

LEGITIMACY OF THE CONSTITUTION OF JAPAN : REDUX

Is an imposed constitution legitimate?

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This research paper is based on an occasional paper that I submitted to the Program on U.S.-Japan Relations, Harvard University, 2010.

After adding some adjustments, using the paper, I made a presentation at the regular meeting of Constitutional Revision Research Project, Reischauer Institute of Japanese Studies, Harvard University on Feb. 11th, 2010.

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Introduction ----*Main Arguments of This Paper*

During my stay at Princeton University as a visiting fellow 2008-09, an American student who studied Japanese politics asked me the following question: “The Japanese People have discussed revision of their postwar constitution many times. But every effort eventually failed. The latest debate which started in 2000 is dying down. So it is failing again. I wonder why the Japanese repeat such an unsuccessful debate.¹ What does the debate mean at all?” I replied half-jokingly, “I think we need to discuss revision of our constitution because we need to recall and memorize that we have a constitution.”

Over time I indeed came to believe that there might be some truth in my reply. To clarify what I mean by this belief, it is necessary for me to reconsider how the postwar constitution of Japan gained legitimacy at its birth in 1945 to 1947.

The issue of “Legitimacy of the Constitution of Japan” is still controversial even 6 decades after the birth of our constitution in 1947. This basic issue has been discussed as a question of “Who made this constitution at all?” We, the Japanese, do not have a clear answer to this question yet.

As many Japan watchers know very well, there existed (and still exists in a sense) a strong criticism against legitimacy of the Constitution of Japan. It is called 「押しつけ憲法論」 (*Oshituke kempô ron*), a view of imposed constitution. And this imposed-constitution view has been thorough-bass 通奏低音 through postwar politics in Japan.

1: But, in the first place, I think this view is not productive, but rather, destructive. If the constitution imposed under occupation were invalid, the development of the postwar Japan was totally invalid too.

2: Second, as I will argue later, the imposition by the GHQ was legitimate. It was another revolution in fact. It was a revolutionary event because it transformed the meaning of the process of making a constitution from imposition to collaboration. Collaborative work view was

¹ The debates of constitutional revision already started at the birth of the postwar Constitution of Japan and has been accompanied its development varying in strength. It is widely known, however, the Constitution of Japan has never once been revised so far. Glenn D. Hook and Gavan McCormack state, “Japan enters the twenty-first century with the world’s oldest unrevised constitution (Kempô).” Hook and McCormack, 2001, p.3.

established by this revolution not by beautiful stories of close ties between the GHQ and Japan.

3. Third, legitimacy is not given, it is constituted. I would like to show another possible concept of legitimacy in my tentative conclusion.

I am thinking of making my own theoretical framework of legitimacy in the near future. But before that, I need to review the possibility of the imposed-constitution view by tracing the history of making our postwar constitution.

My methodology for this paper is as follows. I am not an historian so my examination of historical facts here is going to be a limited one. But the imposed-constitution view is not just a debate on history itself but also a sort of interpretation or evaluation of history. So I chose the method of interpretation in this paper. I will refer to the August Revolution theory 八月革命説 later and I try to draw some jurisprudential implications from that theory. In using them, I reinterpret the process of constitution making. I will interpret some historical documents as authoritative texts of legitimacy. It is almost like a legal interpretation methodology.

My central arguments and conclusion which I would like to make here are as follows:

--- The substantive legitimacy of our postwar constitution lies in the principles which were set up in the Potsdam Declaration of 1945.

--- Our postwar constitution was imposed by GHQ. But the imposition was legitimate.

--- GHQ's imposition by handing their draft over to the Japanese government was legitimized through two revolutions, the August Revolution in 1945 and the February Revolution in 1946. These revolutionary events changed the meaning of the process of establishing the constitution. It transformed an imposed work into a collaborative project.

--- So we should not pay much attention any longer to "who was a legitimate author of the Constitution of Japan"

--- The postwar regime of Japan relied upon a promise we made sixty years ago that we keep on making commitments to the principles in the Potsdam Declaration through interpretations of the constitutional text. This is a new concept of legitimacy. We should turn our attention from a static legitimacy to a dynamic one.

I. A Note on “Legitimacy”

A. Continuity in Regime as a Concept of Legitimacy

1. Continuity in regime part 1 ----continuity in agent or people

Legitimacy is a concept in political philosophy, and it constitutes a foundation which makes it possible for a regime and political community to exist in a firm and stable manner. In other words, legitimacy is a common basis shared by both the ruler and the ruled in order to justify exercising the power and accepting the power². When we identify such a common basis, “continuity in the regime” could come to our mind first. In this concept, legitimacy means that a new regime properly takes over the former regime. If we understand legitimacy in this sense, it comes to matter whether the agent or people who has been supporting and constituting the former regime are still maintaining their identity in a new regime. And continuity of agent or people has been being understood as including a claim that the agent or people must be a constituent of the constitution of their regime. We can acknowledge continuity between the two regimes when the same agent or people across the two regimes still retain the power to frame constitution.

2. Continuity in regime part 2 ----continuity in principle

Not just continuity in agent or people but also continuity in principle should be necessary for establishing continuity in the regime. In other words, there should be no gap of the principles between the former regime and the latter one. However, it is usually not clear what a foundational principle the regime is based on. So, continuity in agent or people who might know well what it is should be a successor in order to maintain continuity in principle. If an agent or people are the same between the two regimes, it is hard to imagine that the foundational principles between them are largely changed. Therefore, I think that continuity in agent or people and continuity in principle have a mutual connection in a sense.

B. Approach in this Paper

1. Establishment of the principle to justify a new regime

In fact, a claim for continuity in regime presupposes that what was traditionally regarded as legitimate in the former regime should be successfully taken over in a certain way. If this is

² Kitada 北田, 2006, p.516.

correct, it might be said that continuity in regime as a concept of legitimacy originally does not expect a huge change to take place, which could bring about a serious gap between the regimes. So the question is what assures a new regime of its legitimacy where continuity in regimes is completely blocked. To be brief, it is a new principle that guarantees legitimacy of a new regime without continuity of the former regime. A new regime which lost or rejected continuity without connection with the former would establish and grow its legitimacy by accepting and realizing a new principle, and would take it seriously as the identification of the same one political community to hand the principle down to the succeeding generation. The basic idea on legitimacy in this paper is that there surely existed a gap in principle between the Meiji regime and the postwar regime. Based upon this idea, I will argue that postwar Japan should gain its legitimacy by making every effort to realize new principles which was introduced by the Potsdam Declaration.

