The Development of the Rule of Constitutional Law in Japan after World War II

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The meaning of the principle of rule of law is ambiguous. First, it means the rule of not person, but law. Second, it means rule of legislative law by the parliament. Third, it means the rule of higher law. Fourth it means the rule of basic principles involved in the legal thought, such as the people's sovereignty, superiority of legislation, independence of judiciary, protection of human rights, freedom and equality.

I understand the rule of law in this paper as a third and fourth meanings in the modern sense, that is, rule of constitutional law in the domestic area. It is called commonly as constitutionalism. So I use the term rule of constitutional law same as constitutionalism.

Purpose of my presentation is to explain the rule of constitutional law in Japan and the development of Japanese constitutionalism, and to think about features and problems involved in the process of developments. In order to report in short time, I would like to discuss about the following four points as a main theme.

1. How was the rule of the Meiji Constitution, how was the development of the constitutionalism of Japan from the Meiji Restoration 1868 to the end of World War II 1945?
2. How was the development of the rule of constitutional law after World War II?
3. How is the political situation of the rule of constitutional law nowadays?
4. What should we learn from the development of the rule of constitutional law and constitutional debates in Japan?
1. The Development of rule of Meiji Constitution

(1) Sun Yat-sen and Japan

When the Qing government decided to reform political system in the last period of government in the beginning of 20th century, it sent the biggest delegation to Japan in order to hear the constitutional governmental system. However, the reform was unsuccessful: the Qing dynasty collapsed by the Xinhai Revolution.

While the Xinhai Revolution was going on, Sun Yat-sen (孫中山) said, that the Chinese National Party is on earth the loyalist in the Meiji restoration 50 year before, that Japan was in those days only a weak state in the eastside, but since the growth of Imperial loyalists, Japan stimulated to become a powerful state, and that patriots of our party also intended to reform China, following after Japanese patriots. According to Sun Yat-sen, the Meiji restoration in Japan was the cause of the Chinese revolution; the Chinese revolution was a result of Japan's Meiji Restoration. Both were primarily connected with each other to achieve the reconstruction of East Asia.

Although seeking for solidarity between China and Japan in sympathy with the Meiji Restoration at first, Sun Yat-sen then criticized the Japanese Twenty-One Demands against China 1915, in which Japan seemed to have forgot the spirit of the patriot of the restoration, in advancing the invasion to China.

As Sun Yat-sen estimated the Meiji restoration correctly, the constitutionalism in Meiji era had both high appreciation and fatal weakness: the enactment of the Meiji Constitution 1889 was well estimated, but it had such a fatal weakness that the Meiji Constitution couldn't deter the invasion and occupation to Asian countries. Whether the rule of Meiji Constitution was going well or not, the answer divides into two parts, yes or no, which influence the debate whether the Constitution of Japan 1946 must be revised or not.

(2) Establishing Meiji Constitution and its result
After Meiji Restoration 1868, Japanese government aimed at building a new national State. Hurrying westernization in order to overcome the inferior status to European countries, the Meiji government determined to introduce constitutional regime of European style, and enacted the Constitution of the Empire of Japan called Meiji Constitution in 1889. It was the first western-style constitution in Asia, establishing parliamentary governmental system. However, as the fact showed, that model of the Meiji Constitution was the Prussia constitution 1850: Meiji Constitution was founded on the principle of constitutional monarchy, in which sovereignty resided in person of the Emperor (Tenno), rather than in the people. The frame of government was less democratic; protection of human rights was insufficient. Throughout the era of the Meiji Constitution the Emperor's authority was an ultimate legitimacy for political powers. There, the basic constitutional thought that governmental power must be controlled by the constitution, was very scarce. In fact, the Meiji Constitution was not able to control the state power effectively.

From the 1930s, the thought of militarism and of the state became predominant. Meiji government and special higher police suppressed socialism and liberalism in internal affairs. Japan went into occupying Korea, founding Manchukuo, aggressing against China, making war upon the United States. To the end, Japan lost the war.

(3) Continuity or Discontinuity of Meiji Constitution to the Constitution of Japan

The rule of the Meiji Constitution was ambivalent, namely it contained plus and minus. Indeed, Japan secured independence promptly in Asia, introduced the constitutional government of Europe, and became a strong country. However, the government was based on the undemocratic politics by the Emperor's authority, based on the nationalism with military powers. Japan invaded Asian countries and insured Asian people.

After the end of the war, many of politicians still upheld this thought of Tenno
regime in prewar Japan. They criticized the Constitution of Japan, and asserted its revision. On the other hand, the politician and educated class, who reflect on Tenno regime of militarism and Asia invasion, tended towards to protection of the Constitution of Japan.

