

# CONSTITUTIONAL ADJUDICATION IN JAPAN

by

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The Constitution of Japan as adopted November 3, 1946, includes the following provisions :

Article 76. The whole judicial power is vested in the Supreme Court and in such inferior courts as are established by law.

No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power.

All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

These provisions suggest on their face two fundamental questions. First, is the judicial power thus vested in the Supreme Court and the inferior courts qualified or inhibited by conceptions of judicial power comparable to those which have been developed in American constitutional law under the rubrics of "the nature or judicial power" or the meaning of "case or controversy" under Article III? Secondly, is the power of the Supreme Court "to determine the constitutionality of any law, order, regulation or official act" any different from the power of the inferior courts to make similar determinations?

The answer to the second question can be given more unequivocally than the answer to the first, even though they are closely related to one another. It has been assumed that the inferior courts, as well as the Supreme Court, have the power to



determine questions of constitutionality, even though there is no explicit grant of such power in the Constitution, except in so far as it is implied by the provisions of Article 76. It is perhaps debatable whether the Diet could by statute take this power away from the inferior courts but that problem has not been presented. The inferior courts have passed on the constitutionality of legislation - - in at least two cases making determinations of unconstitutionality. Finally, the Supreme Court has said that there is no difference between its own power to determine constitutional questions and that of the inferior courts; that in each case it is a power to be exercised only to the extent required for the disposition of concrete controversies. Thus it is apparent that the Supreme Court of Japan has adopted the same fundamental approach to its exercise of the power of judicial review as that adopted by the United States Supreme Court despite the absence of the words "case or controversy" in the Japanese Constitution, and the presence there of an explicit grant of power to pass on constitutionality. It remains to consider the concrete application of this approach to particular situations.

The first announcement of the principle by the Supreme Court of Japan was in the case of **Suzuki v. State of Japan**, (6 Supreme Court Reports 783, 1952), in which the petitioner asked for a determination that the laws and regulations establishing the National Police Reserve (the defense forces of Japan) were unconstitutional. The basis of the constitutional claim was Article 94 of the Constitution which not only renounces war "as a sovereign right of the nation and the threat or use of force as a means of settling international disputes", but also provides that "in order to accomplish the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained." The petitioner, Mr. Suzuki, as chairman of the Central Executive Committee of the Left Socialist party, was politically committed to the strict interpretation of this article and to opposition to the rearmament of Japan. His standing to bring the suit was apparently based simply on his position as a citizen of Japan. On its face the



suit seems most comparable to our taxpayer's suit, although there is no mention in the opinion of a claim based primarily on the petitioner's position as a taxpayer or of a request for relief directed particularly at preventing the expenditure of public funds. Instead the petitioner's basic proposition apparently was that Article 81 gave the Supreme Court a particular kind of power, in addition to its usual judicial functions, to determine the constitutionality of governmental action, irrespective of an actual case or controversy. This contention was rejected on the ground that the Court was vested only with judicial power, that the exercise of such power required the existence of an actual case or controversy, and that the Court could not determine abstract constitutional questions. The Court's opinion does not discuss the possibility that this was not an abstract question, because funds were in fact being expended for the Police Reserve Forces and the petitioner had an interest in such funds. Thus the Court did not explicitly choose between the American federal doctrine, represented by **Frothingham v. Mellon**, 262 U. S. 447 (1923), rejecting the taxpayer's suit as a vehicle for constitutional adjudication, and the rule of many of our states, permitting such suits. There is a rather enigmatic sentence in the Court's opinion referring to the impropriety of determining constitutional questions on the basis of mere expectation of future occurrences, which seems inapplicable to the situation presented in the particular case. Theoretically, it is at least possible that the Supreme Court of Japan is not yet firmly committed to the proposition that a taxpayer has no standing to challenge the validity of the expenditure of public funds. However, there is a general statement of policy included in the opinion of the Court in the Suzuki case which suggests that the Court does intend to take the same position as was taken by the United States Supreme Court in the Frothingham case. This statement is generally to the effect that if the Supreme Court had the power to declare laws and orders invalid in the manner suggested by the petitioner, the result would be to increase constitutional litigation and to place the Supreme Court above the other bran-



ches of the government, so as to cause a danger to the fundamental principles of separation of powers in democratic government. Thus, it seems likely that the constitutional validity of the Police Reserve is beyond challenge in the courts so long as it depends for its manpower upon voluntary enlistment rather than upon conscription.

A more debatable application of these same principles is to be found in a decision rendered by a division of the Supreme Court of Japan, consisting of five justices, on February 17, 1956. This was rendered in a suit brought by a citizen and resident of Setagaya Ward in Tokyo, asking for a declaration that the Revised Local Government Law insofar as it provided for the selection of the head of the Ward, by the Ward legislature, with the consent of the Governor of Tokyo, instead of by popular election of the residents, was invalid, as a violation of Article 93 of the constitution. The second paragraph of Article 93, in the official translation, reads as follows: "The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities." In addition to asking for a reconsideration of the ruling of the Police Reserve case, with regard to the interpretation of Article 81 so as to require a concrete controversy, the plaintiff contended that there was a concrete controversy between himself and the defendants, particularly Nagashima, the purported head of the Ward, since the plaintiff was subjected to a ward residence tax in the name of Nagashima, had to negotiate with Nagashima with regard to his rights, and finally was deprived of his concrete right to elect a new ward head as guaranteed by Article 93, because of the illegal method established for the selection of the Ward head. The Court had, of course, little difficulty in rejecting the request for reconsideration of the ruling in the Police Reserve case. But the answer to the plaintiff's claim of a concrete controversy with Nagashima and a legal right to participate directly in the choice of the ward head was far from satisfying. The opinion suggested in the first place that these asserted interests



might establish the plaintiff's motives for bringing the suit, but that, nevertheless, the request for a declaration of the invalidity of the selection of Nagashima as head of the Ward, and his assumption of that office had no direct relation to a legal right of the plaintiff. The only further explanation of the grounds of the decision was that even if the petition of the plaintiff were granted, the plaintiff would not be able to exercise the right of selecting the ward head as a result of that decision.