2. Legitimacy, an authoritative text, and legal interpretation

In this paper, I will refer to a “legal” legitimacy, which provides a foundation for legal institutions and political order of a new regime. In other words, I will focus on a somewhat positive legitimacy. So I will find sources of legitimacy in the authoritative “text” or authoritative “decision making” and interpret them like an interpretation of a legal text³. In doing so, I will be able to specify the principles which made the postwar regime of Japan legitimate and clarify a dynamics of the functions of its legitimacy in “substance” and “procedure” of the new constitution making. As you will see in the following pages, the authoritative text was the Potsdam Declaration (and other related documents), the authoritative decision making was announcing and accepting it, the substance of legitimacy lied in the principles stated in the Declaration, and the procedure of constitution making was provided by the paragraph 10 of the Declaration, the Basic Initial Post Surrender Directive of 1945⁴, and the Communiqué of Moscow Conference of 1945⁵.

In the following talk, I will examine Miyazawa Toshiyoshi’s August Revolution theory

³ In fact, the Potsdam Declaration that I will refer to as an authoritative text is obviously an international legal document.

⁴ The Basic Initial Post Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan (JCS1380/15) (November 3, 1945). *See*, Appendix 2. This Directive is based on the previous policy statement, the U.S. Initial Post-Surrender Policy for Japan (SWNCC150/4/A) (September 21, 1945).

⁵ The Incoming Message to CINCAFPAC [MacArthur] from Washington (War), nr WCL 32355 [Communiqué of Moscow Conference, December 27, 1945] (issued on December 28, 1945). *See*, Appendix 3.

宮沢俊義の「八月革命説」, which is the most authoritative theory justifying legitimacy of our constitution by the most influential constitutional scholar at the time of making the constitution, and I will dare to make my own interpretation of the text of Potsdam Declaration so that I would make my arguments above clear.

II. A Brief Story of How the Postwar Constitution of Japan was Created

1945

July 26 *The Potsdam Declaration*

August 15 *Imperial Speech declaring the end of the war*

August 30 *General MacArthur arrives at Atsugi*

The Allied Powers issued the Potsdam Declaration on July 26, 1945. They set the policy in the Declaration that the occupation policies would be carried out through the Japanese Government, but it did not refer explicitly to what would happen to the Emperor system. At this time, the greatest concern of the Japanese government was that the Emperor should retain his sovereign status and the "national polity" 国体(*kokutai*) should be maintained. The Japanese government demanded this condition but the United States never provided an explicit answer. So the Japanese government could not help accepting the Declaration without the express protection of the Emperor. In the end, this process produced a myth of unconditional surrender 無条件降伏 (*mujôken kôfuku*).

Accepting the Declaration meant that fundamental reform to the Meiji Constitution of Japan (1889) was inevitable. The Potsdam Declaration called for "establishing a peacefully inclined and responsible government," "revival and strengthening of democratic tendencies," and "establishing respect for fundamental human rights." Introduction of these principles required a fundamental reformation of Japan so that constitutional reform became inevitable.

These reforms got started under the Allied military occupation, which was in fact dominated by the United States, and the policy of occupation was performed under the leadership of Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), and his staff in GHQ (the General Headquarter). MacArthur had been invested with absolute powers to implement the Potsdam Declaration.

October 25 *The Matsumoto Committee*

On October 11, MacArthur met with Shidehara, the newly appointed Prime Minister, to give him a suggestion on "liberalization of the Constitution 憲法の自由主義化(*kenpô no jiyûshugi ka*)." The Shidehara Cabinet was not in favor of constitutional reform, however, it appointed Matsumoto Jôji 松本烝治, a Minister of State, as the Chairman of the Constitutional Problem Investigation Committee (as known as the Matsumoto Committee 松本委員会) to initiate just an examination of the constitution not its reformation.

Chairman Matsumoto once was a professor of commercial law at the Imperial University of Tokyo. After having left Tôdai, he ran up the ladder of success in the business and political world. So he was a self-confident, perhaps too self-confident person and arrogant in a sense. He wanted control over the debate in the Committee. Investigation in the Committee was basically performed by him, sometimes quite personally. Matsumoto and constitutional law professors in the committee (Miyazawa was one of them) did not recognize what the Potsdam Declaration required of Japan. They just made small amendments to the Meiji Constitution and created conservative drafts

December 16 Moscow meeting reached agreement to form FEC

On the other hand, on December 16, 1945, at the Moscow meeting, the Allied Powers reached an agreement to form the Far Eastern Commission (FEC). This brought a radical change in how the occupation of Japan would be carried out. From February 26 of the following year FEC was to start activities which would inevitably bring constraints on the power and authority of SCAP in regards to the reformation of the Constitution. Against a background of cold war, MacArthur needed to quicken constitutional reforms.

1946

February 1 Mainichi Shimbun disclosed the draft

February 8 "Gist of the Revision of the Constitution" was submitted to GHQ

February 13 GHQ Draft (MacArthur Draft) was handed over

March 6 "Outline of a Draft for a Revised Constitution" was announced

MacArthur was a very lucky person because on February 1, 1946, the Mainichi Shimbun disclosed and criticized the draft proposal of Matsumoto Committee. The draft was too conservative and not significantly different from the Meiji Constitution. At this moment, MacArthur started writing the GHQ draft and it was completed in around 10 days.

On February 13, Courtney Whitney as Chief of Government Section at the GHQ met

Matsumoto and Minister for Foreign Affairs Shigeru Yoshida to inform them that the Japanese plan they had previously submitted was "wholly unacceptable." At that point Whitney handed over the GHQ Draft⁶. A few days later, Matsumoto tried to resist by submitting the supplementary explanation of his plan but Whitney rejected this supplement and even worse he demanded the Japanese government to make a response regarding acceptance of the GHQ draft within 48 hours.

