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THE CONSTITUTION OF THE EMPIRE OF JAPAN*

IN THE history of the Japanese people, five dates stand out above all others. They are 660 B. C., when, according to legendary account, the Empire of Japan was founded by the Emperor Jimmu; 1853, when Commodore Perry, with an American squadron, anchored offside what is now Yokohama and caused the opening of Japan to foreign intercourse; 1867-1868, when there was a restoration of the monarchy, marking the beginning of the Meiji Era of Constitutionalism; and 1889, when the Constitution of Japan was promulgated.

Up to the year 1867, Japan was like unto a mediaeval state. There was nominally an Emperor, but in fact the Shogun was all-powerful. But various causes had served to weaken the authority of the Shoguns, with the result that in 1867 the Tokugawa Shogunate surrendered its sovereignty to the Emperor.¹ Curiously enough the restoration of imperialism became the first step in the advance of liberalism in Japan. Shortly after the young Emperor Mutsuhito succeeded to the throne, on April 6, 1868, he took an Imperial Oath in the sanctuary dedicated to the worship of his ancestors. This charter oath which forms the Magna Charta of the political and social life of Japan, contained five articles which, translated,² read as follows:

"1. Widely representative institutions for deliberation shall be established, and the affairs of state shall be determined in accordance with public opinion.

"2. The sovereign and the people shall unite as one man in the vigorous execution of the policies of the Empire.

"3. The common people no less than the civil and the military officers shall be permitted to pursue the respective objects of their lives, and we must see to it that no cause for discontent is given anywhere.

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¹ See IYENAGA, CONSTITUTIONAL DEVELOPMENT OF JAPAN, 1853-1881, pp. 21-24.

² Translations of Baron Dairoku Kikuchi, Baron Nobushige Hozumi, and Mr. Tsunejiro Miyaoka.

"4. Unworthy customs of old shall be abolished, and things shall be adjusted in accordance with the eternal principle of justice.

"5. Wisdom and knowledge shall be sought throughout the world, and the power of the Empire shall thereby be strengthened."

The constitutional movement which then began in Japan was a logical sequel to the restoration. Various imperial decrees provided for a governmental organization including a council of state, a senate, and local assemblies. Vigorous political agitation conducted in favor of the establishment of a representative assembly elected by the people resulted in the announcement of the Imperial Decree of October 12, 1881, which definitely fixed the date of the establishment of such a National Assembly for 1890, and which paved the way for the promulgation of a constitution. This transitory period of nine years was then given up to the inauguration of important reforms in the organization of the government and to the preparation of a constitution.

To make ready for the constitutional changes promised for the year 1890, a commission for the study of constitutional governments headed by Ito Hirobumi (afterwards Prince Ito), was sent on a tour of the United States and Europe. Ito's political ideas had received their first impression during his education in England. But in Germany he met and fell under the influence of Prince Bismarck, then in the zenith of his power. With a choice practically narrowed down to England and Germany, the fact that the British Constitution was unwritten and that a constitutional monarchy of the British type was politically impossible in Japan, caused Ito to come to the natural conclusion that Prussia, rather than England or any other country, furnished the model best suited to Japanese needs. The commission finished its investigation of foreign constitutions and institutions in about a year. A bureau for the investigation of constitutional systems was then established to carry out the work of drafting a constitution. Prince Ito was the chief of this bureau and had associated with him, among others, Inouye Ki, Ito Miyoji, and Kaneko Kentaro, who had been members of the foreign mission. The final draft of the constitution was presented to the recently

established Privy Council, of which Prince Ito was the President, for confirmation, instead of to the Senate, a legislative body, or to a constituent assembly. The Emperor is said to have been present frequently in person during the sessions of the Council. Prince Ito, writing upon this subject, says: "The Sovereign himself presided over these deliberations (in the Privy Council), and he had full opportunities of hearing and giving due consideration to all the conflicting opinions. I believe nothing evidences more vividly the intelligence of our august Master than the fact that in spite of the existence of strong under-currents of an ultra-conservative nature in the council, and also in the country at large, His Majesty's decisions inclined almost invariably toward liberal and progressive ideas, so that we have been ultimately able to obtain the constitution as it exists at present."³ The Constitution was thus prepared in a government bureau, was then submitted to a specially organized and select council of officials, and was always kept secret and away from all contact with public opinion.

