

Development of the Constitution and Constitutionalism in Japan: Traditionalism versus Modernism

(first draft, please not quote without the consent of the author)

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Introduction:

In the late 19th century, Japan set about building a modern state. It was, in one aspect, the response against the Western powers that were colonizing Asia countries. In order to resist the Western imperialism by diplomatic way, building the modern legal system became the agenda for the Japanese government along with the economic and military development.

The legal reform was also the response to the domestic politics. After the bloody civil war (*Boshin War*), the feudal government (*Tokugawa* government) was defeated and Japan could establish the centralized modern state under the Emperor. This event is called the Meiji Restoration. In the Meiji Restoration regime, winners of the civil war dominated government positions. Therefore, people who was excluded from the government power, such as losers in civil war and landlords who suffered heavy tax, demanded the Constitution and the Parliament.

Therefore, the legal constitutional development of Japan in the early stage had two different vectors, namely, the modernization of law to address external pressure, and to address domestic political demand. Furthermore, the interaction between the imported modern western law and the existing Japanese law had significant influence of this development both in practice and in theory.

This paper will discuss the development of the constitutional law and constitutionalism in Japan as a case of this legal development under the interaction of global community and indigenous culture.

1 Modernization of Japanese law: the Meiji Restoration and the promulgation of the first Japanese Constitution

The idea of the constitutionalism in Japan emerged soon after Japan experienced the *Meiji* Restoration in 1868. Meiji Restoration is the turning point of Japanese history from the feudal regime to the modern centralized government under the Emperor.

Before Meiji Restoration, under the Tokugawa regime, Japan applied the "isolation policy (*Sakoku*)" which prohibited the entrance of European ships other than Dutch to Japanese ports. Therefore, diplomatic and intellectual exchange with the West was very limited in this period. As only Even Dutch merchants could have trade directly with Japan only at Nagasaki port, 960 km to west from the Capital, Japanese people knew the things in the West from the Netherlands and called the study of the West "the Dutch studies

(*Rangaku*).” However, because subjects of the Dutch studies were almost exclusively about natural sciences and technology, the modern idea of law and politics, including the constitutionalism, did not enter to Japan before the Meiji Restoration.

In 1853, the US navy fleet came to near Tokyo (at that time, called "Edo") and demand the Japanese government to allow the US ships use some Japanese ports to supply fuel, water and food. The US ultimately aimed to let Japanese government lift the prohibition of the trade with European countries. Since then, Japan inevitably involved itself to the Western law. In 1854, Japanese government concluded the Kanagawa Treaty (Treaty Convention of Peace and Amity between the United States of America and the Empire of Japan) by which Japan designated two ports other than Nagasaki to supply materials for the US ship. In 1858, Japan further concluded the Treaty of Amity and Commerce with the US (the Treaty of Amity and Commerce Between the United States and the Empire of Japan). By this treaty, Japan allowed the US ship to have trade in five ports¹. Furthermore, Japan recognized the consular jurisdiction by the US, the renunciation of tariff autonomy, and the unilateral most-favored-nation treatment by this treaty. Though these conditions are unequal, Japan concluded similar treaties with other European countries, such as the UK, Russia, France, the Netherlands, and Germany (at that time, Prussia).

Japan did not understand the international public law and the obligation owed by these treaties. Those treaties so-called the unequal treaties caused the economic disadvantage for Japan in relation to the western countries. Since then, the revision of the unequal treaties was the most important diplomatic agenda for the modern Japanese government.

As for domestic sphere, the direct contact with the western countries made the authority of the Japanese feudal government unrest. Political contestation exacerbated the situation to internal armed conflict. Finally, the authority of medieval feudal regime (Edo government) fluctuated, and Japan went at full flying to the Meiji restoration to establish a centralized government under the Emperor.

(1) Introduction of the western legal system

Ahead of the Meiji Restoration, the progressives of the government who felt the risk of unequal treaties and necessity of the knowledge on the modern legal system dispatched the young officials abroad. Among all, Amane Nishi and Mamichi Tsuda studied at Leiden University from 1862 until 1865. They learned the natural law, international law, state law, economics and statistics under the supervision of Prof. Simon Vissering (Ohkubo 2010, 8). The government also established the Institute for European Studies (*Bansho Shirabedokoro*) in 1862 to which Nishi and Tsuda belonged.