Finally in its meeting on February 22 the Cabinet decided to accept the GHQ draft as a basis of constitutional reform.

*June 20 "Bill for Revision of the Imperial Constitution"
was submitted to the Imperial Diet.*

November 3 Constitution of Japan was promulgated

1947

May 3 Constitution of Japan came into force

On March 6, 1947, the Japanese government announced, with the concurrence of the GHQ, the "Outline of a Draft for a Revised Constitution." On June 20, an Imperial Rescript was issued according to Article 73 of the Meiji Constitution, and the "Bill for Revision of the Imperial Constitution" (not the Bill for creation of a new constitution) was submitted to the 90th session of the Imperial Diet. With the addition of several important revisions to the draft, the Constitution of Japan was promulgated on November 3 and it came into force on May 3, 1947.

⁶ The SCAP record recounts what Whitney told them."As you may or may not know, the Supreme Commander has been unyielding in his defense of your Emperor against increasing pressure from the outside [FEC] to render him subject to war criminal investigation. ... But, gentlemen, the Supreme Commander is not omnipotent. He feels, however, that the acceptance of the provisions of this new Constitution [the GHQ draft] would render the Emperor practically unassailable. ..." ([] by Komamura) Takayanagi, Ohtomo and Tanaka vol.1, 1972, 高柳・大友・田中 1, pp.326-329. Matsumoto interpreted these remarks as "MacArthur does support the Japanese Emperor, and this draft constitution is the only way of protecting the person of the Emperor from those who are opposed to him." Ashida 芦田, 1986, p.76. There is no proof of Matsumoto's memory. Even if Whitney did not use strong words "the only way of protecting the person of the Emperor", his remarks were effective enough for Matsumoto to take the situation very seriously.

III. Who made the Constitution of Japan? : Three Points of View

There have been three representative view points about who the author of our constitution was.

---1. Imposed-constitution

Needless to say, this point of view regards the constitution as made-by-GHQ and the U.S. This thesis was a driving force for revisionists particularly the revision movement during the 1950s to 1960s.

---2. Mac constitution or FEC constitution

Professor Nagao Ryuichi 長尾龍一, professor emeritus of the University of Tokyo, a very unique figure in the field of legal philosophy in Japan, argues that SCAP, General MacArthur, came to retain a sovereign authority in legal developments during the initial occupational era. However, after the Moscow meeting the ultimate authority would be transferred to the Far East Commission. So in this view, the authorship moved from Mac to FEC⁷.

---3. Collaborative Work

This somewhat optimistic view holds that our constitution was created as a collaboration between Japan and the U.S.⁸ This view refers to the historical fact or arguable episodes like these. General MacArthur's memoir and other memorandum suggest that Prime Minister Shidehara actually proposed an original idea of Article 9 when they met⁹. The GHQ never ordered the Japanese government to reform the constitution, as a matter of fact, it was a just recommendation. In the process of making the constitution, the GHQ referred to private drafts by legal scholars and intellectuals outside of the government. So civil society had played an important role in the constitution making, etc,etc. This view was strongly argued by Takayanagi Kenzo 高柳賢三, a professor of Anglo-American Law at Imperial University of Tokyo, and Chairman of the Cabinet Commission of the Constitution 憲法調査会 which was established in the Cabinet in 1957 to

⁷ See Nagao 長尾, 1996; Nagao 長尾, 1997a; Nagao 長尾, 1997b.

⁸ Professor Takayanagi was the most powerful advocate of the collaborative- work view. For the detail, see *infra* note 10. Professor Lawrence W. Beer characterizes the process of making the Japanese Constitution as "a binational product." Beer, 1990, pp.232-33. Some comparative constitutional law scholars such as Mark Tushnet and Vicki C. Jackson, suggest that a role of the occupying forces in Japan was something good for the process of making a constitution by stating "[n]ote the possible distinction between interventions by occupying forces that are themselves from liberal constitutional democracies (the U.S. in Japan and Germany) and interventions by less domestically-constrained occupying forces." Jackson and Tushnet, 2006, p.286. Takayanagi

⁹ MacArthur, 1964, pp.302-03. See also Kenpô chōsa kai 憲法調査会, 1961, pp.332-36.

investigate constitutional issues.

Many members of this Commission, for example, Kamikawa Hikomatsu 神川彦松, Oishi Yoshio 大石義男, Hirose Hisatada 広瀬久忠, called for revision of the postwar Constitution from the view of imposed constitution. But since Takayanagi suddenly proposed his opinion in June, 1963, and started to argue that the constitution was a collaborative work of Japan and the U.S. 日米合作 (*nichi bei gassaku*)¹⁰, the Commission was sharply divided into two groups. After all, the Commission was not able to work out its own draft of revision of the constitution¹¹. Revisionist efforts in the late 1950s and early 1960s failed partly because of this collaborative-work view¹².

I have come to agree with this collaborative-work view. But the view of the constitution as a collaboration is filled with a lot of somewhat optimistic interpretations of history. The reality was more complicated and tragic. I will come back to this issue later.

In the next part I will discuss the basic foundation to trace a historical line of legitimacy of our constitution. So I have to start to examine the common understanding about legitimacy of

¹⁰ He submitted “Article by Article Analysis on the Constitution” (as known as “Takayanagi’s Opinion to the Commission in June, 1963. *See* Takayanagi 高柳, 1964a. Shortly thereafter, as his opinion invited severe opposing arguments from conservatives in the Commission, he submitted another opinion, “In Response to the Opinion titled “A Course of Constitutional Revision””, in November, 1963, where he emphasized the collaborative-work view again. For this second opinion, see Takayanagi 高柳, 1964c. For his analysis on a political thoughts of the Commission, *see* Takayanagi 高柳, 1964b.

¹¹ For the background of Takayanagi’s collaborative-work view and how the Commission divided into two groups due to his view, *see* Sato 佐藤, 1964a; Sato 佐藤, 1964b; Takemae, Okabe, and Fujita 竹前・岡部・藤田, 2001, pp.186-213.