The Constitution⁴ was promulgated on February 11, 1889, by the late Emperor Mutsuhito, whom the Japanese would like to have known by his posthumous title, Meiji Tenno. At the same time, there were issued the Imperial House Law, the Ordinance concerning the House of Peers, the Law of the Houses, the Election Law for members of the House of Representatives, and the Law of Finance. The constitution was in effect after the formal opening of the Imperial Diet on November 29, 1890.

The Japanese Constitution is at least the outward symbol of the transition from an absolute to a constitutional form of government. Baron Hozumi, in an address delivered at the International Congress of Orientalists held in Rome in October, 1899, described the fundamental principle of the Japanese Government as "theocratico-patriarchal constitutionalism."⁵ Yet there is nothing new and

³ Quoted in Count Okuma Shigenobu, *FIFTY YEARS OF NEW JAPAN*, Volume I, p. 131.

⁴ An English translation of the Japanese Constitution can be found in DODD, *MODERN CONSTITUTIONS*, Vol. II, pp. 23-35, and in Count Okuma, *FIFTY YEARS OF NEW JAPAN*, Vol. II. Appendix A.

⁵ Published in book form under the title, "ANCESTOR WORSHIP AND JAPANESE LAW," Revised Edition, 1913.

startling to be found in the constitution. The document merely served to perpetuate much of the old and to cover the traditional, political principles of the Japanese with a representative form.

To understand this idea fully and to be able to do justice to Japanese institutions, one has to keep constantly in mind the people and their political psychology. The Japanese have ever been able to maintain their ethnic unity and successfully to defend themselves from an influx of alien races. Organized as "one great family," the welfare of the individual is subordinate to the welfare of the family, i. e., the country. The unconscious belief of the Japanese is, that the Emperor reigns and governs the country absolutely by a divine right inherited from his ancestors. In the preamble of the Constitution prepared for His Imperial Majesty's signature, he was made to say that "The rights of sovereignty of the State We have inherited from Our Ancestors, and We shall bequeath them to Our descendants." At a meeting of the Presidents of the Prefectural Assemblies held just four days after the promulgation of the Constitution, Prince Ito, the author of the Constitution, said, "The Sovereign power of the State resides in the Emperor." Again in the opening chapter of his Commentaries on the Constitution, this eminent statesman writes: "The Sacred Throne of Japan is inherited from the Imperial Ancestors, and is to be bequeathed to posterity; in it resides the power to reign over and govern the State. That express provisions concerning the sovereign power are specially mentioned in the Articles of the Constitution in nowise implies that any newly settled opinion therein is set forth by the Constitution; on the contrary, the original national polity is by no means changed by it, it is more strongly confirmed than ever."⁶ A learned Japanese writer has expressed the same thought in the following beautiful language: "Theoretically he (the Emperor) is the centre of the State as well as the State itself. He is to the Japanese mind the Supreme Being in the Cosmos of Japan, as God is in the Universe to the pantheistic philosopher. From him everything emanates; in him everything subsists; there is nothing on the soil of Japan existent independent of him. He is the sole owner of the Empire, the author of law, jus-

⁶ COMMENTARIES, English Edition, p. 2.

tice, privilege, and honour, and the symbol of the unity of the Japanese nation."⁷

There may be in theory a division of powers between the executive, legislative, and judicial departments in Japan. In reality, however, the outstanding and most unique feature of the Japanese Constitution is the dominance of the executive branch over the legislative and judicial. The executive power is the government, and the legislative and judicial merely exist to enable the executive branch, that is the government, to functionate properly. It is for this reason that the Constitution opens with a description of the powers and rights of the Emperor.