2. Enactment of the Constitution of Japan and Development of the rule of the Constitution law

(1) The draft made by the GHQ. -- "forced constitution" or advocacy for enacting "a new own constitution by Japanese"

On August 14th, 1945, Japan accepted the Potsdam Declaration, surrendered unconditionally to the Allies. Then World War II ended. Japan was put under an allied force's occupation. The revision of the Meiji Constitution was unavoidable as one of occupation policies towards democratization. The constitutional revision was at first pursued by the revising commission set under the Japanese government, but the draft made by the Japanese commission did not revise the basic principle of the Meiji Constitution that the Emperor held the sovereign powers. It was far from fundamental revision. Disappointed in the conservative contents of the draft by the revising commission, the GHQ, the General Headquarters, the Supreme Commander for the Allied Powers, drew up himself the draft, which was called MacArthur's Draft of the Constitution of Japan, and urged Japanese government to set forth with it. Although the Japanese government opposed at first on account of its democratic contents, after recognizing that the GHQ’s proposal couldn't be refusable, Japanese Government decided to accept the GHQ’s proposal as a formal draft for constitutional revision. The reform bill of the Meiji Constitution, the "constitutional revision draft", was submitted to the 90th Imperial Diet, from June to October 1946, was deliberated, was materialized after some correction, was proclaimed on November 3rd, 1946, and was enforced since May 3, 1947.
Thus, the Constitution of Japan was enacted based on the draft proposed by the GHQ. Then, conservative politicians criticized the Constitution of Japan, as it was a "forced constitution", and they advocated to enact "a new own Constitution by Japanese". The criticism against the Japanese Constitution has been maintained by the conservative politicians who especially feel a strong adherence to the Emperor regime in prewar days. The advocacy of “a necessary new constitution" became one of the basic policies of the Liberal Democratic Party (LDP), which has been having the political power consistently after the war until losing in 2009.

(2) The basic principle of the Constitution of Japan -- Freedom, democracy, and peace -- the coolness of conservative politicians

The Constitution of Japan is an outstanding constitution, which stands up on the many principles of the rule of law, that is to say, freedom, democracy and peace. At the point of Japanese restart, the Constitution cleared the way for democratic politics, which is only based on the will of the sovereign people. The Constitution established full protection of human rights to eliminate infringements on human rights by the authoritarian government of prewar days. Furthermore, it was absolutely important that Article 9 of the Constitution provided "renunciation of war" and “no maintenance of military forces” due to reflect on the past war of aggression. The fundamental principles of the Constitution of Japan are sovereignty of the people (democracy), guarantee of fundamental human rights (freedom), and pacifism.

Observing totally, there are two ideological bases of the Constitution of Japan. One is new establishment of the rule of constitutional law suited with human rights and democracy, the other is reflection on the war and militarism in Tenno-Emperor regime of Meiji Constitution of prewar days. These two bases were wrapped over since enacting the Constitution of Japan. Although it was indeed a weak point of the Constitution, that it was founded on the draft proposed by the GHQ, but the
Constitution contains surely basic principles of the protection of human rights and peoples sovereignty, which are already recognized as a universal principle in international society; father it adopts drastic pacifism by means of declaring "no maintenance of military forces". Moreover, although the Tenno-Emperor system was maintained, the Emperor's status shall be limited to a "symbol" and shall not have political powers at all. We must admit that the Constitution of Japan is already legitimated by its contents, and also by support of the Japanese people in those days and afterwards.

However, the Constitution of Japan seems to be nothing but a political obstacle for conservative politicians of the LDP. When the government aimed at rearmament and founded the Self-Defense Forces in 1954, Article 9 of the Constitution, which provided "no maintenance of military power", became big barrier. Moreover, conservative politicians wanted to put such nationalistic thoughts into the essential part of the constitution, as Japanese tradition, patriotism and also the Emperor. Namely they took a cool attitude against the Constitution of Japan.

(3) Economy as a central politics from 1960 to the 90s – Dispute about revision of the Constitution going backward

The Constitution of Japan 1946 has come into effect continuously to actual politics and society, without being revised. It has been promoting political and social development in Japan as a national basic law. However, the Constitution of Japan has not necessarily been supported by all Japanese people. Rather, conservative politicians regarded it consistently as the object of a criticism based on the advocacy of constitutional revision, especially against Article 9.

The conflict regarding the Constitution of Japan was and is always concerned with a question whether the revision of the Constitution should be approved or opposed. However, this conflict has not always been argued in the public in the postwar Japan.
Rather, the issue of constitutional revision went backward after the tumultuous movement against the revision of Japan-US Security Treaty 1960. Instead, there came an era of economy and Japan has had the rapid growth of economy. At the same time the LDP government withdrew the issue of the constitutional revision. The reason was, on one hand, that political conflict concerning constitutional revision was expected to be avoided, on the other hand, that the government was convinced to overcome the problem of unconstitutionality of Japanese Self-defense force against article 9 indeed by means of the interpretation that the Self-defense force was not unconstitutional.

In 1960 and afterwards anyway, Japan has enter into economic era through the high growth of economy in the 60-70s, the oil crisis of the second half of the 1970s, the U.S.-Japan trade friction of the 1980s, and then became the "big economic country". Meanwhile serious problems concerning Constitutional Law occurred little, although various constitution problems arose, such as the existence of Self-Defense-Forces, restriction of labors right of public servants, control of textbook in school by the education minister, students movements, visit of a prime minister to Yasukuni shrine and so on. The Constitution of Japan didn’t come in front in this period.

It can be almost said, that democracy did hardly advance in that period. In the distribution of seats in Diet, there continued a confrontation “LDP v. opposite parties”, LDP held political power succeeding, whereas opposition parties, such as Socialist Party, Communist Party and Komei Buddhist Party, were relative small and independent without cooperation. At that time a change of government didn’t occur. To be sure, although the justification of the LDP government rest on democratic election process which the Constitution of Japan defined, and politics of the LDP was performed along with the frame of the Constitution, the political actual condition was far from democracy. Political decision making was substantially borne by the bureaucrat, and LDP government exercised little power to decide concrete policies for Japanese people.
The politician was busy for "a vote and money" and corruption scandals often occurred at that time, such as Lockheed scandal (1975), Recruit Co. incident (1988), and Sagawa Co. incident (1990).