¹² I think there were some reasons other than Takayanagi’s opinions and his leadership why the Commission failed to reach a new constitution draft. The Commission was originally set up in the Cabinet of the Prime Minister Kishi Nobusuke 岸信介 who was enthusiastic about constitutional revision in June, 1956. In the middle of its activity, however, Kishi left the administration and Ikeda Hyato 池田勇人 took up its post, who wanted focus on the high growth line and put the debate of constitutional revision aside. Another reason why the Commission failed is that in the early 1960s a huge struggle against the US-Japan Security Treaty, 安保闘争 (*Anpo tōsō*) brought about. I guess that the Japanese government worried about this movement might introduce a real socialist revolution to the society of Japan and the political leaders were not inclined to go so far as to realize a constitutional revision against this popular sentiment. *See generally*, Takemae, Okabe, and Fujita 竹前・岡部・藤田, 2001, pp.174-75.

our constitution which has been dominant among contemporary scholars, intellectuals, and politicians. It is a famous theory, the August Revolution theory 八月革命説 by Miyazawa Toshiyoshi 宮沢俊義¹³. This theory was and still is the most influential one about legitimacy of our constitution. In fact, the original idea came from another influential scholar of that time, Maruyama Masao 丸山眞男¹⁴. In addition, Miyazawa's rival, Odaka Tomoo 尾高朝雄, was strongly against Miyazawa's sovereignty theory but seemed to acknowledge a revolutionary effect of the Potsdam Declaration¹⁵. So this theory was dominant among distinguished intellectuals at the time.

IV. The August Revolution Theory and its Implications

A. Continuity and Discontinuity

The Postwar Constitution overturned the Meiji regime and brought a fundamental change to the legal system at that time. In particular, transferring sovereignty from the Emperor to the people of Japan was the biggest change because it transformed institutions and narrative which “national polity”国体(*kokutai*) was based on. Nevertheless, the new constitution was made as amendments to the Meiji Constitution. The Meiji Constitution was a typical constitution of monarchy. Therefore, the amendments were performed by the Emperor by himself according to Article 73 of the Meiji Constitution¹⁶.

¹³ The first version of the August Revolution theory appeared in *Sekai bunka* 世界文化 journal in May, 1946. See Miyazawa 宮沢, 1946. For the development and impact of the theory, see Takami 高見, 2000, Part4. Chaps 1 and 2. His theory has been so dominant that it has invited a number of critical comments as well. For the details of these comments, see, e.g., Koyama 小山, 2004; Hibino 日比野, 2008. I observe no alternative in place of the August Revolution theory so far.

¹⁴ Koseki 古関, 1995, p.199; Ugai 鵜飼, 1984, p.28.

¹⁵ Odaka 尾高, 1946, pp.32-33.

¹⁶ At the very head of the Postwar Constitution, there attached the Emperor's remarks like this.”I rejoice that the foundation for the construction of a new Japan has been laid according to the will of the Japanese people, and hereby sanction and promulgate the amendments of the Imperial Japanese Constitution effected following the consultation with the Privy Council and the decision of the Imperial Diet made in accordance with Article 73 of the said Constitution. Signed : HIROHITO, Seal

As a matter of formality and procedure, the Constitution of Japan was amendments of the former constitution. This means that a historical continuity between the former regime and a new one was successfully maintained and that it was not blocked.

If legitimacy means continuity of regimes, legitimacy of the new constitution was secured and the Meiji Constitution became its authority. But we cannot explain legitimacy of the new one which is based on completely different principles from the former constitution by using a historical continuity. There would be an explicit discontinuity in the principles.

B. What is the August Revolution Theory?

Professor Miyazawa's "August Revolution" theory is a solution to solve the paradox mentioned above.

The main points of the theory are as follows¹⁷. Acceptance of the Potsdam Declaration in August 1945 brought a revolution to Japan. The Declaration required the Japanese government to carry out a series of reforms such as transferring from Imperial sovereignty to popular sovereignty, from theocracy to democracy, and from militarism to pacifism. Miyazawa states that this August Revolution radically changed the basic premise 根本建前 (*konpon tateme*) of the Meiji Constitution. The Meiji Constitution still remained the same after the Revolution but it changed its meaning. The Postwar Constitution was the amendment to the Meiji Constitution but actually it was the amendment to the Meiji Constitution whose meaning and basic premise were dramatically changed.

Consequently, the continuity of the postwar regime and the Meiji regime was cut off at the moment of the acceptance of the Potsdam Declaration. The Meiji Constitution which survived was no longer the basic law of *ancient regime* but a new text with totally different meanings. Therefore, the Constitution of Japan was a newly created one, which was based on the former but fundamentally transformed constitution. This is Miyazawa's August Revolution theory.

I think there are two implications from this theory.

---1. Continuity between the Meiji regime and the new regime is blocked. So, the Meiji Constitution is not a source of authority of the Constitution of Japan.

---2. The Potsdam Declaration is an authority of the new regime

The next step is "What did the Declaration as an authority demand of Japan?" A popular

of the Emperor."

¹⁷ For the details of the theory, see, e.g., Miyazawa 宮沢, 1946; Miyazawa 宮沢, 1967.

understanding is that the Declaration demanded Japan's, so called, unconditional surrender¹⁸. A narrative of revolution tends to allow "anything goes" type thinking. But the Declaration was in fact conditional. If we should find legitimacy as a legal authority in the Declaration, we will have to interpret its text carefully and deliberately.

C. Interpreting the Declaration as a legal authority¹⁹

---1. Conditional surrender

In paragraph 5, the Declaration explicitly announces that it is conditional by saying that "Following are our terms. We will not deviate from them." Rather, reading paragraph 13 and paragraph 5 together, "the unconditional surrender" is just for "all Japanese armed forces". It is limited to a context of military surrender²⁰.