The very first article of the Constitution announces the Japanese theory of government by stating that the Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal. Article 4 of the Constitution states that the Emperor is the head of the Empire, combining in himself all powers of the State and exercising them in accordance with the provisions of the present constitution. He has the right to determine the organization of the different branches of the administration, to exercise the supreme command of the Army and Navy, and to determine their peace standing, to declare war, make peace, and conclude treaties, to proclaim a state of siege, to confer titles of nobility, rank, orders, and other marks of honor, and to order amnesties, pardons, and commutation of punishment. Article 5 of the Constitution provides that the Emperor exercises the legislative power with the consent of the Imperial Diet. The executive has the right to initiate laws, has absolute veto power over laws which have been passed by the Imperial Diet, and can issue ordinances. The judiciary is made independent of the executive branch of the government. Yet Prince Ito says that as the sovereign is the fountain of justice, all judicial authorities are merely a form of the manifestation of sovereign power.⁸ Only in the hands of the Emperor is the power of amending the Constitution. Prince Ito expresses this fundamental purpose of the Japanese Constitution as follows: "The sovereign power of reign-

⁷ UYEHARA, *POLITICAL DEVELOPMENT OF JAPAN, 1867-1909*, p. 23. See also Chapter 2 of the same work.

⁸ *COMMENTARIES*, pp. 101-104.

ing over and of governing the State is inherited by the Emperor from His Ancestors, and by Him bequeathed to His posterity. All the different legislative as well as executive powers of State, by means of which He reigns over the country and governs the people, are united in this Most Exalted Personage, who thus holds in His hands as it were, all the ramifying threads of the political life of the country, just as the brain in the human body is the primitive source of all mental activity manifested through the four limbs and the different parts of the body."⁹ Even one of the most progressive of Japanese considers the Imperial Family to be "the most valuable heritage of the Japanese Nation."¹⁰

In every line of the constitution, there is emphasized the absolute and autocratic authority of the Emperor. But the Emperor never attempts a personal reign or an actual exercise of his vast powers. He is merely the ceremonial head of the State. This wise passivity has served to remove the Emperor from the active sphere of the government and to perpetuate the reverence of the people for him because it necessarily places him beyond censure and criticism. While many features of the Japanese Constitution, as before indicated, show the influence of the German Constitution, yet in this respect there is a difference between the German practice under the former monarchy and the Japanese practice which, as a Japanese writer has said, "is to be found in the fact that the Kaiser exercises a personal rule and the Chancellor is only his Secretary, while the Japanese Emperor does not exercise a personal rule and never has done so for many centuries."¹¹

Executive power is actually exercised by the Cabinet. This body, like the Cabinet of the United States, is not expressly recognized in the Constitution. The Constitution only mentions the Ministers of State and requires them to sign laws, imperial ordinances, and imperial rescripts, and makes them responsible for advice given the Emperor. Yet, there is in the Japanese constitutional system a collective body of Ministers of State under the presidency of a Min-

⁹ COMMENTARIES, p. 7.

¹⁰ MIYAOKA, GROWTH OF LIBERALISM IN JAPAN, p. 24.

¹¹ MIKAMI, POLITICAL AND CONSTITUTIONAL DEVELOPMENT OF JAPAN DURING THE LAST FIFTY YEARS, I PHILIPPINE LAW JOURNAL, October, 1914, p. 107.

ister President. The Ministers of State can be selected by the sovereign from any party or from no party at all. The ministers are not responsible to the Diet but to the Emperor. No cabinet would, however, wholly disdain the support of political parties. The Ministers of War and Navy are officers in the active service of the Army and the Navy. The powers of the Cabinet Ministers are determined by the Emperor.

