

# THE CONSTITUTION OF JAPAN

by  
*Harun Al Rasjid*

## **1. Constitutions and Power Relations.**

In one sense, a constitution can be seen as a reflection or effect of the power relations existing in a given country. In this sense, whenever a new power relation comes into being, commonly a new constitution has to replace the old one. Now, this power relation obviously changed in Japan after the Second World War. The position of the Emperor declined, the role of the military vanished, and the political parties, represented in Parliament, gained in power. Hence, as in other countries that had lost the War, a new power relation arose and was partly projected in a new formal and written constitution. In Japan, the old Meiji Constitution of 1889 was replaced by the so-called MacArthur Constitution of 1947.

## **2. The Making of the New Constitution.**

In the first months after Japan's capitulation, General MacArthur told the Japanese Government that the Meiji Constitution had to be revised in accordance with the political demand of the time for a democratic regime in a new Japan. Thus, in October 1945, Constitutional Problem Investigating Committee was appointed by the Government; it was headed by Dr. Joji Matsumoto, a member of the Shidehara cabinet.



The first draft of the new constitution was completed in January 1946, but General MacArthur rejected it because it contained no fundamental changes compared with the previous constitution. A second draft, a more liberal and democratic one, was finally endorsed by MacArthur. Approved by the House of Representatives in August 1946 and by the House of Peers in September, the Emperor proclaimed the new constitution as the law of the land on November 3, 1946. The constitution came into force on May 3, 1947.

According to Ike, the second draft had been composed by the Government Section of MacArthur's headquarters, referred to by Ike as the "American framers of the Constitution".<sup>1</sup> But MacArthur later wrote that the Japanese themselves had revised the constitution without coercion.<sup>2</sup> The fact that the first draft had to be revised because it did not satisfy the wishes of General MacArthur shows what a decisive role he played in making the constitution. Publicly, however, both sides maintained the fiction that the proposed constitution was a Japanese document.<sup>3</sup>

### 3. The Prewar and Postwar Constitutions Compared.

#### (a) Sovereignty.

Contrary to the prewar constitution, which was considered a gift from the Emperor to the people in response to the demand of the liberal movement in Japan during the first decades of the Meiji regime, the postwar constitution was drafted without any interference from the palace except its promulgation.

The term "We" used in the preamble of the past constitution stands for the "Emperor"; in the present constitution it stands for the "Japanese People". This was a drastic change, for the sovereignty of the Emperor or that of the State had been replaced by the sovereignty of the people. A limited or constitutional monarchy had given way to a parliamentary monarchy.

<sup>1</sup> Nobutaka Ike in George McT. Kahin (ed.), **Major Governments of Asia** (2d ed. Ithaca New York: Cornell University Press, 1963); pp. 183-190.

<sup>2</sup> Douglas MacArthur, "The Drafting of a New Constitution for Postwar Japan", in **The Washington Post** of September 11, 1964, p. A23.

<sup>3</sup> Ike, *loc. cit.*



The theory of the sovereignty of the State was first introduced in Germany. (It should be noted that a Prussian advisor played an important role in drafting the Meiji Constitution). What had happened to Germany after the First World War happened to Japan after the Second World War, in the sense that the role of the monarch disappeared or decreased. In present-day Japan, the Emperor is a mere symbol of the State and of the unity of the people. He derives his position from the will of the people and has no power related to government. He can only perform those acts that are stipulated in the constitution.

**(b) The Legislature.**

According to Article V of the prewar constitution, the legislative power was to be exercised by the Emperor with the (formal) consent of the Imperial Diet. But now it is the Diet that is the only law-making organ and moreover the highest organ of state.<sup>4</sup>

The present Diet, like the old, is a bicameral organ, but the House of Peers was replaced by a House of Councillors and members of both houses were to be elected as representatives of all the people. The term of office of members of the House of Representatives is four years (formerly also four years) while that of the House of Councillors is six years (formerly, in the House of Peers, seven years or a lifetime).

The position of the House of Representatives is far stronger than the House of Councillors because the national budget must first be submitted to the House of Representatives and the latter can overrule the decisions of the House of Councillors. A bill already passed by the House of Representatives but rejected by the House of Councillors can still become a law if it is passed for a second time in the House of Representatives by at least a two-thirds majority of the members present.

Finally, as is the practice in England and in all other countries that exercise the parliamentary system, if a conflict arises between the Cabinet and the House of Representatives, the latter can force the resignation of the Cabinet by passing a motion of no-confidence, unless the House itself is dissolved within ten days. Unlike the House of Representatives, the House of Councillors cannot be dissolved.