---2. Terms (Conditions) = New Principles + Basic Rules for Constitution

The Allied Powers decided that the Potsdam Declaration called for reforming the constitution of Japan. Therefore, making a constitution meant implementing the Declaration. In this understanding, the terms and conditions provided here should be interpreted as "new principles" to be realized by an incoming constitution and as "basic rules" to control the process

¹⁸ It is dominant today to understand that the Declaration required of the Japanese government a conditional surrender. Professor Yokota Kisaburô 横田喜三郎 already showed this understanding of a conditional surrender in the midst of the occupation. *See* Yokota 横田, 1946, p.84. Kiyose Ichirô 清瀬一郎, a former defense attorney for Tojo Hideki 東條英機 at the Tokyo War Trial, also stated this understanding by a textual interpretation of the Declaration. *See* Kiyose 清瀬, 1981. The term, an unconditional surrender, was employed by Franklin D. Roosevelt. The image of an unconditional surrender was produced in the process of negotiation between the U.S. and Japan. It played a great roll that concealed the true intention of the U.S. and made it possible for the U.S. to reserve a possibility of survival of the National Polity of Japan 国体 as a bargain chip. In fact, then Prime Minister Yoshida Shigeru 吉田茂 showed the view of unconditional surrender as an official view of the government in the sixth Diet on November 26, 1949 (第6回国会衆議院予算委員会発言第57).

¹⁹ *See* Appendix 1.

²⁰ In the Cairo Communiqué, the predecessor of the Potsdam Declaration, "the unconditional surrender of *Japan*" (emphasis added) was used. The Potsdam Declaration used "of all Japanese armed forces" instead of "of Japan". *See* the Cairo Communiqué, December 1, 1943, at "Birth of the Constitution of Japan", online gallery of the National Diet Library (http://www.ndl.go.jp/constitution/e/shiryo/01/002_46shoshi.html) (visited 02/23/2010).

of making a new constitution.

Let me pick up on those terms of the text.

---Removing militarism and seeking for “a new order of peace, security and justice” (paragraph 6)

---- doing justice to war criminals, “the revival and strengthening of democratic tendencies among the Japanese people”, and establishing “respect for the fundamental human rights” (paragraph 10)

---3. The Goals

In the third place, it has specific goals. These are the two conditions in paragraph 12; 1) Occupation shall be ended as soon as these objectives mentioned above have been accomplished and 2) there has been established in accordance with **the freely expressed will of the Japanese people** a peacefully inclined and responsible government.

V. From August Revolution to February Revolution

A. Reaction of the Japanese government

Now let us see how the Potsdam Declaration was implemented by the Japanese government. Actually the Japanese government did not take the acceptance of the Declaration seriously. I think they did not appropriately recognize the defeat in the Second World War.

---- First, the government formed the Matsumoto Committee on October 25, 1945. But its mission was just an investigation of constitutional problems. It was not designed to reform the constitution or make a new one.

---- Second, Chairman Matsumoto firmly believed that even if some constitutional revisions were needed, it should be autonomously done by the Japanese people. Importantly, he believed so because of paragraph 12 of the Potsdam Declaration. At the first general meeting of the committee on October 27, 1945, Matsumoto emphasized his view of the committee’s objectives (he provided the same view on October 25). He said “it is unnecessary at this time to debate the pros and cons of constitutional revision.” At this meeting, Nomura Junji 野村淳治, a former professor of the Imperial University of Tokyo, an adviser of the committee, suggested that the United States would be questioning Imperial sovereignty in Article 1 and 4 of the Meiji Constitution. Matsumoto responded that “since the Potsdam Declaration says that *this issue shall be determined by the free will of the Japanese people*, even America cannot forcefully order it. *The general will* of the Japanese people is as unmovable as a mountain. Therefore, there is no

need to mention articles one and four. It is simply not the case that Japan cannot be democratic without revising articles one and four.”²¹

---3. Third, constitutional law professors stood the same ground with Matsumoto. Minobe Tasukichi 美濃部達吉, a professor emeritus of the Imperial University of Tokyo, an adviser of the Matsumoto Committee, and Miyazawa Toshiyoshi, a professor of the same university, a member of Matsumoto Committee as well, were both against constitutional revision and they thought that the Meiji Constitution was not opposed to democracy²². Both professors were the most influential and distinguished constitutional law scholars at that time. Miyazawa tried to protect and maintain the Meiji Constitution at this point in time, but he changed his position later. In any event, he created the August Revolution theory later in *Sekai bunka* magazine 世界文化, issue of May 1946. But at least at this point in time, he did not seem to take the revolution seriously.

B. Two Interpretations of the Potsdam Declaration: Matsumoto vs. Nomura

On November 10, 1945, the Matsumoto Committee changed its policy. They started drafting just in case. But the Committee was inclined to just rehash the Meiji Constitution. Matsumoto provided his “Four Principles” and decided that no change should be made in the basic principle of Imperial sovereignty. All the committee tried to do was just set a limit on urgent Imperial ordinance and to remove Articles of Imperial right of supreme command over the army and navy, etc. And in fundamental human rights, there was no specific difference from the Meiji Constitution. While MacArthur issued the so-called “Five Great Reforms Directive” and the Emperor denied himself divinity, the Matsumoto Committee fell behind the times and still remained in the Meiji regime.

By the way, was Matsumoto’s interpretation of the Potsdam Declaration correct? He seemed to believe that the Japanese people have a right to refuse even an implementation of the Declaration by its free will. As it turned out to be clear a few months later, however, the August Revolution was not as easy as he thought.

There was an exceptional figure in the Committee, who recognized the meaning of the August Revolution very correctly at that time. It was Nomura Junji again, an adviser of the committee, whom I mentioned before. As a professor emeritus of the Imperial University of Tokyo, Nomura was in the same generation of Minobe Tasukichi. They shared the course of constitutional law at Todai. Nomura submitted the so-called Nomura Statement of View on December 26. He stated it in this way:

²¹ Koseki 古関, 1995, p.86; Koseki (English version), 1997, p.54.

²² Koseki 古関, 1995, pp.85,86; Koseki (English version), 1997, pp.53,54.