The Privy Council is a body separate and distinct from the Cabinet although the cabinet ministers are members of the council *ex officio*. The Council is made "the highest body of the Emperor's constitutional advisers." According to the Constitution (Art. 56), it is to "deliberate upon important matters of state." The ordinance by which the Privy Council was constituted specifies the important matters concerning which it shall state its opinions.¹²

An extra-constitutional body of possibly even more influence than the Cabinet or the Privy Council is the *Genro* or Elder Statesmen. This is a small coterie of the most eminent and experienced Japanese, whom the Emperor consults on matters of importance. Generally speaking, no change of cabinet is effected without their consent, nor is any action taken, which might lead to the declaration of war, the conclusion of peace, or the negotiation of an important treaty, without consulting them.¹³

The difference between the three bodies then is, that the Cabinet is an administrative body, the Privy Council is a consultative body, and the *Genro* is a select body whose members derive their influence from the confidence reposed in them by the Emperor.

The legislative power of Japan is vested in the Emperor and a legislature called the Imperial Diet. The Diet consists of two houses: the upper chamber, the House of Peers, and the lower chamber, the House of Representatives. The organization and legal powers of the Diet are provided for by the Constitution and various laws and ordinances.¹⁴ The two houses fail to correspond to similar bodies

¹² Imperial Ordinance of April 28, 1888, revised by Imperial Ordinance No. 216, 1890.

¹³ See McLAREN, PRESENT-DAY GOVERNMENT IN JAPAN, XIX Asia, March, 1919, p. 236.

¹⁴ See Law of the Houses of February 11, 1889.

in Great Britain for, whereas in the British system the House of Commons is predominant, in the Japanese system, the House of Representatives does not have more influence than the House of Peers. The Diet is convoked every year for a period of three months. Each house has close to four hundred members. Every law requires the consent of the Diet. Most of the important bills are introduced by the Cabinet. The Emperor retains the veto power which he exercises freely. In addition to its legislative functions, the Diet has the following rights: (1) To receive petitions; (2) to address the Emperor and to make representations to him; (3) to put questions to the Government; and (4) to control the financial affairs of the State, a subject to which one chapter of the constitution is given up, and which provides for the budgetary system.¹⁵

The House of Representatives is an elective body. Practically the only qualification for a candidate is, that he must be a Japanese subject and over thirty years of age. Shintu or Buddhist priests, Christian clergymen, teachers of religion, teachers in elementary schools, and those who have business contracts with the central government are disqualified from becoming candidates.¹⁶ The House of Representatives necessarily finds it difficult to represent public opinion and to obtain reform. It is principally because of its nearly constant opposition to the government that occasionally an advance is made.

The House of Peers is composed of members of the imperial family (who, however, absent themselves from meetings), of certain imperial nominees, and of representatives of the orders of the nobility and the larger taxpayers.¹⁷ The tenure of office for elective members is seven years and that of the others is for life. The House of Peers cannot be dissolved; it can only be prorogued. Such a body will necessarily be controlled by the aristocracy and will be closely affiliated with conservative and bureaucratic elements.

The judicial power is exercised by the courts of law in the name of the Emperor. What these courts shall be, their organization, and

¹⁵ As given by Prince Ito in his Commentaries, p. 62.

¹⁶ LAW OF ELECTION, 1889; REVISED ELECTION LAW OF 1900.

¹⁷ Imperial Ordinance concerning the House of Peers.

the qualifications for judges, is determined by law.¹⁸ There are four grades of law courts in Japan and certain special courts. The Judiciary has no power to interpret the constitution or to declare invalid any law passed by the Diet and approved by the Emperor, for this is a prerogative of the Emperor. Moreover, it cannot adjudicate a suit to which the administrative authority is a party. What is considered the most important function of the judiciary in many other countries, as in the United States, to act as the protector of the rights and liberties of the people, in Japan is left to the Court of Administrative Litigation, a court dependent upon the executive branch of the government. The reason for this is thus given by Prince Ito: "Were administrative measures placed under the control of the judicature, and were courts of justice charged with the duty of deciding whether a particular administrative measure was or was not proper, administrative authorities would be in a state of subordination to judicial functionaries. The consequence would be that the administration would be deprived of freedom of action."¹⁹