This suggests reasoning very similar to that employed by Mr. Justice Frankfurter in **Colegrove v. Green**, 328 U. S. 549 (1946), when he said that one reason for rejecting as nonjusticiable, or political, the claim that electoral districts were so disproportionate as to be a denial of equal protection, was that the court was powerless to create new and more equal electoral districts. Presumably the Japanese court had very much the same thought in mind in suggesting that the plaintiff would get no effective relief from a determination of invalidity. Thus it may be that the view of the Japanese court is fundamentally in accord with the views of the United States Supreme Court on similar questions, although it is not articulated in terms of political questions. However, it might also be pointed out that in other situations the Supreme Court has not hesitated to set aside or to enjoin the carrying out of elections in a manner deemed to violate federal law, even though it remained for the state to establish suitable alternatives. (Compare **Smiley v. Holm**, 285 U.S. 235). It might also be noted that there is ample precedent both in English and American law, for permitting a member of the general electorate to challenge by **quo warranto** the right of a particular official to hold office on the ground that he has been improperly elected or appointed, even though it requires affirmative action by other branches to afford complete relief by choosing a successor in a more suitable manner. 44 Am. Jur. Sections 71 - 78; **McDuffie v. Perkerson**, 173 S. E. 151, 91 A. L. R. 1002 (Ga., 1933) **Rex v. Speyer** [1916] 1 K. B. 595 These observations are offered not for the purpose of



establishing that the Supreme Court of Japan was wrong in its disposition of the plaintiff's claim, but only for the purpose of suggesting that the contention was worthy of less cavalier treatment than the opinion seems to accord it. On the merits it is perhaps doubtful whether a ward head comes within the term "chief executive officers of all local public entities", but the decision would apparently permit clear and wholesale violation of Article 93 without any judicial redress. This may be a wise result, in view of the difficulties in the way of complete judicial relief, but it does not follow automatically, simply from the adoption of the principle of case or controversy.

An even more famous and still unresolved bit of litigation in Japan, which verges on our "political questions" area arose out of Prime Minister Yoshida's dissolution, in 1952, of the House of Representatives, acting through the Emperor, without either a non-confidence resolution or the rejection of a confidence resolution. Article 7 of the Constitution provides that "The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people: .... Dissolution of the House of Representatives". Article 69 provides: "If the House of Representatives passes a nonconfidence resolution, or rejects a confidence resolution, the Cabinet shall resign en masse, unless the House of Representatives is dissolved within ten days." Gizo Tomabechi, a member of one of the opposition parties, who lost his seat in the resulting election, first filed suit in the Supreme Court on the theory that Article 81 gave the Supreme Court exclusive jurisdiction of proceedings brought to test the constitutionality of governmental action. After his suit was dismissed on the same grounds as were applied to Suzuki's attack upon the police force, Tomabechi started over again in the lower courts, in suit to recover his salary as a member of the Diet, from the time of his ouster until the natural expiration of his term. He won in the District Court, lost in the Tokyo High Court, and is now appealing to the Supreme Court. Both the District Court and the High



Court ruled on the merits of his contentions. It seems not unlikely that the Supreme Court will affirm the High Court on the merits, for the Constitution does not explicitly limit dissolution to non-confidence situations and the English practice is also to the contrary. Nevertheless some members of the Court may be tempted to turn again to justiciability, and perhaps even to wrestle with the problem of political questions.

A less famous case, touching even more closely on the political question doctrine arose out of the dismissal of a member of the Aomori Prefectural Legislature, by a majority vote of his colleagues, on account of his rude utterances. The plaintiff sued to enjoin his dismissal and the District Court granted the injunction. The Prime Minister moved to suspend the effectiveness of the injunction, until the termination of the litigation, as he is authorized to do by the Administrative Litigation Act, under certain circumstances. The District Court overruled the Prime Minister's objection, and the Supreme Court affirmed, simply on the ground that the Prime Minister had moved too late, in coming in after the injunction had issued. Chief Justice Tanaka wrote an elaborate dissenting opinion, in which he argued that the entire suit should have been dismissed on the ground that the judiciary has no authority to interfere with a legislative body's authority to discipline its own members. The Chief Justice conceded that some questions relating to the internal problems of a legislature are justiciable, such as those based on the Local Autonomy Act or equal protection under the Constitution. However, the plurality of the legal order required that certain areas be outside the control of the courts. One of these was the legislature's authority over its own members. Mr Justice Kuriyama took the same general position as the Chief Justice although he purported to find some additional support for his position in Article 93 of the Constitution, which provides in its first paragraph that "The local public entities shall establish assemblies as their deliberative organs, in accordance with law." He also suggested that if the dismissal of a legis-



lator is unreasonable, the people will correct the mistake at the next election or it will be solved by the dissolution of the legislature. Justice Mano concurred in the Court's judgment, but did so on the ground that the provision of the Administrative Litigation Act, that an injunction should not issue over the Prime Minister's objection, was itself unconstitutional, as a violation of the principle of separation of powers. I am not clear as to whether the decision of the Court may properly be regarded as merely disposing of the Prime Minister's objection on the ground that it came too late, without passing on the issues suggested by the dissenting and concurring justices, or whether the decision assumes both the propriety of the suit and the validity of this particular provision of the Administrative Litigation Act. Until otherwise instructed, I am inclined to the former interpretation.