(4) Article 9 as the most serious point at issue about revision

The most serious issue in dispute about the revision of the Constitution of Japan is Article 9 of the Constitution. Article 9 says in the 1st clause, “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.” It says in the 2nd clause, “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.”

The most important point lies in the 2nd clause, the “no maintenance of military forces”. Because it forbids having any army, it seems that the Self-Defense Forces violates this clause. Since 1990s, the issue concerning article 9 has shifted to a question, whether the use of "right of collective self-defense" is forbidden under Article 9. According to interpretation of the government, especially Cabinet Legislation Bureau, the use of the right of collective self defense is forbidden, while the right in itself is permitted by Article 9.

There was a controversial argument, which the original proposer of Article 9 was, MacArthur or Prime Minister Shidehara. Anyway, there is no doubt that the Japanese hated and reflected on war, promised never to carry out war, and decided "renunciation of war" and "no maintenance of military forces". Article 9 declared the unarmed neutrality, and the United States also agreed with it.

However, as the confrontation of the Cold War became more and more serious, the United States changed policy to Japan, namely from democratization to anti-socialism, and urged Japan to enter into a western group. When the Korean War occurred in 1950,
Japan was asked for rearmament. Then, Japan built up police reserve forces, which were organized newly to the Self-Defense Forces in 1954. So it began a contradiction between the norm of Article 9 and the reality of existence of the Self-Defense Forces. This conflict of Article 9 and the Self-Defense Forces became the greatest dispute of the postwar history of the Constitution.

Existence of the Self-Defense Forces should be essentially considered to violate Article 9, because the intent of founder of the Constitution was apparently to abandon all military weapons and troops: therefore Article 9 had to be revised inevitably if the Self-Defense Forces would be founded. However, the LDP government had no proposal to the revision during this epoch, because LDP government avoided an unnecessary political confrontation. LDP government was conceived to explain the constitutionality of the Self-defense forces by means of the interpretation of the right of self-defense without revising Article 9, which was called "revision by interpretation of the Constitution." That interpretation is as such, that the state has fundamentally the immanent right of self-defense for protecting its own country against unjust infringement, and that it is allowed by the Constitution, to hold the minimum defending power for using the right of self-defense against such infringement. As such "the minimum power for self-defense" does not correspond to the "war potential" in the meaning of Article 9 of the Constitution.

Although justification of the Self-Defense Forces by this interpretation continues until now, a new issue contradictory to this interpretation arose since 1990. When the Gulf War broke out by the invasion of Iraq to Kuwait in 1990, the overseas dispatch of the Self-Defense Forces to Kuwait came into discussion. In the end, SDF dispatch to Kuwait was abandoned, because sending the Self-Defense Forces abroad despite of no attack to Japan came under "the use of the right of collective self-defense", which was forbidden by the Constitution. Thus, sending SDF dispatch abroad is considered
unconstitutional even according to the government interpretation.

Taking opportunity with this incident, the advocacy of Article 9 revision was asserted actively again. Revision of Article 9 of the Constitution is the point at issue of primary importance in debates of the constitutional revision. The advocacy in favor of constitutional revision insists in the first place on the revision of Article 9, whereas the advocacy in opposition to the constitutional revision persists to keep up Article 9. The revision of Article 9 remains the central point at issue even now.

(5) Structure of the confrontation over protecting vs. revising of the Constitution – Twisted phenomenon

When we think of the confrontation between protecting vs. revising the Constitution of Japan, we must pay attention to the fact who assert the revision and who assert the protection of the Constitution. The following several notes are important to understand main features of postwar constitutional history.

First, LDP, which is composed of several fractions and has been a ruling party in the Diet for most of the postwar era, calls for constitutional revision. The LDP has been taken a cool attitude to the Constitution. As a ruling party the LDP has adhered to freedom and democracy, stressed relations with the US, and argued for the superiority of the west’s political and economic system. On the other hand, the LDP seeks to revise the Constitution, which takes as its starting point a western constitutionalism and rule of law whose fundamental values are those of freedom and democracy. The attitude of the LDP and its government toward the Constitution is truly contradictory.

Second, in contrast to this, there was the Japan Socialist Party (JSP), which took the position that the Constitution should be preserved. JSP has been a first opposition party and above all has had sympathy for socialism. The JSP, whose name was changed to the Social Democratic Party, SDP since 1993, described itself as the party of labor. For a long period after the war it opposed LDP politics, but the party never did take
political power and in the 1990s lost force. Put briefly, the JSP, which aimed at socialism as its goal, defended a Constitution that took Western capitalism as its basic thought. This means that there was a strange twist in the postwar confrontation between those favoring and opposing constitutional revision.