After the Meiji Restoration in 1867, the new government dispatched students abroad further systematically. From 1875 when the new regime became stable until 1899 around the promulgation of the Meiji Constitution, 38 students went abroad to study the Western law with government scholarship. During the same period, the total number of students abroad was 229. Especially early period (1875-1879), there were 38 law students abroad. This number is next to engineering and natural sciences (18 students for each), and bigger than medical students (14 students). In terms of the destination of law students, the US and the UK were major destinations from 1880-1884. Then from 1880-1884, six students went to Germany, and 2 went to Austria. After that, Germany was consistently the destination of most students, and France was second. Even though some students went to the US and the UK, the

¹ Yokohama, Kobe, Niigata, Hakodate and Nagasaki.

number was less than half of the number of Germany and France. This tendency continued until around 1910.

In addition, the presence of foreign advisors is definitively important to review the transplantation of legal thoughts to Japan. Japanese government invited various foreign experts with quite high salary to absorb the Western systems and technics quickly. The government invited 37 experts in the field of law and political system as well (Umetani 1971, 255-257). As of dispatching students abroad, at the early period, the government referred legal systems of various countries, but in later period, it is clear that French and German influence was increasing, and finally German advisor had primary importance².

Among them, Boissonade (Gustave Émile Boissonade de Fatarabie, 1825-1910) from France and Roesler from Germany were the two most important advisors in terms of both length and extent of engagement.

Boissonade established the French influence on the Japanese law which continue until today. Japanese government needed to establish the modern legal system as soon as possible to match with the Western countries in the negotiation for the revision of unequal treaties. At the early stage of legal reform, the government even considered transplanting directly foreign laws, especially French laws, through translation to mend appearance of the Western legal system. Of course, there were many questions about details and operations of laws. Therefore, the government invited Boissonade as an advisor. He stayed Japan for 22 years and engaged in the drafting of main codes, such as the civil code, criminal code, criminal procedure code, and civil procedure code. He also actively engaged in legal education. Therefore, Boissonade, as the "founder of the Japanese modern codes"(Umetani 1971, 144), left the huge impact of French law to Japanese modern legal system.

(2) Western Law versus Japanese Tradition: Controversy over the Civil Code

Contribution of Boissonade was especially important for the civil code. In 1890, The parliament adopted the civil code that Boissonade drafted to be implemented three years later. However, a group of conservative scholars criticized this code because they considered the code is incompatible with Japanese tradition. Yatsuka Hotsumi, the Professor of the Tokyo Imperial University (now, Tokyo University), published the thesis titled "Enacting the Civil Code, the country perishing" in 1891 and criticized that the Code is based on individualist value that was not proper for Japanese traditional moral value. His thesis resonated with the conservative feeling of the society and finally the goverment decided to postpone the enforcement of the Code indefinitely.

In fact, the controversy over the Boissonade's code is more political rather than legal. Boissonade himself well recognized that rules on family should be based on the customary law in a country while rules on contract should be governed by the natural (western) law. Therefore, Boissonade ordered his Japanese disciples to draft the part of family law based on Japanese custom. In fact, the criticism against the Civil Code reflected the political conflict between the French law school and the German law school in Japanese academia and bureaucracy at that time.

² In terms of countries of origin, 16 advisors from France, 7 from Germany, 7 from the UK, 4 from the US, 2 from the Netherlands, and 1 from Italy. However, 15 of 16 French experts invited before 1880. Whereas, 6 of 7 German invited after 1881. There 10 persons invited after 1881. Among them, 6 from Germany, 2 from the UK, 2 from the US and 1 from Italy. (Umetani 1971, 255-257)

After the abortion of the Civil Code, Boissonade went back to France with disappointment. The government ordered Japanese scholars (Kenjiro Ume, Masaaki Tomii, and Nobushige Hotsumi) to make a new draft of the Civil Code. This team drafted the new Civil Code by referring to the first draft of the German Civil Code (*Bürgerliches Gesetzbuch* or BGB. This code was enacted in Germany in 1896), the French Civil Code and several laws of other European countries. The structure of the present Japanese Civil Code is the German type (*Pandekten*) which is different from Boissonade's draft that was based on the Napoleonic codes. The move from French code to German code reflected the change of international relation in Europe where the unified Germany under Bismarck's leadership became the emerging power almost defeating France.