The Bill of Rights of the Japanese Constitution is fairly extensive. The purpose of the framers of the Constitution appears to have been to protect the people from the evils of an irresponsible government. The duties of Japanese "subjects" are two: Amenability to service in the army and navy, and to the payment of taxes. The rights guaranteed to individuals are of two classes: Personal immunities and immunities as to property. The personal rights include appointment to civil or military offices; liberty of abode; freedom from arrest, detention, trial, and punishment unless according to law; inviolability of domicile; trial by judges; religious freedom in so far as it does not conflict with public peace and order or their duties as subjects; freedom of speech and press, and right of petition. The immunities as to property are inviolability of private property except for public benefit and privacy of correspondence. The effectiveness of these guaranties has been greatly lessened because in the enumeration of the rights of "subjects" in the Constitution, there is usually a qualifying clause ending with the words, "according to the

¹⁸ See articles 57, 58 of the Constitution and Law Relating to the Organization of Law Courts of February 10, 1890.

¹⁹ COMMENTARIES, p. 109.

provisions of law." Numerous laws have thus served to restrict to a large degree the rights of "subjects."²⁰ In discussing liberty of speech and press, Mr. Miyaoka assures us "that the limitations imposed are for the good of the country;" and it is to be presumed that restrictions found in other laws would quite similarly, according to the usual Japanese viewpoint, be considered as advancing the public welfare.²¹ Another Japanese, more critical and outspoken, frankly says that "that part of the Constitution which deals with the rights and liberties of the people is a mere ornamental flourish, so long as the Government is not responsible to the people."²²

A true estimate of the merits and demerits of the Japanese constitution is difficult to make. Compared with other leading constitutions, it can, in the first place, in all fairness, be said that the Japanese Constitution is blessed with brevity and clarity. The international Japanese lawyer, Mr. Miyaoka, truly says that "the language of the Japanese Constitution is so terse, so simple, and so direct, that it is evidently a work of a group of men who lacked neither clearness of vision nor precision in the art of expressing thoughts."²³ The Constitution, in the second place, seems suited to the circumstances and aspirations of the people. At least it has attained for the Japanese solidarity and security against disorder. The conclusion of an American observer is, that the working of the new system of government in Japan "has, on the whole, been satisfactory. * * * Japan is deserving of the greatest credit for what was accomplished in the first decade of constitutional government."²⁴ Prince Ito, the author of the Constitution, quite properly claims that "excellent results have thus far been obtained, when it is remembered how sudden

²⁰ CODE OF CRIMINAL PROCEDURE, PENAL CODE, Law of the Exercise of Administrative Authority of June 2, 1900, Postal Law of March 13, 1900, Telegraph Law of March 14, 1900, Law of Public Safety and Police of March 10, 1900, Law of Publication of April 14, 1893, and Press Law of May 6, 1909. The rights in property are governed by the Expropriation Law of March 7, 1900, as amended.

²¹ Growth of Liberalism in Japan, p. 12.

²² UYEHARA, THE POLITICAL DEVELOPMENT OF JAPAN, 1867-1909, p. 186.

²³ GROWTH OF LIBERALISM IN JAPAN, pp. 3, 4.

²⁴ CLEMENT, CONSTITUTIONAL GOVERNMENT IN JAPAN, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, March, 1903, pp. 57-68.

has been the transition from feudalism to representative institutions."

Japanese publicists would be the first to admit that the Japanese constitution is far less democratic than the constitutions of most countries, but would pass on rapidly to contend that it is best suited for the Japanese people. On a subject of such purely national concern, it would, of course, be presumptuous for a foreign critic to proffer a contrary opinion. Yet no divine gift of prophecy is needed to proclaim that in the future all important institutional movements in Japan will face away from oligarchy and toward democracy.

GEORGE A. MALCOLM.