*However, the allied powers will not leave the issue of what the ultimate form of the Japanese government should be to the free will of the Japanese people to decide. The absolutely necessary condition of the final decision to be made based on the free will of the Japanese people is that it must abide by the Potsdam Declaration. Examining the provisions of the Declaration, with regards to determining the final form of the Japanese government, the Japanese people do not have complete free will. Rather, concerning the Japanese people's having freedom of will in this matter, a serious responsibility accompanies this. ...*²³

If we consider the revolutionary effect of the Declaration, Nomura's statement is much more accurate than Matsumoto's. Nomura was right. This became obvious at the turning point when the GHQ draft was handed over on February 13. At this historical meeting, Whitney referred to the person of the Emperor, and it was the only way of protecting the status of the Emperor for the Japanese government to accept the GHQ draft. This very moment became the origin of imposed-constitution view against which the Japanese people would continue to argue against over the years²⁴.

Of course, you can interpret this event as a strategic change or a political intervention of the GHQ to fabricate an accomplished fact as quickly as possible. At the same time, however, this event was brought about by the inability of the Japanese government to implement the Potsdam Declaration. In this sense, the event that occurred on February 13 demanded implementation of the Declaration again. I think it is fair to say that the Potsdam Declaration was declared again, and it was accepted again on February 13, 1946. Professor Koseki Shouichi 古関 彰一, a constitutional historian in Japan, regards this event as "the second defeat" 「第二の敗戦」 (*Dai ni no haisen*)²⁵. The only difference between August 1945 and February 1946 was that protection of the Emperor was proposed as an explicit bargain chip, which was implicit at the

²³ For a full version of Nomura's Statement, see Nomura, Junji, "Position Paper Regarding Constitutional Reform", December 26, 1945, at "Birth of the Constitution of Japan", online gallery of the National Diet Library (<http://www.ndl.go.jp/constitution/e/shiryu/02/051shoshi.html>) (visited 09/01/2010). See also, Koseki 古関, 1995, pp.91, 101-02. I rely on the English translation in Koseki(English version),1997, p.63.

²⁴ There is another view of imposed-constitution that forcing to make a constitution under occupation, as such, was an imposition. But acceptance of the Potsdam Declaration was a natural result of the defeat. As far as the defeat itself was imposed by the Allied Powers, it is meaningless to reject the very fact of the defeat as an "imposition". I will not refer this version of imposed-constitution view here.

²⁵ Koseki 古関, 1995, p.172.

point of August 1945. So I would like to call the event the February Revolution.

C. February Revolution?

What may we learn from those historical facts and important statements?

---- Paragraph 12 of the Potsdam Declaration which provided the term “the freely expressed will of the Japanese people” is the origin of the reason why the Japanese people keep on asking who made the constitution and continue to argue against imposed-constitution.

---- Was it possible for the Japanese government to refuse GHQ draft on the ground of paragraph 12, their own free will?

First, in fact there was no political option other than acceptance just like they accepted it at the end of the war.

Second, the government was not able to ask for a grace period because in paragraph 5 the Declaration stated “We shall brook no delay.”

Third, as I mentioned before, if the Japanese people had a free will, there was no freedom against the principles in the Declaration. They had only freedom within the term of the Declaration. So legitimacy of the new regime is a basic principle which limits the will of sovereign people within a constitutional domain.

---- Intellectuals Defeat Miyazawa, who argued for the August Revolution theory, did not take what happened in August seriously. Miyazawa published his article about the August Revolution May, 1946. And he changed his opinion from the Meiji Constitution to a new constitution after the event of handing over. All things considered, it is a reasonable inference that for him the February Revolution was more revolutionary than the August Revolution.

February 13 was “the second defeat” (Koseki). Military defeat brought about the August Revolution. Intellectual defeat brought about the February Revolution.

D. Some Legal Issues concerning the February Revolution: the February coup d'État as well?

---- Now, hand over the GHQ draft, is it consistent with basic rules of the Declaration? If it is OK for the GHQ to review whether the Matsumoto draft fits the principles or not, then can GHQ go so far as to hand over their own draft? Is it too strong a measure to implement the Declaration? To examine this issue, it would be helpful to take a look at the “Basic Initial Post Surrender Directive” (SWNCC52/7)²⁶ approved on by SWNCC on November 1, 1945. This directive

²⁶ See Appendix 2.

enlisted powers given to SCAP to implement the Declaration. In the directive, SCAP shall respect the free will of the Japanese people. But in paragraph 5 a, it states “At all times, however, and in all circumstances you are empowered yourself to take direct action if and to the extent that Japanese authorities fail satisfactorily to carry out your instructions.” So the Matsumoto draft failed to carry out MacArthur’s instructions satisfactorily, and Whitney took direct action by handing over the GHQ draft²⁷.

But this is just one possible interpretation. This is just an interpretation and not what really happened²⁸. This interpretation depends upon a premise that the initial arrangement and structure of the occupation were still valid and active on the day of hand over. In fact, the initial arrangement was fundamentally changed already.

---- The fundamental changes were brought about by the establishment of the Far Eastern Commission. On Dec.16, 1945, at the Moscow conference, the Foreign Ministers of the United Kingdom, the United States and the Soviet Union reached an agreement to form the Far Eastern Commission (FEC) in place of the Far Eastern Advisory Commission. It was made clear that from February 26 of the following year the commission was to start activities and that the FEC would inevitably bring constraints on the authority of the SCAP regarding the reformation of the Constitution.

The basic idea and structure of the FEC are the following. Policies decided by the FEC were sent through the U.S. government as orders to the Supreme Commander for the Allied

²⁷ Koseki 古関 1995, pp.200-01.

²⁸ On February 1, 1946, Brigadier General Courtney Whitney, the Chief of Government Section, submitted his memorandum suggested that MacArthur had “the unrestricted authority to take any action you deem proper in effecting changes in the Japanese constitutional structure” “[i]n the absence of any F.E.C. policy decision.” See “Courtney Whitney’s Memorandum for the Supreme Commander: subject: Constitutional reform” (February 1, 1946), at “Birth of the Constitution of Japan”, online gallery of the National Diet Library (<http://www.ndl.go.jp/constitution/e/shiryō/03/069/069tx.html>). He argued that the existing arrangement for the constitutional reform of Japan would be completely valid before the FEC got launched in the late February. If this idea had been correct and carried out, handing over the GHQ draft should have been justified as a “direct action” as I suggested to in this paper. But some commentators his idea and suggestion was erroneous. See, e.g., Takemae and Okada 竹前・岡田, 2000, p.163; Kenpō chōsa kai, 1961, pp.291-95. In any event, MacArthur did not accept this legal interpretation suggested in the Whitney’s memorandum. Rather, he took up a political strategy that, in less than one month, (1) he would avoid ordering or forcing the Japanese government to reform their constitutional, and (2) by piling accomplished facts he would marginalize the FEC and block its intervention.