Though, the German influence was growing, Japanese drafting team tried to keep Boissonade's idea in terms of contents. Therefore, new Civil Code is a unique mixture of laws of various countries, mainly, France, in the framework of German code. Furthermore, because there was not modern and comprehensive civil code in Japan at that time, the draft of Boissonade was the only model for such civil law. Therefore, judges used Boissonade's draft as a *de facto* code since 1880 when he began drafting work, and the commentary on the draft had been widely used as a standard textbook.

Influence of the German law is far more obvious in the Japanese first Constitution. Japanese government leaders intended to enshrine the Emperor's theocratic power which was assumed entrusted by divine ancestors by using the monarchist Constitution of Germany. For that purpose, Roesler had a great impact on the Constitution drafting.

The Japanese government sent a mission to observe governments and societies of the US and European countries in 1871. Among countries visited, the mission members were heavily impressed by the strong monarch government system of Prussia (soon unified as the German Empire) as the emerging power after winning the Franc-Prussian War (Umetani 1971, 154).

In the early period of the *Meiji* Restoration, there was a controversy about future Constitution between the group which pursued the British type parliamentary democracy based on constitutional monarchy and the group which insist German style constitution with strong monarch power. In 1881, the government decided to take German Constitution as a model for Japanese Constitution. Accordingly, the group insisting the British model fell from government positions (Umetani 1971, 164). Roesler already had arrived at Japan in 1878. The pro-German group learned the constitutional theory from Roesler.

As mentioned above, the government publicly promised to promulgate the Constitution by 1889. But only a small number of high government officials were involved in the Constitution drafting. Persons who had significant influence on the introduction of German constitutional theory were Tomomi Iwakura and his brains, Kowashi Inoue and Hirobumi Ito. Iwakura led the Japanese mission to Europe and the US in 1871. Ito also attended same mission. Inoue was the expert of French judiciary but later oriented to the German system. In addition, the drafting process was strictly secret. Roesler stayed nearby the place of drafting, and drafting members often asked his advice. Finally, the first constitution of Japan (The Constitution of the Empire of Japan, or Meiji Constitution) accepted almost all advice of Roesler. Therefore, his involvement to the Constitution is, in terms of either length or content, far bigger than other advisors (Umetani 1971, 167). In fact, however, drafters did not accept Roesler's opinion without condition. They also asked opinions from other advisors for every important point and compared them with Roesler's opinion. Opinions of drafters were sometimes different from Roesler. For instance, Roesler disagreed the mystic characteristic of the Constitution. The preamble of the Meiji constitution starts with sentences

"[h]aving, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal." Roesler insisted on changing this part so that only mentioned undivided monarch sovereignty for the future.(Umetani 1971, 168) Roesler considered such a mystical definition of the Emperor's power was not proper for the modern Constitution, but the Japanese leader did not accepted his idea.

Their primary concern of drafters was to secure Japanese imperial regime based on traditionalism. In fact, they considered that the German constitutional model was practical to secure this regime, especially to guarantee the independence of the supreme command over the military by the Emperor. Therefore, providing the status of the Emperor as the sacre being³ was more important than the modern state system based on constitutional monarchy itself. As discussed above, Japanese Constitution drafters and Roesler had a very different standpoint on this issue.

2 Constitutional Politics under the Meiji Constitution and its collapse.

This gap became prominent when Japan began modernized politics under the Constitution. After the implementation of the Meiji Constitution, in spite of its anti-democracy characteristic, Japanese constitutional politics directed to parliamentary democracy. The parliamentary cabinet system, in which the prime minister is to be selected by the majority party and appointed by the Emperor, become a constitutional custom, or the "Ordinary way of the constitutional politics."

The interpretation to read the Meiji Constitution in the context of the British parliamentary democracy affected this practice. While it, at least formally, moderate interpretation based on the German monarch constitutionalism supported this constitutional practice. Minobe, a leading professor of the constitutional law at that time, developed a constitutional theory called the "Emperor-as-organ theory (*Ten'no Kikan Setsu*)." This theory assumes a state as an entity of legal personality with a certain purpose and placed the Emperor as the supreme organ of this entity.⁴

However, since the Great Depression of the 1930s, militarism was emerging in Japan and oppressed any thoughts that are against the supremacy of military power. The liberal interpretation of the Meiji Constitution bore the brunt of the attack. The oppression against Minobe's moderate liberal interpretation of the Meiji Constitution based on German constitutional theory took form of the irrational mystical argument which was held by the Constitution drafters above mentioned. Conservative politicians and scholars charged Minobe *lese majesty* because Minobe expressed the Emperor as an organ. They insisted that the Emperor as a divine power was above the Constitution and could not be restricted by any means. However, Minobe's theory is a quite moderate interpretation of the Meiji Constitution

³ For example, the article 3 of the Meiji constitution provides that "The Emperor is sacred and inviolable."