Third, arguments supporting the Constitution have turned into criticisms of the politics pursued by the government and LDP, and as a result, the Constitution has become a symbol of confrontation, not a symbol of unity. The pro-Constitution forces have opposed the movement revising the Constitution by the government and conservative fractions. They also have criticized the politics pursued by the government and the LDP, by invoking the Constitution when they engage in confrontations to constitutional issues, such as self-defense, education and textbooks, and the Yasukuni Shrine. Pro-Constitution arguments have served the important role of criticizing and correcting government actions that deviate from the Constitution. However, to this end, the Constitution has provided the grounds for criticizing the government’s actions. As a result, the Constitution has turned into “a symbol of opposition” against politics of LDP government: the Constitution couldn’t play a role of “a symbol of unity”, which is expected to the constitution of States in general. This situation is one of the reasons why the government and the LDP bore antipathy toward the Constitution.

3. Present Situation and Tendency of the Revision of the Constitution

(1) Active discussion for the Constitutional revision in 1990 and afterwards

After 1990s, the issue of revision of the Constitution came to serious attention again. The reason was, first, that the socialism collapsed and the Cold War ended. It brought about the predominance of the western groups in a worldwide scale, while in Japan it had influence in the form of a decline of the JSP, which was the greatest party in favor for protection of the Constitution. Second, the dispatch of the Self-Defense Forces abroad became a serious issue, as regional or racial disputes broke out frequently.
in the world. Article 9 of the constitution and also the official governmental interpretation, which is the interpretation of the Cabinet Legislation Bureau, that use of the right of collective self-defense was forbidden by Article 9, became an obstacle to sending the Self-Defense Forces to disputing regions. Third, the trend for revision of the Constitution increased also in public opinion. A typical example was an announcement of the draft of constitutional revisions in 1994 by the newspaper Yomiuri, which has the maximum circulation in Japan in 1994 and also nowadays. Although the mass media of Japan were taking a position on government criticism till then, Yomiuri took a side for the LDP government for the first time, and sustained the revision of the Constitution.

The distinctive feature of advocacy of revision of the Constitution of the 1990s was that, instead of the archaistic and conservative advocacy, a new criticism of "the Constitution's of Japan having been exhausted" or "having become old" was advocated. And, besides revision of Article 9 of the Constitution, the proposal of revision included also significant revisions, such as adoption to the human-rights catalog of new rights, such as privacy right and right to know, introduction of a referendum system, and foundation of the Constitutional Court etc. On the other hand, such conservative proposals also remained, as exaggeration of "public order" against human rights clause, the demand of respect to the state Japan and Japanese tradition, that is to say, demand for patriotism etc.

Such a tendency to the advocacy of constitutional revision led to the establishment of Constitution Research Council in 2000.

(2) The investigation and the report concerning the Constitutional revision by Constitution Research Council

In 2000, Constitution Research Council was established in both houses in the Diet, the House of Representatives and the House of Councilors. It investigated issues in all fields of the Constitution for five years, and then made a report in 2005, in which
opinions of the constitutional revision were mentioned. Although the report was bulky and precise, there were no such concrete proposals, which provisions and how should be revised. Rather, there were only a result of investigation and nothing more than die enumeration of opinions issued in the Research Council. However, following a report, each party released the indicator of the constitutional revision, and the LDP released the own concrete private draft for revision of the Constitution in November, 2005.

Along with the investigation in Research Council, a conservative tendency in politics advanced remarkably. Its features appeared in the Iraq dispatch of the Self-Defense Forces, cooperation with the United States, Prime Minister Koizumi's visit to Yasukuni Shrine, enforcement of the Rising-Sun flag and national anthem Kimigayo at the graduation ceremony in school, penalizing to teachers who didn't stand up during singing Kimigayo in unison etc. The then prime minister Koizumi in the meantime was opposed to traditional LDP politics with the slogan of "break down the LDP", and pushed neo-liberal policies, such as privatization of the postal service, but he reserved conservative idea, such as to visit to Yasukuni Shrine, on the other hand.

The reason why the advocacy of the constitutional revision became bigger in these days might be as follows. The LDP government set forth nationalism in the front as political appeal by the idea of nominated conservative prime ministers. Meanwhile in stagnation of the economy of Japan in 1990s and afterwards, in the situation of a deadlock of bureaucratic administration, the LDP government was about to lose national support. The LDP then began to exaggerate "the State Japan", by means of avoiding the stagnation of politics and economy, in order to maintain national support to the LDP. Under such political inclinations of conservatism, the revision of the Constitution of Japan is sustained and planned.

Moreover, one of the reasons which promote the flow of conservatism was the rise of nationalism. The introduction to the education of "patriotism" and "Kimigayo", the
visit of prime minister to Yasukuni shrine were just expressions of nationalism. The trend of nationalism has become strong also on the national level, as national sentiment of exclusion to foreigners, and especially hostility to the latest North Korea. Besides, in the progress of globalization, seeking for national identity was increasing.

Nationalism in itself is not bad, so that the people of almost all countries may often point out. However, in the case of Japan, nationalism is connected with "nationalism" of "the Rising-Sun flag and Kimigayo", the "Emperor", etc. Nationalism of Japanese is sometimes connected with the ancient thought of predominance of the State Japan, which affirms the aggression against Asia of World War II.

In this meaning, nationalism of Japan must be touched with big watch.

(3) The movement to the conservative Constitutional revision under Abe Cabinet

In 2006, the LDP Shinzo Abe Cabinet, which succeeded the Koizumi Cabinet, declared the constitutional revision as a political commitment. The Prime Minister Abe hanged up the slogan "a breakaway from postwar regime", to break down the exceeding postwar democracy and the basic thought of the Constitution of Japan. And two important measures for a constitutional revision were taken.

