversial for a few months after surrender.

Of course, more than correct analysis about the war was involved in determining the emperor's role in the new constitutional scheme. For instance, there was the matter of SCAP's immediate convenience. Anti-imperial protagonists made allegations, difficult to confirm in any detail, that SCAP made a tradeoff, allowing the emperor to stay, in exchange for a conservative government's cooperation on other democratic changes essential to the Potsdam goals. Also, General MacArthur supported the emperor. Overall, it seemed to me then that the decision, however made, was an acceptable solution, because it formally removed the real problem for a modern Japan. That problem had been that power-wielders had used the emperor to mystify and obscure their irresponsible acts of government. My impression was that most politically aware Japanese people at that time had sensed this clearly enough, too. Surely, the intervening forty years has removed the emperor from the center stage. The recent succession of Emperor Akihito is an exceptional event.

I suppose, however, that it is natural for some hard-core conservatives of religious fervor to long still for a mystifying façade, rather than the noisy openness of democratic policy debate. It is difficult to wean those holding such views of their powers and privileges. Professor Higuchi suggests that the weaning process has not yet been fully accomplished, and I agree. But I do not think the group that wants even a semblance of the prewar emperor is very large or has much credibility with the Japanese public today.

Still, such forces linger on, even existing in high places. As a young political science teacher at Berkeley, I was in Japan in the early 1950s gathering material for a doctoral thesis. A colleague invited me to a meeting on constitutional revision with a spokesman of the LDP, who was unknown to me at that time. There were only about a dozen of us at the meeting. The spokesman suggested reforms that would reduce local autonomy and revive the old family, the old peerage, and the old imperial powers for the bureaucrats. From my perspective, his vision was obviously backward. It left most of us quite surprised, even shocked. The spokesman was Kishi Nobusuke. Within a short time thereafter, he became prime minister.¹²

Thus, Professor Higuchi rightly argues that some vigilance is still needed. He reminds us that Yasuhiro Nakasone, another strong prime minister of forthrightly revisionist views, has only recently left office. He points to the serious mistreatment of the mayor of Nagasaki because of his views on

12. Kishi Nobusuke was prime minister from 1957 to 1960.

Emperor Hirohito's wartime role.¹³ Surely, the mayor's views deserve protection under Article 21 of the Constitution, whether one agrees with them or not. Finally, Professor Higuchi reminds us of the latent theology in the 1989-90 succession process. Clearly, some of the old school are still around.

As Professors Higuchi and Okudaira note, these extremist views, while they may still exist, have waned because they do not have the support of most of the Japanese people. This observation relates to my final comment. Much of the force of the conservative revisionist position on these matters is buttressed by their argument that the 1947 Constitution is an *imposed* constitution, not a Japanese constitution. The argument is based on the role SCAP played in the Constitution's drafting and adoption. Their argument is reinforced by pointing to the language of the Constitution itself, which, it is argued, even sounds foreign in phrase and diction. Both of these arguments are specious because they are half-truths. The language argument is partly true, but only because the old Japanese terminology of confucianistic, elitist authoritarianism and Shinto theology is clearly inappropriate to express democratic values such as human rights and popular sovereignty. Language changes were necessary to achieve this purpose. In fact, in order to provide that ministers of state be civilians,¹⁴ not military men, a new word for civilian had to be invented (*bunmin*).¹⁵ The real question should be the aptness of the neologisms, and these are subtle concerns.

I do not find very cogent, however, invoking SCAP's role in dealing with the defeated leaders to support the argument about the "imposed constitution." Of course, as Professor Higuchi clearly says, the Constitution was in fact presented to Japan's defeated leaders with minimal conditions of popular governance attached. Understandably those defeated leaders were, on some of these issues, unable to transcend their authoritarian past. If we must dwell on the issue, we could say that such conditions were imposed on Shidehara and his colleagues in the fall of 1945 and early 1946. But the criterion of legitimacy is otherwise: Was the Constitution imposed on the Japanese people? This criterion was clearly met by the overwhelming embrace of the Japanese people in the April elections of 1946. I censored (without making any substantial deletions or changes) all of the candidates' broadcasts for the island of Hokkaido, and the winners there were those supporting change. True, as in any campaign, there was opposition, but the positive expressions for change were overwhelming. This popular support satisfies the criterion for legitimacy. The Constitution was not imposed on the people then, and the majority have supported it ever since, because they want to live in a world of peace and in a democracy understandable to the international community.

13. See Higuchi, *supra* note 2, at 59.

14. 1947 CONST. art. 66(2).

15. See Kades, *supra* note 9, at 240.

Unfortunately, the debate over whether the Constitution was "imposed" has cast constitutional reform into an emotional mold, which makes any reform difficult to discuss. Like any other human work, the Constitution is not perfect. Among the interesting results of the work of the Commission on the Constitution were the many thoughtful proposals for amendments proffered by individuals and made available in the Commission's report (without its endorsement).¹⁶ But rational discussion of real improvements is hardly possible in a climate produced by reactionaries, still a part of public life, whose dreams of Japan are all in the past.

III

Professor Urabe's paper notes that Japanese public law was never justiciable until the new Constitution imported the concept of the rule of law in 1947.¹⁷ Thus, the rule of law is not only an alien concept, but a fledgling one of only forty years. Furthermore, the concept is more verbal than real. Therefore, the problem is the implementation of a new, imported, verbal formula that permeates the entire legal system only formally and only touches society on the surface. This task is enormous and, while much has been accomplished in the last forty years, progress has still been slow. Of course, the rule of law also has its problems here in the United States. Since the New Deal, the welfare state has created a bureaucracy with positive tasks that strain the principles of separation of power and are as difficult to conform to the rule of law as they are to control by the electoral process. Criticisms made by the American Legal Realists and, more recently, the Critical Legal Studies movement, even if not entirely persuasive, still raise challenging questions about the rule of law in this country and the limitations of the institution of law generally.