## II

Chapter III of the Japanese Constitution, entitled Rights and Duties of the People, contains 30 articles spelling out the fundamental human rights or civil liberties of the people. Some of these are largely hortatory in character and can hardly be regarded as a basis for constitutional adjudication. For example, Article 13 provides: "All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." However, there are many other provisions which are at least as specific and unequivocal as those of the American Bill of Rights, and in some instances considerably more so. For example Article 37 provides among other things, that "At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State." Consequently, it is not surprising that particularly in appeals from criminal convictions there is frequently reliance by the defense on constitu-



tional provisions. Somewhat more surprising is the fact, that apart from a few cases in which a conviction was set aside on the ground that a confession was obtained by force or after too long confinement, such claims have been almost uniformly unsuccessful.

Probably the best known of the unsuccessful appeals to constitutional protection, is the Fukuoka Patricide Case, in which the Supreme Court, two judges dissenting, reversed a holding of the District Court that a provision of the Criminal Code prescribing a heavier penalty for causing the death of one's lineal ascendant's than in other cases, was invalid as a violation of Article 14. Article 14, the equal protection clause of the Japanese Constitution, provides: "All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin." Both the grounds of decision, and their relation to the Japanese family system have been elaborately discussed by Professor Kurt Steiner in a recent issue of the *American Journal of Comparative Law* (5 *Amer. J. of Comp. Law* 106, 1956). Consequently, I will pass over it here without further discussion, except to say that even apart from the traditional emphasis in Japan upon family loyalties, the decision seems hardly exceptional as an application of general principles of equal protection and appropriate classification. It is true that Article 14 particularly mentions "social status of family origin", but there is little reason to doubt that these words were designed to outlaw distinctions between different kinds of families on the basis of lineage and the like, rather than classifications based on particular kinds of family relationships. Indeed, the guess may be hazarded that the decision was more difficult in Japan than it would have been elsewhere because of self-conscious concern regarding the need for reform of the social structure.

The one decision in which the Supreme Court of Japan has actually held a statute unconstitutional was rendered in 1953 in a case popularly known as the Red Flag Case, because



it concerned publication of "Akahata", a Communist newspaper and its successors. This is also the only decision of the Supreme Court in which the opinions have been published in an official translation. Nevertheless, the decision is really of comparatively little significance in contributing insight into the process of constitutional adjudication in Japan. This is primarily because it arose out of a directive issued by SCAP during the Occupation and was concerned with the problems of transition from the Occupation to full independence. The case began as a criminal prosecution instituted during the Occupation for violation of Cabinet Order No. 325 of 1950, which provided in general "for the Punishment of Acts Prejudicial to Occupation Objectives." In this particular instance, the Occupation Objective was set forth in SCAP directives prohibiting the editing, printing and distribution of the "Akahata" and other publications designated by SCAP as affiliates or successors of the "Akahata." The original judgment of guilty was rendered by the trial court while the Occupation was in effect; the judgment of the Sendai High Court affirming the conviction was rendered on April 28, 1952, the very day that the Treaty of Peace came into force, the Occupation was terminated and the full sovereignty of Japan was restored. A statute adopted April 28, 1952, Law No. 81, provided that orders such as Cabinet Order No. 325, should continue in effect for 180 days unless sooner abolished or continued in effect by special legislation. Another statute adopted May 8, 1952, Law No. 137, specifically abolished Cabinet Order No. 325, with the following condition: "The application of the penal provisions to the acts done prior to the enforcement of this law shall follow the former examples." Thus it was the apparent intention of the legislature to preserve the validity of prosecutions for violations of Cabinet Order No. 325 while it was in effect, even though it was no longer to have prospective operation. Accepting this as the apparent legislative purpose, the Supreme Court decided by a majority of ten to four that the statutes were unconstitutional and dismissed the prosecution.



The first of the published opinions, in which six justices concurred, explained this result on the ground that Public Law No. 81 had attempted the impossible, namely that it had attempted to give effect to Cabinet Order No. 325, without giving legal effect to the SCAP directives which the Cabinet Order purported to enforce. Thus it attempted to give legal effect to an order which prescribed punishment without prescribing any punishable offense. The justices adopting this view found it unnecessary to examine the substance of the directives to determine their constitutionality. They concluded that "Public Law No. 81 is null and void and is unconstitutional so far as it purports to punish violation of directives, regardless of whether the substance of the directives in question was in conformity with the Constitution." Having thus disposed of Public Law No. 81, these justices then went on to hold that the statute of May 8, 1952, Law No. 137, "must be admitted to be null and void inasmuch as it violates the purport of Article 39 of the Constitution, in that the Law will become so-called *ex post facto* in reviving anew the penal provisions of Cabinet Order No. 325 which was once invalidated." It is not clear why the same reasoning which invalidated Law No. 81 would not be equally applicable to Law No. 137, without reliance upon the strained and artificial *ex post facto* argument. At any rate, the feelings, if not the logic, of these justices becomes clear when they add: "To say that the acts of violation of directives issued by the SCAP under the occupation should still be punished in the present days when the occupation is no longer in existence and Japan has regained her independence and her Constitution has assumed a paramount position, would be tantamount to recognizing the continued existence of the SCAP's power and the effectiveness of his directives, and approving the continued existence of 'acts prejudicial to occupation objectives'. Such a position is utterly incompatible with the Constitution."

This line of reasoning was entirely rejected by four members of the Court who concurred in the judgment. According to their view, "The directives which constitute the substance



of Cabinet Order No. 325 contained many elements which were designed, not only for the benefits of the occupation, but also for maintaining peace in our country and for the promotion of public welfare. One cannot assert that Cabinet Order No. 325, embodying the substance as described above, is not entitled to become a legitimate law of our state simply because the directives were issued by the SCAP. Our country is at liberty to continue the validity of the said Cabined Order as law of our land insofar as it concerned directives having elements compatible with the Constitution, even after the Peace Treaty had come into force." However, these justices then went on to consider whether the substance of the directives, as involved in this prosecution, was compatible with the Constitution. This question they answered in the negative, because "The SCAP directives covered by Cabinet Order No. 325 prohibited in toto in advance the publication of the 'Aka-hata' and its successors and affiliates regardless of whether or not the articles to be printed therein would disturb the order of the country or injure the welfare of the society. It is obvious that the directives in question deprive the people of their freedom of speech more drastically than would an ordinary censorship. They are clearly contrary to Article 21 of the Constitution." Article 21, in addition to guaranteeing "Freedom... of speech, press and other all forms of expression", also provides that "No censorship shall be maintained, nor shall the secrecy of any means of communication be violated." *Near v. Minnesota*, 283 U.S. 697 (1931), is not cited by the justices, but there is little doubt that they were familiar with it.