The first, the "referendum act" was enacted in May, 2007. Although this act is called “referendum”, it is not the act for general referendum, but the "act concerning the procedure of the revision of Constitution". That is to say, the referendum means special vote by nationals, which is necessary process for revision of the Constitution. Article 96 of the Constitution of Japan requires the affirmative vote for a majority of people, after initiating by 2/3 of all members of each House. If starting on the revision of the Constitution, it is indispensable to make law providing the procedure of the people’s referendum. However, such a law was not enacted till that time, because the LDP government didn't dare to do it, with consideration to the opposing opinion to the
revision of the Constitution. Abe government did it.

The second, the "Fundamental Law of Education" was revised in December 2006. The Fundamental Law of Education is the basic law of education enacted in 1947, which is based on freedom and democracy and pacifism. It has the same spirit of the Constitution, so that conservative politicians hated it. The intent of revision was to strengthen moral and national education. So the revision was made in the sense contrary to the constitutionalism. Namely, the wording of "respecting public order" was newly inserted in the preamble; "cultivating a rich sentiment and moral sense" and what "tradition and culture are respected and our country and a hometown are loved for" were put into targets of education. The revision intended to turn students towards the faith to "patriotism" and the "respect for tradition and history". It meant also, that the revision of Fundamental Law of Education was performed in close relation to the constitutional revision.

(4) Defeat of the LDP in the 2007 Upper House election, and Prime Minister Abe's resignation

The Abe LDP government fought the Upper House election in July 2007, hanging up the "constitutional revision" as one of the election slogan. As a result, the LDP was beaten completely and the LDP loosed a majority of seats in the House of Councilors. Prime Minister Abe, who had at first expressed the intention of remaining in prime minister, resigned suddenly in August 2007.

It turned out from the result of an Upper House election, that people didn't have the big concern about the constitutional revision. Peoples concern lay in economic problems, such as employment, business and pension scandal. Argument of constitutional revision was out of "gaining a vote"; it couldn't deserve as political appeal to people.

In another words, people were not positive to constitutional revision, because
Prime Minister Abe couldn't gain support at all. Rather, large majority of peoples had no desire to revise the Constitution, at least negative to the constitutional revision intended by conservative and a nationalistic viewpoint like Prime Minister Abe.

(5) The change of government 2009 and the issue of the revision of the Constitution

After resignation of the Prime Minister Shinzo Abe, Yasuo Fukuda and Taro Aso became the prime minister, because the LDP was still maintaining a large number of member seats in the House of Representatives. However, while the approval rating of LDP and Aso Cabinet remained lower, it came the day of election of the House of Representatives in August 2009. In this election, the Democratic Party (DP) took a vast majority seats and came to political power, whereas the LDP defeated tremendously and loose the political power. The DP is a new party established in 1999, gathering small opposition parties. The DP was expected to bring about the change of government, and it came into realization.

It is not easy to explain why this change of power happened, because there was no obvious failure of the specific policy under the LDP government. The cause of change of power was in the essence, that people got tired of the long-term LDP government. Since 1990, there occurred many topics, such as stagnation of the economy after the breakdown of the bubble economy in 1990’s, exceed of the bureaucrat's administration over many years and its dirt, extension of the earnings differential between the rich and the poor through a free market policy etc. The LDP has been losing national support gradually.

Although the DP gained large support of overwhelming majority in the election 2009, the DP government has been losing national support, because the scandal of the illegal political fund of the Prime Minister Yukio Hatoyama, the party leader, and the DP Secretary-General Ichiro Ozawa occurred.
By the way, it should be said, that the change of power to the DP government was not directly connected with the Constitutional revision. The Constitutional revision was not discussed in the election campaign in 2009. However, it doesn't mean that the DP stands for protecting the Constitution. Rather, the DP presented the constitutional revision draft in 2006 after ending of Constitution Research Council, and both the Prime Minister Hatoyama and Secretary-General Ozawa had once advocated indeed the constitutional revision. To say truly, there exist both politicians in the DP, not only for revising the Constitution, but also for protecting the Constitution.

In the real politics at that time, the cabinet was busy in economic problems, reform of official system, parachutist of a bureaucrat, so that there no features that the constitutional revision will take place. People don't expect the constitutional revision from the DP government either.

(6) Election of the House of Representatives on December 16th 2012

On March 12th, 2011, the East Japan Earthquake and the breakdown of the second Fukushima nuclear power plant occurred. The Naoto Kan (菅直人) cabinet became busy to take measure to restoration. After changing the cabinet Kan to new prime minister Yoshihiko Noda (野田佳彦), Noda passed the Bill of increasing of consumer tax from 5% to 8 to 10% in corporation with LDP and Komei Buddhist Party. And Noda cabinet decided dissolution of the House of Representatives after passing the bill of issuing government bond. Now we, the Japanese, have an important election on December 16th, 2012.

The political situation now is very complicated. Total seats in the House of Representative amount to 480. Ozawa group, which was one of the DP fractions and amounts to 60 members, has already separated from the DP at the point of time of consumer tax bill. It established a new party named “People’s Life First” (Kokumin’noseikatsugaiichi, 国民の生活が第一). So is now the DP already
declined to ca. 240 seats. It seems that the DP is sure to lose seats to half of present seats. The LDP will increase seats, probably to the majority of the total seats. As for the LDP, it is very important, that former Prime Minister Shinzo Abe became LDP leader again since September 2012.