I can only emphasize a point or two. First, the rule of law is a political theory, in that it serves as a way of implementing popular sovereignty. Its essence is popular rights, which are exercised in their assertion by the people. These rights function, if at all, only from the bottom up. No one can give them to another. Second, the importance of rights assertion is particularly clear when the citizen is pitted against a strong elitist bureaucracy like Japan's.

Professor Urabe correctly identifies several factors that hinder a thorough implementation of the rule of law in Japan. The "one-and-a-half party" system is part of the problem, but that system will not change until the people vote the LDP out of its dominance. Why they should do so is not obvious, given the choices. Particularly when satisfied with the party's performance, reinforcing a two-party system is not within the electorate's appropriate ambit. The electoral system is also a factor: The serious malapportionment is clearly unconstitutional, and the influence of money in politics is excessive. By asserting their rights, however, the people could convert the bureaucrats

16. COMM'N ON THE CONSTITUTION, REPORT ON THE COMMISSION ON THE CONSTITUTION 1958-1964, at 372 (J. Maki trans. 1980).

17. See Urabe, *supra* note 3, at 63-64.

into public servants, instead of the elitist cadre they are today. By all accounts, the bureaucracy now operates largely by way of discretion, or “guidance,” quite outside the legal system, which in standard democratic theory is the people’s instruction to their “servants” by statute. Professor Urabe correctly specifies these problems. However, another way to interpret the present failure of the rule of law to function with the depth expected in a democratic society is that the Japanese people accept, maybe even prefer, a rule of bureaucrats.

IV

Professor Maki identifies the key principles of Japanese postwar constitutionalism—pacifism, popular sovereignty, and fundamental human rights.¹⁸ He then applauds the Japanese achievements of stability, prosperity, and crisis avoidance under the new legal order, in spite of the system’s imperfections. He identifies these weaknesses as (1) the Self-Defense Forces, which are controversial under Article 9; (2) the bureaucracy; (3) the permanent dominance of the LDP which in turn depends on a serious malapportionment that is incurable by judicial review; and (4) the overriding influence of money and business in politics. Despite these deplorable inadequacies in the system, Professor Maki’s overall assessment is quite upbeat, and I do not quarrel much with his appraisal. I do think, however, that two major features of Japanese constitutionalism do not get the focus they should. First, as I noted earlier, the constitution occupies an essentially superficial position in a social system where so much is outside the realm of justiciability and cannot be rectified by resort to the legal system, at least not in any realistic sense. The bureaucracy is responsible for most government action (policy, as well as execution), and is almost, but not quite, wholly beyond realistic constitutional challenge. Most of what the Diet does is born in the ministries; it passes into legislation with precious little change and clearly displays its bureaucratic sources by allowing massive discretion for officialdom. Second, the elections are deeply problematic. Real choices are denied due to a lack of an opposition. Minor parties, atrophied by inexperience and ideology, are withered away by the LDP’s monopoly of money. Elections are also skewed by rural gerrymandering that undercuts the growing urban vote. Specifically, I think the decision in *Arita v. Kojima*¹⁹ was a mistake because it approved corporate political payments to the LDP, which perpetuates the lopsided influence of money on elections.

Yet, this scenario, which reduces the Constitution to a very shallow bite even in the realm of government, is only part of the context I am discussing. Most of the massive regulation of peoples’ lives is social, not governmental. It occurs in the family, the school, the company, the association, the cartel, and the community. Professor Okudaira puts it succinctly and correctly: “Japan is

18. See Maki, *supra* note 4.

19. *Arita v. Kojima* (The Yawata Steel Political Contribution Case), 24 Minshū 625 (Sup. Ct., G.B., June 24, 1970).

politically free, but socially not free.”²⁰ The key point is the separation of the governmental and social spheres, and the practical inaccessibility of either sphere to change by law or lawsuits.

The Japanese informal governance in social groups is a form of decentralization, which has some merits. For example, the authoritarian strains of residual confucianistic thinking in these social institutions are mitigated and made to work well by the fact that decisions are left to those who know each other and care about each other, but the fact remains that the decisions of these social functionaries cannot be challenged at law or otherwise. So, it seems that any assessment of Japan's performance under the Constitution must start by recognizing how much of Japanese performance is yet unaffected by the Constitution, or indeed law, lawsuits, and lawyers generally. This analysis does not itself imply a negative evaluation of the Japanese methods of governance. It does, however, imply a lesser role for constitutionalism. Confucius did not agree with Lord Acton that power always tends to corrupt, or that a rule of man must be replaced by a rule of law. I suspect that there is a lot of neo-neo-confucianism in Japan's modern bureaucracy and a widespread public faith in the elitism and *élan* of that bureaucracy—something quite foreign to democratic legal culture. Perhaps my point could be expressed by analogy to the concept of an “unwritten constitution.” Much of Japanese society is highly structured, and life is highly controlled by rules, but these rules are not written or justiciable. Moreover, the whole structure is only loosely linked with the written Constitution. With respect, I think the whole must be viewed in this context in order to see real Japanese constitutionalism at work, and also to see where it does not work.

20. See Okudaira, *supra* note 1, at 26.