⁴ Minobe's "Emperor-as-organ" theory is Japanese version of Georg Jellinek's "juristische Staatsperson (State legal person)" theory in 19th century Germany. According to Jellinek, a state has a legal personality. Therefore, state has own will and is a subject of rights (sovereign right to govern). King, parliament, courts and so on are organs of the legal personality. State implement its right through those organs, and organs functions are regarded as a state function. When one says the king have sovereignty, it means that the king has supreme position among organs. Minobe never denied the supreme competency of the Emperor. But because Minobe called the Emperor an organ and place the Emperor as one of organ, conservative group considered that Minobe reject divine authority of the Emperor. They insisted the Emperor himself is the state. (Ashibe 1997, 21)

in comparison with rather radical parliamentary democratic interpretation based on British model mentioned above. Indeed, this theory was the almost formally recognized one and, for instance, used for the higher civil service examination. This theory can explain legitimacy of the Emperor's superior power without touching sensitive issue such as the place of sovereignty but can set the rational limit of the Emperor's power within the theoretical framework of German constitutional theory. Even this moderate opinion became the target of the conservative understanding of the Constitution. They criticized Minobe's theory as disrespect against the sacred authority of the Emperor.

3. The end of the Pacific War and the birth of the new Constitution of Japan

The Meiji Constitution lacked the institutional mechanism to stop the militarism once the military decided to ignore the constitutional democracy. Though the Meiji Constitution provided citizen's rights, those rights were all subject to the restriction of law and just nominal at best. The Emperor could issue an emergency decree which is equivalent to the parliamentary law. Ministers were responsible to the Emperor as his courts. Among others, because only the Emperor can command the military, the parliament could not control any issue regarding the military including military budget. The sacred divine status of the Emperor was the foundation of these articles.

That is why the revision of the Meiji Constitution, especially the status of the Emperor, was inevitable upon the unconditional surrender to the allied forces in the Pacific War, 15th August 1945. However, both for Japan and the US considered the deposal of the Emperor must be avoided. Japanese government considered safety of the Emperor's authority was the minimum condition to secure the fundamental character of the nation. The US afraid if deposal of the Emperor caused social unrest in Japan and led to the socialist revolution.

Though the process to the new Constitution is quite complex, there are roughly two stages. The first stage is the drafting work by the Japanese government, and the second is the preparation of a draft by the US military. At first, Japanese government appointed the investigation committee of the constitutional problem chaired by the Minister Joji Matsumoto (Matsumoto Committee).

Members of the Matsumoto committee considered that it was enough to change the interpretation of the Meiji Constitution to fulfill the demand of the Allied nations. Therefore, the Committee decided the amendment should be minimum. Though working process of the committee was closed for the public, a newspaper scooped the draft idea of the committee in 1 February 1946. The revealed idea of principles of the Committee were:

- a) The Emperor remains ruling all governmental issues;
- b) Prerogatives of the Emperor are to be reduced and the more issues need the consent of the parliament;
- c) Ministers are responsible to the Parliament not to the Emperor;
- d) Rights and freedom of the citizen are expanded, and the remedy should be provided.

The US military force considered that these principles were too conservative to accept. Because some countries of the Allied nations insisted the execution of the Emperor for his responsibility to the war, the US government tried to settle the issue on the Emperor's status before setting up the Far East Commission which was composed of representatives of the Allied nations and had the supreme authority regarding the occupation. Therefore, general MacArthur, the supreme commander of the US military for occupation, decided to take initiative of the constitution drafting from Japanese side. On 3 February 1946, two days after

the scoop, MacArthur ordered the Government Section of the military to prepare the draft and handed the memo of three basic points which must be included in the constitutional revision⁵.