From the judgment thus reached through different routes, by ten members of the Court, four justices, including the Chief Justice Kotaro Tanaka, dissented. For this conclusion they seemed to have alternative bases. The first was that because the offense occurred during the Occupation, and because the authority of SCAP during the Occupation, and the Imperial Ordinance designed to carry out the objectives of SCAP "had legal validity beyond the Constitution of Japan and regardless of the provisions of the Constitution", the conviction should



be sustained without consideration of the constitutional validity of the substance of the directives. As for the position of the first six justices that Laws No. 137 and 81 ran counter to the Constitution because they attempted the impossibility of prescribing a penalty without an offense, and retroactively attempted to revive penal provisions which have already expired, this was criticized "for confusing the issue of abolishment of the statutes in the future with the consummated act of punishment for the act committed prior to the abolition or invalidation of the statutes." Then in aside directed to the question of unconstitutionality of the Directives themselves under Article 19 (freedom of thought and conscience) and Article 31, these justices add, "the directives stand on the premises that the 'Akahata' and its successors, etc. gave evidence of the fact that they are not a legitimate organ of a Japanese political party but rather an instrument of foreign subversion. Therefore, in short, we are not here concerned with a problem of freedom of thought or expression as a legislative question, but rather the directives were designed to cope with the situation in which foreign subversion, a kind of violence, figures in." Anyone acquainted with the American opinions, will recognize familiar strains.

In addition to these three joint opinions, several of the justices added individual opinions, elaborating particular points or answering particular arguments advanced by the opposition. For example, Justice Saito suggested that the only unanimity among the justices was that the accused was "guilty of the crime under consideration at least for a period from the commission of the offense until the enforcement of the Peace Treaty on April 28 of 1952"; that the views of six of the justices in favor of acquittal (in majority) were incompatible with those of the other four who joined in the judgment; that therefore the two views in favor of acquittal were "in fact two separate minority opinions" with the result that the appeal should have been dismissed. Justice Mano, who joined in the first opinion, added an individual opinion placing particular emphasis on sections of the Penal Code



providing that "If subsequent to the commission of a crime the penalty thereof has been changed by law, the lesser penalty shall be applied"; and that there should be a judgment of acquittal "when the penalty has been abolished by a law or ordinance enforced subsequent to the commission of the offence." Justice Inoue, who had joined in the second opinion, added an individual opinion in which he said that although he could not fully understand or agree with the opinion of Justice Mano and the other five justices, both the first and the second opinions were in agreement in concluding that "it is unconstitutional to punish the accused for violation of the directive in question under No. 235; and that such a state of affairs cannot be permitted to continue after our country has become independent." Therefore "when both of our opinions are taken together, they constitute the majority opinion of this Court." With regard to this delicate numbers game, the outsider can add only this tentative observation. Apparently eight justices thought that the legislation following the Peace Treaty could constitutionally incorporate the substance of the occupation directives, as applicable only to previous offenses, so long as there was no constitutional objection to the substantive provisions of the directives. Four justices thought there was such a constitutional objection. Four thought there was none. Six of the justices thought it was a legal monstrosity to attempt to give effect to the directives for the purpose of punishing acts committed while the directives were in effect, without also giving them prospective operation. These six did not pass upon the constitutionality of the directives themselves and consequently we do not know what the result would have been if the questions had been voted on separately. Justice Inoue seems justified in concluding that the first and second opinions reach the same conclusion and properly constitute the majority even though their reasoning is inconsistent, and viewed separately present only minority positions. In short this is a case without an "opinion of the court" or a *ratio decidendi*.

But this is not the main reason why the decision is disappointing and relatively unenlightening. Except for the opinion



of the four who hold the substance of the directives unconstitutional, the opinions are mainly exercises in dialectic regarding the techniques of incorporating the substance of the directives in the subsequent legislation and its possible legal consequences. Both the first six justices comprising part of the majority, and the four dissenters seem to regard these dialectics as a way of avoiding the necessity of seriously considering the constitutionality of the substantive provisions of the directives themselves. Thus the opinions may be interesting illustrations of the problems attendant upon passing from a state of qualified subservience to full independence, but they cast little light upon the problems of constitutional adjudication which must be faced in the future. Even with regard to the problems of transition, there hovers in the background an assumption in which all the justices apparently agree, but which yet seems worthy of critical examination. This assumption is that before the Peace Treaty became effective, actions of the Japanese Government taken for the purpose of carrying out SCAP directives, were themselves entitled to "legal effect beyond the Constitution of Japan, irrespective of the provisions of the Constitution." In support of this proposition the opinions refer to a judgment of the Grand Bench pronounced on April 8, 1953, "Re" case No. 685, 1949. Apparently none of the justices was prepared to take the quixotic, but eminently sound position, that SCAP, having encouraged the adoption of a new Constitution on November 3, 1946, which unequivocally provided that the Supreme Court should have power to determine the constitutionality of governmental action, could expect help from the Government of Japan in carrying out its directives, only to the extent that the Government of Japan could act in accordance with its Constitution, as interpreted by its Supreme Court.