Remarkable is the newly established parties, such as Japan Restoration Party (JRP, Nihon’ishnnokai, 日本維新の会, Toru Hashimoto 橋下徹), Sun Party (Taiyoto, 太陽党, Shintaro Ishiwar, 石原慎太郎), Party Japan future (Nihonmirainoto, 日本未来の党, Yukiko Kada, 嘉田由紀子). There are also existing small parties, such as Your Party (Minnanoto, みんなの党, Yoshimi Watanabe, 渡辺喜美), Communist Party (Kyosanto, 共産党, Kazuo Shii, 志位和夫), Social Democratic Party (SDP, Shaminto, 社民党, Mizuho Fukushima, 福島瑞穂) etc.

After the dissatisfaction of the DP government and the former LDP government, many grassroots movements attempted to gain political influences known as the "third pole" to counter the two major parties. Here I must mention two cases of joining parties. One concerns Japan Restoration. Shintaro Ishiwara, who was a Governor of Tokyo and is well known as a strong conservativist, resigned Governor and established new party, Sun Pary (Taiyonoto, 太陽の党). Toru Hashimoto, who is Governor of Mayor of Osaka, established also newly “Japan Restoration Party”(JRP, 維新の会) and becomes a party leader. Hashimoto was a lawyer and became popular once at the TV talk show, then became Governor of Osaka, was devoted into financial reform with success. Hashimoto’s political thought is ambivalent, on one hand, good governance to achieve rationalizing the administration, on the other hand conservative politics, such as hostile to labor union, promoting enforcement of national flag and song in high school, and revision of the Constitution. Recently the RP and SP joined and made unified Restoration, RP: Ishiwara became party leader, Hashimoto became sub-leader RP. The RP is expected to gain considerable numbers of seats.
Second concerns Party Japan Future. When Yukiko Kada, a governor of Shiga prefecture, decided to establish an anti-nuclear and equal gender party “Japan Future Party” (JFP, Nihonmirainoto, 日本未来の党) last November, Ichiro Ozawa, a leader of the People’s Life First (Kokumin’noseikatsugadaiichi, 国民の生活が第一), reacted immediately to join to the Japan Future Party. So that, although the Japan Future Party is new established, it contains already 60 seats in the Diet. However, the JFP will be expected to lose many seats, because the JFP has no policy agreement without anti-nuclear, and because Ozawa is unpopular to Japanese people.

It is indeed big worry for us, who support the Constitution of Japan, whether Japanese politics would turn toward to revision of the Constitution. The reason is, that conservative politician Shinzo Abe became LDP leader again, according forecast of mass media, the LDP will win the an election campaign, and that Shinzo Abe become once again the prime minister. Besides, the Japan Restoration, Shintaro Ishiwara and Toru Hashimoto, obtains many seats, will have big influence to politics, and then will cooperate and push the revision of the Constitution. We pay high attention to the result of the election December 16th with bated breath.

4. Development of the rule of constitutional law in Japan and its Problems

(1) Meaning of the constitutionalism

The meaning of constitutionalism is indeed equivocal, from the idea of regulating the administration by law-statute to judicial review. However, according to original meaning, it means restricting the states power in order to guarantee human rights. And the constitution restrains power at home, and builds the foundation of the structure of the politics of a State. At the same time, the idea of constitutionalism is broader, namely it includes the fundamental principles, such as protection of human rights, rule of law, “Rechtsstaatprinzip”. Besides, in the advance of globalization, constitutionalism becomes more common and universal. Now the idea of constitutionalism becomes
nothing but the basic value, not only in each state, but also in the international relation. The constitutionalism, Verfassungsstaat, becomes common and fundamental value in the whole structure of legal order in the world.

When taking a general view of the history of constitutionalism in Japan, World War II made clear discontinuation between the era of Meiji Constitution, and the era of the Constitution of Japan. In the time of Meiji Constitution the superior national thought prevailed, while the constitutional thought was very vulnerable. On the other hand, in the time of the Constitution of Japan the predominance of the constitution was maintained fundamentally.

Under Meiji Constitution, though national unification and independence was achieved, and though the status Japan among international relation was upgraded, the government took military strength under the Tenno regime without democracy, the guarantee of human rights were quite insufficient. In the end Japan went into invasion to Asian countries. The constitutionalism in the Meiji era was absolutely functionless. Meiji Constitution couldn't control the governmental and military power. It was because the Meiji Constitution itself didn't make the idea of the constitutionalism in her own, and because the politics and society under Meiji Constitution didn't make the idea of the constitutionalism in their foundation.

(2) Normative power of the Constitution in post-war politics and society——"hollowing out of the constitution (leerlaufend) " or "fixing of the constitution (fixierend)"

Evaluating the normative power of the Constitution of Japan to post-war politics and society, three different views coexist, whether the Constitution of Japan has been hollowed or fixed in post-war politics and society.