The contents of the memo are:

- I. Emperor is at the head of the state. His succession is dynastic. His duties and powers will be exercised in accordance with the Constitution and responsible to the basic will of the people as provided therein.
- II. War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.
No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerency [*sic*: belligerency?] will ever be conferred upon any Japanese force.
- III. The feudal system of Japan will cease. No rights of peerage except those of the Imperial family will extend beyond the lives of those now existent. No patent of nobility will from this time forth embody within itself any National or Civic power of government.

Undoubtedly, those points intended fundamental change from the Meiji Constitution.

The drafting by the US military was swift, and MacArthur handed the draft Constitution to Japanese delegation who just visited the US Military headquarter to ask opinion. While Japanese delegation rejected to receive this draft, the US military told if Japan did not accept it, they would open the draft directly to Japanese people. At last, Japanese delegation accepted that draft and, after some modification, submitted it as an own draft to the Parliament which was elected soon after the war. The new Constitution (the Constitution of Japan, or Showa Constitution) was adopted by the Parliament and proclaimed on 2 May 1947.

From these facts, it was undeniable that the current Japanese Constitution was mainly designated by the US. However, it is also true that ideas expressed in the MacArthur's memo are not totally invented by MacArthur. The first principle regarding the status of the Emperor reflects the draft published by scholars of Kyoto University (in contrast, members of the Matsumo Committee are predominantly from Tokyo University). For the second principle about the renouncement of armed force, some evidence indicates that Shidehara, the then prime minister, proposed to MacArthur (Ohno, Morimoto, Yoshinaga, 260). In general, there is broad support for peace and democratic reform among Japanese people who had been suffered from devastating war.

The legal constitutional reform in post-war Japan covers: the abolishment of the theocratic status of the Emperor, demilitarization, the abolishment of traditional patriarchy, equality between men and women, political liberalization, breaking politically protected industrial conglomerates, abolishment of an absentee landlord system, liberalization of labor union, and, not limited to, local autonomy.

Those reformations, on the one hand, reflect the universal movement against the totalitarianism and fascism, as well as the idealism dominating the young US civilian officers to create the peaceful state at that time. On the other hand, the most fundamental change laying under these reforms are the destruction of the pyramid shape centralized rule by the theocratic Emperor's power. This system authorizes, at the macro level, the restriction of political freedom and democracy, and, at the micro level, the inferior status of the women, labors and small tenants.

⁵ There is a hand-written title on the memo archived stating "three basic points stated by Supreme Commander to be "musts" in constitutional revision." (http://www.ndl.go.jp/constitution/shiryō/03/072/072_0021.html)

The change of the Emperor's status was a great leap for the rule of law in Japan. Previously, it was insisted the Emperor was the state itself and, thus, above the law. Now, the Emperor is not the exception of the rule of law principle anymore and must be subject to the law.

As discussed above, the post-war changes are partially exogenous, and, of course, partially endogenous. Some people believe the new Constitution and the post-war reform are imposed by winners and ignore the Japanese indigenous culture. Combined with the international relation under the Cold War, this argument has formed the controversy over the constitutionalism and democracy in the post-war Japan.

4 Discourses over the revision of the Constitution

In 1955, Two conservative parties merged to establish the Liberal Democratic Party (LDP). One of the LDP's platform is to make Japanese own Constitution⁶ and establishment of the national armed force which is prohibited by the current Constitution⁷. LDP considered that the current Constitution was that imposed by the US to Japan while Japan lacked the freedom of choice under the US military occupation. In fact, the remilitarization is also a part of the US global strategy of the Cold War against the USSR.

Though the LDP insisted the Constitutional revision in its platform, there were no real move for the amendment of the Constitution at that time. Japan began the remilitarization by establishing the self-defense force in 1950 amid the Korean War. However, the LDP's government tries to legitimize the existence of the self-defense force by the flexible interpretation of the Constitution rather than by the amendment.

The concrete move for the Constitutional amendment occurred only after the end of the Cold War. The argument over the Constitution is the combination of the response to the globalization and the emergence of the new conservatives in Japan.

After the Gulf War, the LDP insists the need to change the article 9 of the Constitution which restricted the flexible activity of the Self-Defensing Force abroad. They argue that Japan should contribute to maintain the world peace after the Cold War and to be *normal* country which be able to protect own territory by itself. The pressure of the globalization also affects to areas other than military such as the decentralization and the administrative reform.