Much less spectacular and elaborate than the Red Flag case, but far more representative and significant as an example of constitutional adjudication in the free speech area in modern Japan, was the decision rendered by the Supreme Court on November 11, 1954, in what is generally referred to as the



Nigata Ordinance case. This case arose out of a demonstration carried on by about three hundred people before the police station in the city of Takada, Nigata Prefecture, as a protest against the arrest of about thirty Koreans for unlawful brewing. Two leaders of the demonstration were arrested and charged with carrying on a public meeting and demonstration without a permit from the Municipal Safety Commission as required by a Nigata prefectural ordinance. They were convicted and sentenced to three and four months imprisonment, respectively. The ordinance in question provided in effect that no parade or demonstration, either in vehicles, or by marching on foot or by occupying any street, park or other place to which the public enjoys free access, should be held without a permit issued by the Public Safety Commission having jurisdiction over the area. Application for the permit was to be made not less than seventy-two hours prior to the time of the parade or demonstration. The application was required to contain information with regard to the time and place of the parade or demonstration, the names, addresses, occupations, and dates of birth of its leaders, its purpose and general nature, the participating organizations and the estimated numbers of participants. The ordinance further provided that the Commission should issue the permit not less than twenty-four hours prior to the time of the parade or demonstration, unless it found grounds for fearing that the parade or demonstration would disturb the public peace. The permit could also contain conditions deemed necessary to protect the public against mass disorder or mob violence.

In affirming the conviction, the opinion of the Court considered the contention that the ordinance, thus applied, was violative of constitutional guarantees, particularly Article 21, which provides in part: "Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed." The opinion itself is very short, consisting of only two paragraphs, both apparently masterpieces of ambiguity. The first sentence of the first paragraph is to the effect that it is a violation of constitutional principles to



place a prior restraint upon demonstrations under an ordinance which provides for a system of licensing in general, rather than a system of notification to the authorities, because the people have a right to demonstrate, unless the purpose and means of the demonstration are against the public welfare. The paragraph goes on to suggest that a system of licensing is unobjectionable if it is designed to permit the Commission to impose specific restrictions with regard to the time, place and means of the demonstration, so as to protect the public welfare against serious damage. But the paragraph concludes with the statement that the Ordinance would not unduly restrict freedoms guaranteed by the Constitution, if it authorized the Commission to refuse a license or prohibit the demonstration where the proposed action would clearly provoke imminent danger to the public safety. The opinion then goes on in the next paragraph to interpret the ordinance as to find it in harmony with these principles. This is done by concluding that although the ordinance on its face seems to grant broad discretionary power to the Commission, considering all the provisions together, it may be interpreted to mean that the Commission may refuse licenses for demonstration in particular places or by particular means for specific reasons. Thus the ordinance is not to be interpreted as authorizing the Commission to deny a license simply on the ground that it deems there is reason to fear a disturbance to the public safety.

A concurring opinion by Justices Inoue and Iwamatsu emphasizes that the authorities are entitled to advance notice of parades and demonstrations, so that they can determine whether the proposed place and means of demonstration would endanger the public security and welfare. This particular ordinance, they suggest, although it uses the language of licensing, is primarily designed to give such notification, even assuming that the Commission may deny the license upon reasonable grounds. It is true that the Commission might on some occasions mistakenly deny a license when it should be granted, but the defendants did not apply for a license and therefore



there is no doubt of the constitutionality of the ordinance as applied to this particular case. The exact difference between the majority and concurring opinions does not come through quite clearly in the translations which I have so far available, but I have sometimes had equal difficulty in perceiving the exact difference between majority and concurring opinions written entirely in English.

Compared with the ambiguities of the majority and concurring opinions, the dissenting opinion of Justice Fujita comes as a breath of fresh air. He agrees with that part of the Court's opinion which states that it is contrary to the principles of the Constitution to place a prior restraint upon demonstrations by providing for a system of licensing rather than simply a system of notification to the authorities. He also agrees with that part of the opinion which suggests that the ordinance would be unconstitutional if it authorized the Commission to deny a permit simply on the ground of concern that the parade or demonstration would cause danger to the public safety. However, he does not see any basis for an interpretation of the ordinance so as to avoid these difficulties. Particularly he finds no indication in any of the provisions of the ordinance that the Commission's authority is limited to restricting the particular place or the means of the demonstration. Consequently he concludes that the effect of the ordinance is to require that all demonstrations, except certain ones specifically exempted, namely those for an educational purpose and under educational supervision, must have permission in advance, and that the Commission may deny permission if it finds a likelihood of danger to the public safety. Such a grant of broad discretionary authority to a commission to curb demonstrations and processions violates constitutional guarantees of freedom of speech and assembly.

Although the opinion in the Nigata Ordinance case is extremely aggravating in its ambiguities and has been deservedly criticized by Japanese scholars, I have considerable sympathy with its attempt to preserve some measure of governmental authority over public demonstrations as well as



its attempt to interpret the ordinance so as to preserve its constitutionality. The necessities of traffic in crowded city streets unquestionably justify a considerable measure of control over the time, place and manner of holding public demonstrations and parades. Presumably it was such considerations which were uppermost in the minds of the majority. However, the ordinance on its face certainly did not limit the Commission to such considerations and the opinion of the Court may not be sufficiently unambiguous and emphatic to have such a limiting effect upon the actual administration of this and similar ordinances. In this connection, it is interesting to compare the opinion of the Supreme Court with an opinion of the Tokyo High Court, rendered June 9, 1954, holding a similar Shizuoka Prefectural Ordinance invalid for failure to limit more explicitly the discretion of the Commission in passing upon applications for permits. It also remains to be seen whether the discretion exercised by the commissions in the administration of such ordinances, of which there are apparently many, will be subject to any effective judicial scrutiny.