The first is the view that the Constitution of Japan was in a process of "hollowing". This view is asserted influentially by constitutional scholars. It is indeed sure, that
Article 9 has lost normative power in accordance with the growth of the Self-Defense Forces and with dispatch in foreign countries. Article 9 was indeed hollowing through development of the defense cooperation between the United States and Japan. Moreover, one may say, democracy doesn’t function well, because public opinion was scarcely reflected in the Diet under the long-term government of the LDP. Guarantee of human rights was insufficient because of the self-restraint of the Supreme Court by using judicial review of unconstitutionality of governmental action. However, when post-war politics is seen as the whole, it should be recognized without doubt, that parliamentary democracy and rule of law greatly progressed in comparison with the authority rule under the Tenno regime. Besides, even Article 9 has contributed to peace and economic development of Japan greatly by controlling military extension of the postwar period in Japan, also by restricting an increase in a defense budget. It is only an apparent view that the normative power of the Constitution of Japan in the post-war politics has been hollowing.

The second view, that the Constitution has had nothing to do with the development of politics and economy and society in post-war period, is well-founded in some sense. In the politics of postwar Japan, although there was argument whether to approve of a constitutional revision, the Constitution was hardly referred or discussed in the political process, except Article 9. In respect of the life of the people or national consciousness, central concern lies in economy, and constitutional debate was sent behind the politics. In the post-war period Japanese economy greatly grew and developed even into economic big power with the 2nd GDP of the world. Therefore, no wonder, such a view is presented, that the Constitution of Japan has not contributed to development of Japan after the war, or that the Constitution seems not to be directly related to people’s life. However, this view seems to me false. On the contrary, the Constitution of Japan has had a great contribution to the development of social life in Japan. Being based on the
Constitution, Japan could develop the stable politics, could devote itself into economy, and could enjoy peace in the field of international relation and diplomacy.

Then, the third view says that the Constitution of Japan was fixed to postwar politics and society. And this view catches the true figure of constitutionalism in Japan correctly. Although there was no change of government for a long time, and the LDP government continued over a long period of time, the election by people gave the LDP democratic justification for the political power. Although the LDP government often took the policy which ignored the Constitution mainly in relation to Article 9, it is also true, that the LDP took policies in favor of nationals. The LDP government followed and obeyed the Constitution in sum. Concerning guarantee of human rights, the protection of human rights was broadly advanced, such as dissolving of discrimination, establishing of freedom of speech, ensuring the well and stable life of people. The Constitution of Japan supported these developments in favor of freedom and democracy.

Furthermore, although the existence of the Self-Defense Forces might be regarded as unconstitutional because of violating Article 9, Article 9 doesn't have to be put aside. Observing the peace policy of Japan as a whole, Japan has been maintaining three non-nuclear principles after the war, keeping friendship to foreign countries without dispute or interference. Moreover, Japan has been always appealing peace to the world as only one country suffered from nuclear bombing.

Considering these things, Japan has developed human rights protection, democracy and peace which are indeed fundamental principles of the Constitution.

(3) Relation between the State and the Constitution

There are two different views regarding the relation between constitution and State. One considers relation between the State and the Constitution as same and similar, just as two sides of one coin; the other considers it as in opposition.
Understanding about the relation between State and constitution is different in each country. From the viewpoint of State, the State stands on the nationalism, which emphasizes the independency or specialty, or the other view of the State, which stands on the constitutionalism, which bases on the liberal-democracy. The same comparison is possible from the viewpoint of the constitution: there is one constitution with nationalism, the other constitution with constitutionalism.

Modern States are usually based both on the constitutionalism of liberal-democracy, and on the nationalism. Therefore, in these countries, the confrontation between State and constitution seldom occur. Citizens of the United States, for example, follow the U.S. Constitution, and at the same time, they pay respect to the Stars and Stripes. French people are proud of the Declaration of the Rights of Man and of the Citizen of Human Rights, while they remain loyal to their country. While German people have got their identity in their own country by means of overcoming the past, they have also convinced to the Grundgesetz, which is all recognized as a national fundamental law.

On the contrary, the State and the constitution (constitutionalism) are opposed each other in Japan. Here remains the thought of conservative nationalism, which seeks to the Nationals and the State Japan. This kind of nationalism has been shared with conservative politicians, who want to revise the Constitution. When they exaggerate the nationals or the State Japan, such nationalism comes in conflict with the constitutionalism, to the end in conflict with the Constitution of Japan. Here is one factor of split in the public opinion concerning a constitutional revision.

(4) Nationalism and Nation State

Indeed the concept of nationalism is ambiguous, but here it is so understood, defined value-neutrally and in special relevance with the State, as to "the thought or movement which aims at independence from the influence from another powers outside
the State and also aims at strength and development of the unification of the State”. Nationalism in this sense means the thought, which puts the basic value on the State or Nation of his own and aims at the unity and development of his own State or Nation.

Such nationalism is very common to modern States. We must not estimate such nationalism as bad one. Rather, in Asian Countries such as China and South Korea, by making nationalism into the basic identity of nationals, they seek to the independence and the political and economical development of the State. Having nationalism under globalization, the individual will identify him/herself to the national culture, language and national life, and make identification in connection with his nation, where his basic life and activities are to be done. In this sense, nationalism as personal identity of internationalized individuals plays a significant role even under globalization. Even in the global international society, the state remains still and a "national consciousness" is rather strengthened on the contrary.