The discourse of the new conservatives focuses on the individualist value contained in the Constitution which is, they believe, imposed by the US disregarding Japanese indigenous value. The Constitution caused, they argue, the deterioration of the social integrity of Japan because the Constitution overly emphasizes the individual interest while ignoring the obligation to the society.

⁶ Paragraph six titled "establishing independent regime" of the party's platform manifested in November 1955 states:

While adhere to principles of pacifism, democracy and respect to basic human rights, Japan should aim to independent revision of the Constitution, and reexamine laws enacted during occupation to change or abolish in accordance with the conditions of the country.

In order to secure the world peace, independence of the state and the liberty of the national, under the collective security regime, Japan should have adequate self-defense force in accordance with capability and condition of the country and prepare for the expected withdrawal of foreign occupation forces.

(<https://www.jimin.jp/aboutus/declaration/#sec01>)

⁷ The article 9 of the Constitution provides:

(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

In 1993, LDP lost its majority in the Lower House and became the opposition party for the first time since 1955. The direct reason of this defeat was large scale corruption scandal involving the LDP's leaders. However, the change of international and domestic politics after the end of the Cold War and globalization, as well as the economic recession since the middle of the 1990s lain behind this event.

In 2001, the Koizumi's LDP cabinet began and became a stable cabinet until 2006. Koizumi accelerated the argument of the amendment and the next Abe cabinet succeeded this line. While Abe resigned in short time because of political scandal in his cabinet, he revived in 2012 and keeps quite stable cabinet until today. Abe continuously expresses his plan for the new Constitution.

The Constitution of Japan is the rigid constitution. The procedure to amend the Constitution is far more difficult than to change ordinary law. Until today, the Constitutional amendment is one of the critical issues demanded by the right wing. Because of the history of drafting, the right wing considers that the current constitution is imposed by the US and not reflect the aspiration of Japanese people.

In other words, in Japan, the conservatives are pro-amendment group. They consider the constitution does not accommodate the mythos of Japanese people. They also tend to insist that the article 9 which provides the principle of pacifism should be abolished, and Japan should be a "normal state" with military power.

In contrast, anti-amendment group is mainly the liberal. They insist that the pacifism is very important principle and guarantee the life of Japan in the international relation. They consider that the Japanese people who suffered the war and poverty strongly supported the current constitution. That why, even though the draft was influenced by the idea of the US military, the constitution accommodates the people's will.

In 2012, the LDP publicized the draft of the amended Constitution. As discussed above, the discourse of the Constitutional amendment is a combination of the global oriented and the traditional oriented. The former argues Japan should be a normal country which can play a significant role for the globalized world, especially, in peace and security by actively utilizing the armed force. The later argues that as the individualist value contained in the current Constitution is imposed by the foreign power, Japan should have own Constitution which respect to the traditional communitarian moral of Japan. Sometimes, this argument openly expresses the doubt to the modern liberal constitutionalism which stand upon the principles of the restriction to state power and the protection of human rights. The LDP's draft reflects these two arguments.

Regarding the contribution to the security and peace, the draft proposes the overall change of the article 9. The draft changes the article 9 (2) of the current Constitution to read "the provision of the previous section shall not prohibit the use of the right to self-defense." Furthermore, the draft adds the new article after the existing article 9, and this article provides the establishment of the national defense military force which can act both to protect the national security and to cooperate with international society.

As for the anti-individualist arguments, this draft presents communitarian value and the revision of the basic human rights. At first, the preamble of the draft states the "long history and inherent culture" of Japan, then continues that Japanese people "protects the motherland with pride and spirit, while respecting to the basic human rights, gives high value to harmony, and build a state by the mutual support among a family and a society as a whole." The draft also defines the family, not individual, as a basic unit of society by saying in the article 24 (1) that "the family shall be respected as a natural and basic unit of the society. Family members shall support each other."

The current Constitution defines the basic human rights as a universal in the article 97⁸. But, the LDP's draft proposes the abolishment of this article. Furthermore, the draft adds articles regarding the citizen's duty which is not clearly mentioned in the current Constitution.