Another decision in the civil liberties area, in which Justice Fujita was the sole dissenter, in urging the invalidity of a statutory provision, was rendered by the Grand Bench of the Supreme Court on April 27, 1955. The legislative provision involved was Article 3 of the National Anti-Tax Evasion Law, which authorizes tax officials to search and attach, without judicial warrant, property, books and documents of a person suspected of a tax violation, in a situation where the offense is detected at the time of its commission or just afterward if it is urgently necessary to collect the evidence and it is impossible to obtain judicial authorization, as provided elsewhere in the Act. In a prosecution for violation of liquor laws in which evidence obtained through such a search was apparently used by the prosecution, the defendant contended that this provision for collecting evidence was invalid as a violation of Articles 33 and 35 of the Constitution. Article 33 provides: "No person shall be apprehended except upon warrant issued



by a competent judicial officer with specifies the offense with which the person is charged, unless he is apprehended, the offense being committed. Article 35: "The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33." In the particular case the suspect was not arrested at the time of the search; consequently it was contended that the situation was not within the exception provided by Article 33. The opinion of the Court rejects this contention on the ground that the exception applies in any situation where an arrest could be made without a warrant and where the search is made at the very place where the offense was committed.

A concurring opinion by Justices Saito and Kobayashi suggests an entirely different basis of decision, namely, that Article 33 and Article 35 apply only to criminal and not to administrative proceedings. With respect to administrative proceedings, they suggest the applicable protection is provided by Articles 11, 12 and 13, particularly the latter part of 13, which provides that the "right to life, liberty and pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs." This means, they suggest, that arbitrary regulation cannot be made in the name of the public welfare, but the provision in question does not offend against that principle. The same position is further elaborated in a concurring opinion by Justice Iriye, who also throws into hopper Article 31 of the Constitution, which provides: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law." The justice does not seem to find any inconsistency in limiting Article 35 to criminal proceedings while extending Article 31 to administrative proceedings, even though it is Article 31 and not Article 35 which mentions "other criminal penalty". He finds partial support for this posi-



on in the fact that Article 35 is immediately preceded and followed by articles dealing only with criminal prosecutions. It also seems natural to him that fundamental human rights, including the privacy of homes, papers and effects, should be subject to some administrative limitations in the interest of the public welfare. Such restrictions must be in accordance with Articles 12, 13 and 31 and must be kept to the minimum required by the public welfare. This is, however, primarily a question of legislative policy. In this particular instance, the necessities and characteristics of tax collection make this a reasonable restriction upon fundamental human rights.

Justice Kuriyama also wrote a concurring opinion, designed to emphasize his agreement with the opinion of the Court, and even more emphatically, his disagreement with the views expressed by Justice Iriye. The idea expressed by the latter that the necessities of tax administration might justify certain restrictions upon fundamental rights in the name of the public welfare, Justice Kuriyama regards as alien to the principles of the Constitution. Furthermore, he finds a contradiction in Justice Iriye's reliance upon Article 31 as the controlling provision, because the "procedure established by law" clause of the Article itself includes all the procedures covered by the succeeding articles of Chapter III. Finally, the distinction between criminal offenses and offenses under the tax law has been entirely eliminated since 1947; consequently if there is any difference between criminal procedures and procedures under the Anti-Tax Evasion law, it is one of words rather than substance.

These concurring opinions also provide the basis for Justice Fujita's dissenting opinion, because he is in the happy position of being able to quote each of the concurring justices in support of his dissent. Thus he first agrees with Justice Iriye that Articles 33 and 35 are applicable only to criminal procedures and not to administrative procedures. However, he disagrees with Justice Iriye and agrees with Justice Kuriyama in regarding the tax collection procedures as essentially criminal in nature and therefore subject to Articles 33 and 45.



Finally, as to the interpretation of Articles 35, he agrees with Justice Iriye that the phrase "as provided by Article 33" means that there must actually be an arrest, not merely the possibility of an arrest. Therefore he concludes that the provision of the Anti-Tax Evasion law is unconstitutional and that the conviction of the offender must be reversed.

Here again it seems that the opinion of the Court avoids the more interesting and significant questions and adopts the narrowest ground of decision. This itself is certainly no basis for adverse criticism, where constitutional adjudication is concerned. Probably, the decision has weakened somewhat the protection against unwarranted searches and seizures, although I am not aware of any directly comparable experience by which to judge it. It might be noted that the Japanese constitutional provision is in terms more unqualified than the American prohibition against "unreasonable searches and seizures." The decision of the Court introduces an element of flexibility, since searches need no longer be accompanied by a warrant or an arrest to make them lawful. Presumably the Court has avoided committing itself upon the issue mooted in the concurring opinions, whether the constitutional protection provided by Article 45 has any application to administrative investigations or inspections. Perhaps this question has some relation to the question which the United State Supreme Court painstakingly avoided deciding in *District of Columbia v. Little*, 338 U.S. 866, namely whether compulsory inspection of a private dwelling by a health officer must be justified by a search warrant or run afoul of the Fourth Amendment. Finally, the opinion of the Court also avoids mention of the most far-reaching of all the questions suggested by the individual opinions, namely, whether Article 31 has application beyond criminal proceedings and also implies in the phrase "except according to procedure established by law" some standards of reasonableness which would justify judicial invalidation of procedures not otherwise contrary to one of the more specific constitutional guarantees; in short whether this phrase is the Japanese equivalent of "due process of law."



This question has been carefully analyzed by Japanese scholars. (See, for example, Ukai, *The New Japanese Constitution*, 51 *Northwestern L. Rev.* 733, 742 - 744 (1957).) I suspect it will be quite awhile before the Japanese Supreme Court attempts to answer it.

### III.

It will doubtless have been noticed that Article 31 refers to "life" or "liberty" but makes no mention of property. This does not mean, however, that property is without constitutional protection, for Article 29 contains the following provisions :

"The right to own or to hold property is inviolable

"Property shall be defined by law, in conformity with the public welfare.

"Private property may be taken for public use upon just compensation therefor."