Powers. The United States also had the ability to issue directives (Interim Directive Authority) in emergency situations without waiting for the decision of the FEC. However, it was absolutely necessary to get the consent of the FEC before making any changes to the Constitution, or fundamental changes to the Japanese government's overall administrative system.

---- So if this new arrangement was not active yet at the time of hand-over on February 1946, what the GHQ did was able to be justified as a direct action to realize the Potsdam Declaration. If not so, I mean, the new arrangement was active at the moment of Moscow conference and the existing arrangement was abolished, then the GHQ violated the international agreement among the Allied Powers. That means what the GHQ did at that time was a sort of **coup d'État against the FEC**²⁹. And it is important for us to understand that the GHQ draft was accepted by the Japanese people and the Imperial Diet discussed the draft deliberatively, the members of the Diet added some important amendments to the draft, a right to live etc., even the FEC itself joined this legislative process and proposed an amendment to set up civilian control clause, and finally the FEC accepted the new constitution on April 28, 1949.³⁰ It was two years after the birth of the postwar Constitution of Japan.

If the August Revolution means a defeat for military, the February Revolution was an defeat for intellectuals. Of course, the latter is much more serious than the former because we could renounce the war but we could not throw away our intellect.

²⁹ The ringleader of this coup d'État was undoubtedly the GHQ. The government of the U.S. might be suspected of complicity in the coup d'État. SWNCC 228 was issued by the State-War-Navy Coordinating Committee on January 7, 1946 as the basic instruction for reformation of the Japanese constitution. The U.S. government (the State-War-Navy Coordinating Committee) sent this instruction to the GHQ not as an order but as "information." I think it was because they were aware that the establishment of the FEC completely changed the existing methodology of the constitutional reform of Japan. This means that the U.S. government as a member of the FEC smartly committed the February coup d'État.

³⁰ For the commitments of the FEC and the aftermath of the GHQ vs. the FEC, see Takemae and Okada 竹前・岡田, pp.240-53; Koseki 古関, p.381-85. If the FEC had decided to overturn the whole accomplished facts of constitution making, our postwar regime might have been quite different. In this context, Professor Nagao Ryuichi 長尾龍一 is right in his argument that the FEC was the ultimate constitutional constituent. See Nagao 長尾 1997a, pp.75-76. In any event, the GHQ never expressed its ultimate authority. In other words, the February coup d'État was successfully carried out and the GHQ played this one beautiful.

Tentative Conclusion ----*Constitutional Commitments as a Dynamic Legitimacy*

--- 1. The imposition was legitimate. The Potsdam Declaration twice imposed constitutional reform on the Japanese government. The first one, the August Revolution, was a natural result of the defeat. The second one, the February Revolution, was the same but it was avoidable. Anyway it is important to note that the impositions that took place in both revolutions were integral to the legal interpretation of an authoritative text of the Declarations and its related documents as a source of legitimacy.

--- 2. Who made this constitution? In the end, it was made by us and the US (the GHQ). Both the Japanese government and the GHQ were committed to making the constitution. This role assignment was originally built in the legal structure of the Potsdam Declaration. On the one hand, the Declaration (and its related documents) respects the free will of the Japanese people with some significant limits. On the other hand, it reserves a right to direct action to secure a proper implementation of its principles. But the establishment of the Far Eastern Commission would have changed this arrangement dramatically. If so, the hand-over of the GHQ draft could be understood as the February Revolution to the Japanese Government and as the February coup d'État against the FEC at the same time.

So this highly political event changed the meaning of the constitution making process from imposition to collaboration. Finally, on March 6, Prime Minister Shidehara ended his remarks at the publication of the summary draft constitution like this. The Emperor approved this draft “with extremely firm resolve”, and “the Government has decided to publish this outline of a revised draft Constitution *in close consultation with* the Supreme Commander for the Allied Powers.”³¹ Just as the August Revolution changed the meaning of the Meiji Constitution, the February Revolution changed the meaning of making constitution. The meaning of politics of the making process was translated from “imposition” to “consultation”. It was a collaborative project in this sense.

---- What is legitimacy of the postwar Constitution of Japan? It was the Potsdam Declaration. Stated correctly, it was the principle which was set out in the Declaration. And importantly, interpreting its legal structure of the Declaration, those principles limit the sovereign will of the framers of the constitution.

Here is a new concept of legitimacy. Legitimacy is provided in a commitment to

³¹ Koseki 古関 1995, pp.129-30.

principles. Sovereign people interpret and realize what the principles mean by their freely expressed will. Now we have transplanted those principles in the Declaration into the postwar constitution. The constitution gains its legitimacy from such a kind of constitutional commitment to principles.

---- So, we should stop paying so much attention to “who made this constitution.” It is not productive. I think that it would be much more important for us to ask whether we, the Japanese people, have been properly committed to realizing the principles in the Potsdam Declaration with our free will. This is a promise we made 60 years ago to establish a new regime. Looking at the principles of the Declaration once again, all of them are theoretically connected to universal justice, which we are unable to deny or ignore. We pledged to keep on being properly committed to these principles through interpretation of the constitution as an authoritative text. So, I believe legitimacy of our constitution is based on a number of these constitutional commitments.

In this sense, a new concept of legitimacy should not be a static one, which is supposed to be immediately established when a constitution was created. Rather, it should be much more dynamic project. We, the Japanese People, should grow constitutional legitimacy in our continuous commitments to the principles we accepted 60 years ago³².

---- Finally, if my observations above are correct, constitutional revision would be the highest form of those constitutional commitments. In postwar Japan, the debate of constitutional revision has often come up just like a political geyser. But the debate itself is an important kind of constitutional commitment. Liberals and leftists have been strongly opposed to the constitutional revision movement seeing it as a constitutional crisis.