The way to the amendment is not so smooth as expected by the LDP leaders. Even though the LDP and its coalition have more than two third seats of the both chamber of the Parliament. It is the Constitutional requirement to initiate the motion of amendment. However, the majority of Japanese people is still cautious about the amendment. A public opinion survey by the NHK, a national public broadcasting, tells this data (see figure _):

(Figure to be inserted)

Though the Constitutional amendment is not realized yet, current government tend to achieve a part of their agenda by the legislation. The government enacted the national security related laws in 2017. These laws expand the area of operation of the self-defense force both within the territory and outside the territory. Especially, the law allows the self-defense force use military force as a form of self-defense in case an allied country is attacked by the third country. This form of the defense operation is called the collective self-defense. However, there is a strong criticism against the constitutionality of this law, including the criticism from the great majority of constitutional law scholars and experts. They insist the article 9 of the Constitution allow the self-defense force to use weapon only if there is a direct attack to Japan. This form of defense is called an individual self-defense. Even the past governments recognized this interpretation and explained that the collective self-defense is prohibited by the current Constitution. Thus, many people consider the Abe cabinet violate the Constitution by this law.

The Abe cabinet also enacted a series of law which limit the civil liberty. The crime of conspiracy introduced by the revision of the Criminal Code is considered to restrict the freedom of association seriously. The law on protection of special state secret provides far heavier punishment against a leak of secret information by the state officials and an abetment for it. Because the definition of special secret is too broad, many people afraid the law overly restricts the right to know. Other than legislation, some members of Abe cabinet often openly declare their intention to intervene the freedom of expression. For example, Takaichi, the Minister of general affair who is in charge of the licensing for broadcasting, criticized some TV news and said the Minister could revoke a broadcasting permission if TV programs did not respect for the political neutrality.

The response of Japanese society when the Emperor expressed his will to abdicate the throne before he dies is interesting example showing the relation between the notion of tradition in Japan and the individuality. In his speech in 2016, the Emperor expressed his will to abdicate earlier. He told he was afraid if he could not play the role as the Emperor to communicate people due to his age. He also mentioned that his die as the Emperor might disturb seriously people's social activities as it happened when the previous Emperor passed away. However, some conservative politicians and scholars opposed against the Emperor's will. They insisted the Emperor is the sacred religious existence and the Emperor should not directly communicate with ordinary people. Furthermore, they said that the abdication might cause the confusion of the authority in Japan. Those arguments which reflect the traditional theocratic Imperial authority are obviously incompatible with the current Constitution which provides the principle of the popular sovereignty and the status of the Emperor is derived from the will of people. Indeed, the majority of the people supported the Emperor and they

⁸ Article 97 "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate."

prefer to the opened authority of the Emperor (imperial family which is more accessible to society) as observed in countries of Europe. Finally, the cabinet accepted the Emperor's will and decided the current throne end in 2019.

Conclusion

The relationship of the global norm and the indigenous norm in the development of the Constitutional law in Japan can summarized as below:

In the transition from the feudal regime to the modern centralized state regime (the Meiji Restoration), the legal reform including the Constitution is forced by and to catch up to the West which was considered as having universal value. However, this legal reform largely remains formal one. Japanese law kept the factors which reflect indigenous norm incompatible with modern law. The significant example is the theocratic notion of the Emperor's status.

After the proclamation of the Meiji Constitution, the parliamentary democracy functioned as a constitutional practice. This practice was supported by the interpretation of the Constitution based on European law. Especially, the British parliamentary democracy was influential as referred as a rationale of the constitutionalism. Minobe's theory which assumed the Emperor as the supreme organ of the state as a legal person was more moderate interpretation of the Meiji Constitution and had a *de facto* authentic theory of the Constitution. However, the military which disliked the control by the Parliament and politicians collaborated with the military attacked this constitutional practice to weaken the power of the Parliament. To that purpose, they evoked the traditional understanding of the Emperor's authority which should be above the law.

The defeat of Japan and the proclamation of new Constitution resulted in a complete change of the pre-war legal situation. The change of Emperor's status implies more than secularization of the Emperor. It denies the traditional pyramidic patriarchy which was a micro version of the theocratic Emperor's authority. Then, this change made possible for Japan to accept the principle of human rights and equality which would become global value of the post-war world.

Current controversy of the Constitution represents two different notion. The first discourse is that Japan should join to globalized world by amending the Constitution. Then, the second discourse emphasizes the communitarian concept which, the conservative group insisted, denied by the imposed Constitution.

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