So far as I am aware the first two provisions of this article, aside from passing mention, are still virgin territory in the annals of constitutional adjudication. But the third paragraph has been the subject of one of the great cases of Japanese constitutional law, a case not entirely unlike the Red Flag case, since it involved one of the programs of the Occupation, namely the Land Reform Law, whose validity was tested after the Occupation had terminated. *Issaku Tanaka v. The State*, 7 *Supreme Court Reports* 1523 (1953). It is hardly necessary to add, that, unlike the suppression of Akahata, the land reform program survived the test with flying colours, even though four justices, Inoue, Iwamata, Mano and Saito dissented.

According to the opinion of the Court the Land Reform Law provided in effect that prices to be paid for land under the land purchase program should not exceed the annual rental value multiplied by 40 for paddy land and by 48 for upland fields. The question to be determined was whether the statutory land-pricing formula met the constitutional guaranty



of just compensation. The opinion first concedes that just compensation contemplates an equitable amount of payment rationally computed on the basis of the market value under economic conditions at a given time. This concession is immediately qualified by the proposition that the amount of payment need not always precisely correspond to market value. The reason is that, since property rights shall be defined by law in conformity with the public welfare, according to paragraph 2 of Article 29, restrictions may be imposed upon the right of the owner to use, take the profits of, and dispose of, his property if necessary for the public welfare. This means also that property rights may be subjected to such price controls that free market prices do not obtain. Since the land pricing formula was derived from the revised Agricultural Land Adjustment Law of December 1945 and was designed to carry out the prevailing national policies of land reform it is quite natural that the method of valuation adopted should be for the benefit of selftilling farmers rather than for the protection of landlord profits.

After these disarming generalities, the opinion proceeds to a consideration of the specifics of the land pricing formula, somewhat as follows: The price structure is based on the five year average yield of rice during the period 1940 - 44, the price of rice, and certain subsidiary adjustments for productivity gains in cultivation. The price of rice is of course, the officially established price under the Foodstuffs Management Law. This was regarded as a reasonable price when the land reform program was adopted: it is untenable to argue that the official price cannot be a measure of just compensation. Thus the price fixing formula is based on objective and average standards, as well as reliable statistical data; it is not necessary that the payments should be related to the free market price of each and every piece of land or that they should be revised in consideration of general economic trends at the time of the land purchase. Furthermore, in addition to the statutory price, every landlord required to sell land under the statutory provision, receives a government subsidy, set accor-



ding to the acreage of the land. This is 220 yen par tan for paddy land, and 130 yen per tan for upland fields. This payment is designed to give a reasonable compensation in terms of capital gains, and is also based on objective and average standards. The exact meaning of this last reference to capital gains and the basis of the computation is not further elaborated and at this writing remains considerably obscured.

Finally, the opinion addresses itself to the most difficult contention of all, namely, that even if the statutory prices were reasonable at the time of the original enactment, the economic situation had changed so that they were now far below just compensation. In the first place, it is emphasized that the program for land reform and control of land prices started even before the war, as early as 1938, was gradually strengthened as the war neared an end! and although it was finally brought to culmination as a drastic measure for a government purchase program, by virtue of the directive of the Allied Powers after the war, a program of this kind was within the contemplation of national policies for a long time. In short, the rights of landowners to use, take the profits, and dispose of lands have been progressively narrowed down and free market prices have not been allowed to obtain. True, the official price of rice has been revised several times during the interval between the enactment of the Land Reform Law and the issuance of the purchase order to this particular appellant. But such revisions were designed to counterbalance the increased cost of production resulting from post war economic changes and thereby to protect farm producers. It does not follow that the land prices should be revised accordingly, for landlords have little to do with agricultural production. It may be desirable that prices controlled by law should go along with general trends in the economy, but it is too much to expect that such prices should always realize economic gains for the owners or precisely coincide with market value. Therefore, the argument that the statutory land - pricing formula falls far short of just compensation because it does not go along with general economic trends cannot be sustained.



The opinion of the Court apparently assumes without explicit discussion, that the taking involved in the Land Reform program, is for a public use, within the meaning of Article 39. This point is, however, specifically debated in the concurring opinion of Justice Kuriyama and the dissenting opinion of Justice Inoue and Iwamata. The latter state their view that the taking clause of the Constitution was designed to authorize only the taking of particular land specifically needed for public projects, such as the building of a railroad, rather than to authorize such a revolutionary measure as the Land Reform Law which takes lands from landlords throughout the country and turns them over to tenants. This, they say, is not a purchase for public use but a purchase for resale to tenants, and therefore does not come within paragraph 3 of Article 29. The term "for public use" is not coextensive with the term "for the public welfare." In any event, when there is a taking in the constitutional sense, just compensation must be determined by the fair market price, differentiated according to the quality of the lands, and ascertained by expert surveys and estimates. Furthermore, in the case of a dispute as to the amount, there must be recourse to the courts for a final determination. But under the Land Reform Law, as generally construed, and as now interpreted by the majority of the court, the aggrieved land owner is denied his right of access to the courts, because the court cannot award compensation in excess of the statutory limits. If this is to stand as an interpretation of paragraph 3 of Article 29, the way is wide open to the legislature to employ repeatedly the same method, and thus to make an empty shibboleth of Paragraph 1 of Article 29.