But actually the debate and conflict of this kind guarantee legitimacy of the Postwar Constitution in the end. So, research about historical development of the debate of constitutional revision in Japan is going to be very important. That means our research project is very important as well. That is my tentative conclusion.

³² This idea of dynamic legitimacy might be applied to other constitutions framed under occupation. For a comparative studies of the postwar Constitution of Japan with the Iraqi constitution, *see, e.g.*, Arato, 2009; chapt.1; Elkins, Ginsburg, and Melton, 2008.

Appendix 1:

ポツダム宣言（1945年7月26日）米英中三国宣言（のちにソ連参加）

Proclamation Defining Terms for Japanese Surrender

Issued, at Potsdam, July 26, 1945

五、吾等ノ条件ハ左ノ如シ吾等ハ右条件ヨリ離脱スルコトナカルヘシ右ニ代ル条件存在セス吾等ハ遅延ヲ認ムルヲ得ス

5. Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay.

六、吾等ハ無責任ナル軍国主義カ世界ヨリ駆逐セラルルニ至ル迄ハ平和、安全及正義ノ新秩序カ生シ得サルコトヲ主張スルモノナルヲ以テ日本国国民ヲ欺瞞シ之ヲシテ世界征服ノ挙ニ出ツルノ過誤ヲ犯サシメタル者ノ権力及勢力ハ永久ニ除去セラレサルヘカラス

6. There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.

十、吾等ハ日本人ヲ民族トシテ奴隷化セントシ又ハ国民トシテ滅亡セシメントスルノ意図ヲ有スルモノニ非サルモ吾等ノ俘虜ヲ虐待セル者ヲ含ム一切ノ戦争犯罪人ニ対シテハ嚴重ナル処罰加ヘラルヘシ日本国政府ハ日本国国民ノ間ニ於ケル民主主義的傾向ノ復活 強化ニ対スル一切ノ障礙ヲ除去スヘシ言論、宗教及思想ノ自由並ニ基本的人権ノ尊重ハ確立セラルヘシ

10. We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

十二、前記諸目的カ達成セラレ且日本国国民ノ自由ニ表明セル意思ニ従ヒ平和的傾向ヲ有シ且責任アル政府カ樹立セラルルニ於テハ聯合國ノ占領軍ハ直ニ日本国ヨリ撤収セラルヘシ

12. The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

十三、吾等ハ日本国政府カ直ニ全日本国軍隊ノ無条件降伏ヲ宣言シ且右行動ニ於ケル同政府ノ誠意

ニ付適當且充分ナル保障ヲ提供センコトヲ同政府ニ対シ要求ス右以外ノ日本国ノ選択ハ迅速且完全ナル壊滅アルノミトス

13. We call upon the government of Japan to proclaim now the unconditional surrender of all Japanese armed forces, and to provide proper and adequate assurances of their good faith in such action. The alternative for Japan is prompt and utter destruction.

(出典：外務省編『日本外交年表並主要文書』下巻 1966 年刊)

(The Ministry of Foreign Affairs "Nihon Gaiko Nenpyo Narabini Shuyo Bunsho : 1840-1945" vol.2, 1966)

Appendix 2:

統合参謀本部「日本占領及び管理のための連合国最高司令官に対する降伏後における初期基本的指令」(JCS1380/15=SWNCC52/7) 1945 年 11 月 3 日

Basic Initial Post Surrender Directive to Supreme Commander for the Allied Powers for the Occupation and Control of Japan (JCS1380/15)

J.C.S 1380/15

3 November 1945 pp.139-40.

国立国会図書館電子展示会『日本国憲法の誕生』より

http://www.ndl.go.jp/constitution/shiryo/01/036/036_002r.html

PART I

GENERAL AND POLITICAL

5. Political and Administrative Reorganization

a. Local, regional and national agencies of governmental administration, excluding those with functions and responsibilities inconsistent with the purposes of the occupation will be permitted to continue to function after the removal of officials who are unacceptable as described in paragraph 5 b below, or who are ascertained to be unreliable. Such agencies and their personnel will be held responsible for the administration of government and will be charged with the execution of your policies and directives. **At all times, however, and in all circumstances you are empowered yourself to take direct action if and to the extent that Japanese authorities fail satisfactorily to carry out your instructions.**

Appendix 3:

Communiqué of Moscow Conference, December 27, 1945

GENERAL HEADQUARTERS, U. S. ARMY FORCES, PACIFIC ADJUTANT GENERALS
OFFICE RADIO AND CABLE CENTER INCOMING MESSAGE
IN THE CLEAR URGENT 28 December 1945

88 (Far Eastern Commission and Allied Council for Japan)

A Far Eastern Commission agreement was reached with the concurrence of China for the establishment of a Far Eastern Commission to take the place of the Far Eastern Advisory Commission the Terms of Reference for the Far Eastern Commission are as follows

I. Establishment of the Commission

A Far Eastern Commission is hereby established composed of the representatives of the Union of Soviet Socialist Republics United Kingdom United States China France The Netherlands Canada Australia New Zealand India and the Philippine Commonwealth.

II. Functions

A. The functions of the Far Eastern Commission shall be;

(1) To formulate the Policies principles and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished. (2) To review on the request of any member any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving Policy decisions within the jurisdiction of the Commission. (3) To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V-2 hereunder.

B. The Commission shall not make recommendations with regard conduct of Military Operations nor with regard to Territorial adjustments. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan and will respect existing control machinery in Japan including the chain of Command from the United States Government to the Supreme Commander and the Supreme Commanders Command of Occupation Forces

III. Functions of the United States Government

1. The United States Government shall prepare directives in accordance with Policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government Agency. The Supreme Commander shall be charged with the

implementation of the directives which express the policy decisions of the Commission.

2. If the Commission decides that any directive or action reviewed in accordance with Article II-A-2 should be modified its decision shall be regarded as a Policy decision.

3. The United States Government may issue **Interim directives** to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by Policies already formulated by the Commission **provided that any directive dealing with fundamental changes in the Japanese Constitutional structure or in the regime of control or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.**

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