In the case of Japan, the nationalism is connected with Japanese own history and tradition, and accordingly it is put on original conservative thought. That is to say, Japanese nationalism has, besides the future of normal and simple feeling of patriotism to the nation, the feature connected with the militarism and the Tenno regime, which encouraged the invasion to Asian countries in the World War II. This Japanese nationalism has not been produced in the progress of globalization. Rather, it is appropriate to conclude that this kind of nationalism has sustained as the basic thought in the political life in Japan also after World War II, and that it appears in the front newly in the 1990s. Such nationalism as conservative thought in Japan becomes an obstruction against globalization.

The special feature of conservative nationalism in Japan are those, (a) that it respects Japanese history and tradition and considers especially the government by Emperor, Tenno, as the most important national structure, (b) that it tends to affirm the
military invasion in World War II as necessary conduct for "Greater East Asia Co-Prosperity Sphere", therefore to ignore the war responsibility of Japan, (c) that it takes a hostile posture to the Japanese Constitution in 1946, asserting revision of Constitution, and (d) that it has been supported especially by politician of the Liberal Democratic Party (LDP), which has been a political party in governmental power almost consistently after the war. To emphasize nationalism is dangerous for development of constitutionalism.

(5) Dissolving the confrontation between revising and protecting the Constitution

If we overview the issue of the constitutional revision theoretically without consideration of real political situation in Japan, we must approve that the constitutional revision in general should be never denied, but evaluated rather positive. However, as the advocacy to constitutional revision is based on the conservative Japanese nationalism, we must oppose that kind of constitutional revision. Nevertheless, it would be necessary to think of the contents of the revision from many aspects. Especially such revisions are worth thinking, as insertion of an environmental clause or the right to know, the system of direct democracy, foundation of the Constitutional Court, strengthening of local autonomy etc., which contribute to advance the constitutionalism. It is not a good choice, to deny the constitutional revision totally for the sake of Article 9, because the possibility of advancing the constitutionalism toward in the future would be prevented. The constitutional revision for the purpose of advancing the constitutionalism is desirable and acceptable.

(6) Fundamental consensus as a necessary condition for the Constitutional revision

The Constitution of Japan has never been revised since its establishment in 1946. This is because the constitutional revision itself becomes political controversy and has
been the target of political confrontation in Japan. Then, if more to say, this is because there are no social consensus to the fundamental principles or the basic thought of the Constitution itself. In Germany, the revision of the Grundgesetz amount to indeed 54 times, but there are no objection to the Grundgesetz and no political confrontation to the fundamental principles of the Grundgesetz. Rather, the Grundgesetz are already approved in the politics and society in Germany. On the contrary to say, partial revisions have been made very easily, just because there is social consensus to the essence of the Grundgesetz. There are many reasons why the Grundgesetz is revised so frequently, one reason is that the Grundgesetz contains many precise provisions; one reason is that the conditions of revision are not strict. The most important and basic reason is that the social consensus to the Grundgesetz are already concluded among peoples in Germany. In comparison with German case, in case of Japan, the social consensus to the Constitution is not yet materialized. Conservative revisionist is still hostile to the Constitution itself: they deny the constitutionalism of the Constitution of Japan, on account of its unfitness to the spiritual national style of the State Japan.

Nevertheless, excuse me to say some contradictory words, but it may be the right recognition that social consensus to the Constitution is already established. As I told already, the Constitution of Japan has sustained the development of the economy and society of Japan for 60 years. People have already trusted the Constitution of Japan: people have made a living on the basis of the Constitutional order of the liberal democracy

Conclusion ---- The Perspective of constitutionalism in Japan

In 1946 we, the Japanese people, enacted the Constitution of Japan, which denied the authoritative government of the Tenno regime under Meiji Constitution, reflecting on the invasion to the Asian countries of World War II. The Constitution of Japan is
based on the fundamental principles of human rights, freedom, democracy and peace, that is, the foundation on the constitutionalism, which is also the universal principle recognized internationally. Japan observed these principles fundamentally, maintained the international cooperation and international constitutionalism, and has taken the policy of controlling military strength to the degree of necessary minimum and appealing peace to the world.

The LDP, which has kept political power in post-war politics over a long period of time, has members with different thought, from left to right. While the LDP realized economic growth and development along with friendly relations with the United States, the LDP, especially by the conservative politician who are nationalist with sympathy to the historical tradition of Japan by Meiji Constitution or the Tenno system, criticized the Constitution and insisted to revise it. The advocacy of constitutional revision is irreconcilable with the universality of the Constitution of Japan. It emphasizes national originality of Japan, and turns its eyes away from social consensus to the Constitution of Japan. Therefore, they were opposed to the constitutionalism of the Constitution.

60 years after, present Japan has developed steadily on the basis of the Constitution of Japan. The cause of development of the postwar period of Japan was in economic prosperity, in high technical capabilities, productivity, and flourishing corporate activity. There was also power of education. And above all, there was the political principle of the human rights and the democracy of the Constitution of Japan. The delay of democracy seems to be recovered at last by the clear change of power in the last election 2009. Hereafter, the politics reflecting the will of the people is going to be attained better from now on.

Now we must recognize that the political and social development of Japan for 60 years has been supported by the constitutionalism in the Constitution of Japan. The women who did not especially experience war after the war and did not see out children
to a battlefield according to the draft system are evaluating the Constitution of Japan highly. The Constitution of Japan had a track record for 60 years after the war; it gained namely national support firmly in society.