Finally, these dissenting justices pay their respects to the argument presented in the opinion of the Court to the effect that the Land Reform Law was but the logical, although drastic, culmination of a long development limiting landlords' rights and encouraging owner farmers. They emphasize that the particular land purchase program here in issue was the rural land reform law initiated by the directive of the Supre-



me Commander of the Allied Powers and was carried out entirely outside the Constitution. This is the reason why landlords were resigned to obedience of the governmental orders and complied with such arbitrary measures. If it were not for the pressure of SCAP, the feasibility of the land reform program would have been out of the question. The government was directed to take prompt and vigorous action for the implementation of the Land Reform Law, but no directive was originally issued as to the procedure, payment and other details. Thus the land reform program as a whole was developed under the pressure of the SCAP directive. From this it follows that government purchases of lands in pursuance of the Land Reform Law, settled prior to the Peace Treaty, survive it as valid under the authority of the Supreme Commander, irrespective of the Constitution. So long as the transfer of title took place prior to the Peace Treaty, the validity of the transfer cannot be challenged. But this does not determine the issue of compensation, if that issue is still in litigation. Since the sovereignty of Japan has been restored and the authority of the Supreme Commander is no longer existent, the Court cannot enforce a statutory provision which is unconstitutional. Apart from doubts as to the validity of the law in appropriating land from landlords for the benefit of tenants, they conclude, it is certainly repugnant to the Constitution in prescribing a highly disputable pricing formula and prohibiting recourse to the courts for the purpose of obtaining compensation in excess of statutory limits.

As I gather the gist of these opinions and try to place myself in the position of the justices who had to decide the issues presented, my principal reaction is that it is difficult to conceive of a case more devilishly contrived to try the mettle of conscientious judges. The success of the land reform program was generally regarded as fundamental to the successful democratization of Japan. Despite the doubts expressed by two of the dissenting justices regarding the validity of the entire program, it is hard for me to believe that most of the judges were not in sympathy with its fundamental objectives.



They also must have been painfully aware of the impracticability of upsetting this revolutionary reform, or of burdening the struggling state with large and unanticipated financial obligations, or of giving a few die-hards among the landowners a preferred position. See Eyre, *Post Occupation Conditions in Rural Japan*, *Annals of Amer. Acad. of Pol. and Soc. Sciences*, November, 1956, p. 113. On the other hand, they must have been keenly conscious of the importance to the independence of the judiciary and the virility of judicial review, of a fearless and straightforward application of the constitutional requirement of just compensation for property taken for public use. I can think of no really comparable problem in the American experience, although there is a superficial resemblance to the questions of just compensation presented during wartime when commodities subject to requisition were also subject to price controls. Perhaps a more realistic analogy is to be found in the experience of India, since independence. India also has a land reform program; a constitution which recognizes the right "to acquire, hold and dispose of property" as one of the fundamental rights of citizens; and the institution of judicial review with respect to constitutional questions. However, the Constitution of India now contains a provision to the effect that no law providing for compulsory acquisition of property for a public purpose which either fixes the amount of compensation or specifies the principles on which compensation is to be determined, shall be called into question on the ground that the compensation provided by that law is not adequate. This provision was adopted as an Amendment of the Constitution in 1955, as a direct result of decisions of the Supreme Court invalidating certain statutes. The cynic might be tempted to suggest that the Japanese Supreme Court has arrived at about the same result without going through so painful a process. However, the Japanese Court has retained at least the theoretical power to examine the basis of compensation established by the legislature, and it may yet be inclined to exercise that power more vigorously than it did in the Land Reform case whenever it deems the circumstances more propitious.



## IV

A general survey such as this is apt to limp, or even stumble badly, when it stretches for a conclusion. Particularly is this likely, when the drama has been but dimly seen through the filmy "scrim" of an unfamiliar language. Nevertheless, for the sake of being a little more provocative, if nothing else, I will hazard a few tentative observations. I have heard several of my Japanese associates severally criticize their own Supreme Court for its timidity in facing constitutional questions and in safeguarding civil liberties. As one who is generally satisfied with the wisdom of the policy of postponing the judicial determination of constitutional questions until they are inescapably presented, I am inclined to view with considerable more sympathy than these Japanese friends, the timidity or caution of the Japanese Court in meeting constitutional questions. For example, I think the Court was probably wise in leaving the constitutional fate of the Police Reserve to political determination, and I would prefer to see a firm refusal to consider the validity of Yoshida's dissolution of the Diet rather than a pious affirmation of its validity, several years after the event. However, the policy of postponing or avoiding constitutional questions can be indulged too far, and I would agree that in some instances the Japanese Court seems to have erred in that direction. The attitude of the United States Supreme Court in rejecting taxpayers suits and generally keeping hands off the validity of state legislation except when national interests or clear violations of civil rights are involved, can be, and frequently has been, offset by a more affirmative attitude on the part of state courts in applying state constitutional guarantees. But there is no room for such independence on the part of the lower courts in the Japanese system. Consequently the Supreme Court must set the example in providing judicial protection against petty tyrannies. The invalidation of the Nigata ordinance, with appropriate dicta indicating how it might be revised to meet constitutional objections, would have probably had a healthier effect than straining so hard for an interpretation which would avoid the



constitutional problems. Neither do the obscure dialectics of the principal opinions in the Red Flagg case provide a satisfactory alternative to a straightforward meeting of the more fundamental constitutional questions, as succinctly demonstrated by Justice Kobayashi's concurring opinion.

Of course, dissenting and concurring opinions usually have the advantage of being able to face more forthrightly difficulties which majority opinions tend to gloss over. Majority opinions of the Japanese Court seem particularly prone to indulge in this type of shorthand. This may be partly due to the pressure of the tremendous backlog of cases under which the Japanese Supreme Court staggers, and partly to the difficulty of discussing adequately constitutional conceptions recently imported from abroad, without elaborate consideration of their foreign background. From a reading of the Japanese Supreme Court opinions in these cases, one would apparently gather little hint that the Justices were aware of the English and American gloss on many of the phrases which they are being called upon to interpret. Yet, I am confident that such precedents are well known to the Justices and carefully considered by them. Perhaps it is a matter of national pride or concern lest the Court appear to follow slavishly foreign precedents, which leads the Court to eschew any mention of them. If this is so, I hope that the tendency will decrease as the body of Japanese constitutional precedent develops, so that the followers of the Court's opinions may have the full benefit of the broad range of cosmopolitan learning which really lies behind the formulation of its decisions.

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