<sup>4</sup> **Constitution**, Art. 41.



(c) **The Executive.**

Article 65 of the postwar constitution states that the executive power shall be vested in a Cabinet. Before the war, the Cabinet was an extra-constitutional body, established by Imperial Ordinance in 1885 before the promulgation of the Meiji Constitution.

The Cabinet is headed by a Prime Minister who is chosen from among the members of the Diet. He is assisted by a number of ministers who are appointed and may be removed by the Prime Minister as he wishes. More than one-half of the ministers must be selected from the members of the Diet. Both the Prime Minister and the ministers must be civilian, a rule that reflects the intention of the Allied Occupation to abolish militarism in Japan. In this matter the postwar Cabinet differs from its prewar predecessor, which included military ministers who occupied the posts of Minister of War and Minister of the Navy (with a rank of Lieutenant General of Vice Admiral or higher). These two ministers were chosen by the Prime Minister and appointed by the Emperor after consultation with prominent officers in the army and navy. Hence the armed forces were able to influence the forming as well as the resignation of a cabinet by refusing to nominate a minister or by withdrawing their minister(s).

After the occupation, both the Ministry of War and the Ministry of the Navy were abolished. This step was made virtually irrevocable by Article 9 of the postwar constitution, which says that

”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.

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”.

Unlike their predecessors, who were responsible to the Emperor, the present ministers are responsible to the Diet. As stated above, the ministers must resign in the event of a no-confidence vote by the House of Representatives. On the other hand, the Cabinet may dissolve the House of Representatives and call for a new election within forty days from the date of dissolution.



Among the important functions of the Cabinet, it should be mentioned here that the Cabinet submits bills, reports on general national affairs and foreign relations to the Diet, concludes treaties, prepares the budget and presents it to the Diet, and issues orders to implement the constitution and other laws.

(d) **The Judiciary.**

Before the war, the judiciary was controlled by the executive, while after the war the new constitution recognized the independence of the judiciary. This means that the legislative as well as the executive branch of government may not interfere with the judicial review of the courts. The judge shall be bound only by the constitution and the laws.

Judicial power is vested in a Supreme Court and in such inferior courts as are established by law.<sup>5</sup> The Supreme Court consists of 15 judges (formerly 45). The Chief Justice is appointed by the Emperor upon nomination by the Cabinet. Their appointment is subject to review by the people in periodic referenda.

The Supreme Court is the court of last resort, with power to determine the constitutionality of any law, order, regulation or official act. In contrast, under the Meiji Constitution, the courts had no authority to rule on the constitutionality of laws.

Below the Supreme Court there are 8 high courts (formerly 7), which hear appeals of the decisions of lower courts. Forty-nine district courts try serious crimes and civil suits, and there are 570 summary courts for mild civil and criminal cases. Finally, there are 49 family courts that handle cases involving domestic relations and juvenile delinquency.

In the prewar constitution, we find regulations relating to the administrative court. Article LXI of the Meiji Constitution provides that

"no suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by a Court of Law".

<sup>5</sup> **Constitution**, Art. 76, par. 1.



The postwar constitution does not provide for the establishment of an administrative court. Thus, in Meiji Japan the ordinary courts were not empowered to adjudicate disputes between the government and citizens. As pointed out by Ike, the administrative court was established on the theory that administrators would be inferior to the judiciary if ordinary courts were permitted to rule on the legality of administrative acts.<sup>6</sup> Another theory holds that if administrative suits were tried by ordinary courts, it is feared that they might ignore the public interest because of the "civil eye of the law".

In the field of legal procedure in criminal cases, important changes have been inserted to give more stress upon individual rights. The preliminary examination by means of questions from the bench in a closed court without the presence of a lawyer has been abolished, the cross-examination of witnesses in the formal trial is permitted, and no person may be compelled to give testimony against himself. Moreover, Article 34 of the postwar constitution states that.

"no person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel".

It is evident that the framers of the postwar constitution aimed to make the judiciary the guardian of human rights.

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2. MacArthur, Douglas, "The Drafting of a New Constitution for Postwar Japan", **The Washington Post**, September 11, 1964. Also see Part XIII of his **Reminiscences**.

<sup>6</sup> Ike, *op. cit.*, p. 198.



3. Kahin, George McT. (ed.), **Major Governments of Asia** (Part Two : "Japan", by Nobutaka Ike), 2d ed. Ithaca, New York : Cornell University Press, 1963.
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