

SOME ASPECTS OF THE CONCEPT OF SOVEREIGNTY IN PRE AND POST-WAR JAPAN*

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Abstract. Sovereignty: in Japan. Generally, from the point of international law, sovereignty is combined with independence, state independence. Concerning national law, sovereignty is rather about supreme power, about the hierarchy of power within a given state. For Japan, where the modernisation of state and westernisation of society took place within decades in the second half of the 19th century, the defeat in the Second World War brought about significant changes on the level of the text of the Constitution: the Emperor, former sovereign, was transformed into symbol of the state. In the following a possible interpretation of this transfer and its consequence is presented.

1. Introduction: Some aspects of sovereignty

Looking back to the Medieval Ages, we may see the results of the two sword theory during the struggle for sovereignty between the Pope and the Holy Roman Emperor. The establishment of nation-states Europe-wide later on restructured the antique definitions of sovereignty. The classics of Jean Bodin or Hugo Grotius exceeded the traditional Christian approach whereby God was the one and only true sovereign.

According to Bodin, “Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonweale.”

In Carl Schmidt’s concept, it is precisely the exception that makes relevant the subject of sovereignty. But this power of the sovereign to suspend certain aspects of the legal order has its limits, since he has no power to reverse or fundamentally change that order.

Today, in constitutional states, sovereignty is exercised by the people through their duly elected representatives.

What does sovereignty mean from the aspect of Japanese constitutional history? Who was the source of sovereignty prior to the World War II and how is it exercised in today’s Japan?

In the followings I do not intend to provide a new approach about the definition of sovereignty but I try to outline some possible interpretation of sovereignty through the example of modern Japanese constitutional history.

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2. The emperor under the Meiji Constitution

Following the Meiji-restoration in 1867–68 Japan realised that the only way of preserving its independence and avoiding colonisation – the example of the consequences of the opium wars against China – was the modernisation of the Japanese state and the establishment of a modern legal system by the reception of Western Law, especially French, British and later German codes, definitions and legal concepts.

This period (1867–1912) restored the Emperor's power, destroyed the shogunate and the Emperor became the chief priest of the state-religion Shinto.

The so-called old Constitution, the first modern Constitution of the Empire Japan was adopted in the Meiji period in February 1889 and came into force in November 1890. This modern written constitution was largely influenced by the Prussian constitution of 1850. The Constitution codified the so-called tennō system, i.e. tennō-above-all or the divine principle. Articles 1–17 of the first Chapter of the Constitution listed the Emperor's powers. The following ones are worth to be quoted:

Article 1. The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article 3. The Emperor is sacred and inviolable.

Article 4. The Emperor is the head of the Empire, combining in Himself the rights of sovereignty, and exercises them, according to the provisions of the present Constitution.

These provisions should be highlighted, since Article 1 firmly recognised the old legend that the Emperor was the lineal descent from Jimmu, 660 B.C., who is regarded in Shinto belief as a direct descendant of the sun goddess, Amaterasu.

Article 1 reading in conjunction with Article 4 gives the complete interpretation of the term tennō by providing that the sovereignty was rested with emperor: tennō means heavenly sovereign. Although the constitution established constitutional monarchy it treated the Emperor as an omnipotent religious head of the nation.

Article 3 can be on the one part interpreted, as usually in the cases of Western constitutional monarchs that the Emperor was beyond political accountability. On the other hand, in this Article the old proclamation of Amaterasu may be echoed, whereby the Emperor had to be treated as a god. This later approach is in line with the Preamble of the Constitution, which stipulated the following:

“We, the Successor to the prosperous Throne of Our Predecessors do humbly and solemnly swear to the Imperial Founder of Our House and to Our other Imperial Ancestors that, in pursuance of a great policy co-extensive with the Heavens and with the Earth.”¹

¹ <http://history.hanover.edu/texts/1889con.html>

3. The emperor under the Showa Constitution

In the battles of World War II, Japan was defeated. Emperor Hirohito accepted the Potsdam declaration in his famous radio speech of 15 August, 1945 just couple of days after the horrors of Hiroshima and Nagasaki. The defeat was followed by occupation. Japan, for the first time in her history, was occupied by a foreign authority, by the Allied Powers, which gave in practise large competence for the US Supreme Commander, Douglas MacArthur, who wanted to establish rapidly a democratic and peaceful nation. The Meiji Constitution as a symbol of the pre-war Japan and a barrier in this process had to therefore be abolished or at least completely amended.

The new Constitution was promulgated on 3 November 1946 and came into force on the 3 May, 1947.

Chapter one of the Constitution includes seven articles on the Emperor, the following should be mentioned at this stage:

Article 1. The Emperor shall be the symbol of the State and the unity of the people, deriving his position from the will of the people with whom resides sovereign power.

Article 4. The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.

According to the text, the previous head of the Empire became symbol of the state. The imperial family lost all its religious prerogatives but it must not be forgotten that Hirohito remained on throne and he was called both before and after the war as tennō. The term, the more thousands year old Chinese origin character, the kanji of 天皇 means still today heavenly sovereign. (It must be noted that the original Chinese meaning of this character “was pole star in Heaven as a term of Taoism”²)

Comparing the provisions on the Emperor with the articles on European kings or queens, one thing must be underlined: although their functions and competences are in many aspects similar, the provisions on human rights precede in every case the provisions on Emperor, i.e. I haven't found any basic laws which begin with the articles on the monarch.

4. Popular sovereignty and the will of the people

The Imperial Diet was established by the Meiji Constitution and consisted of two houses: the House of Representatives and the House of Peers. As we have seen above, following from the sovereignty of the Emperor, the role and functions of the Imperial Diet were rather limited. Regarding the composition of the lower houses, universal adult male suffrage was guaranteed first by the 1925 Electoral Law, which enabled more than 12 million Japanese men to vote, which is a significant increase, compared

² YANABU, A: The Tennō system as the symbol of the culture of translation. *Japan Review* 1996/7, 147–157. <http://202.231.40.34/jpub/pdf/jr/IJ0708.pdf>

to roughly 500 000 men who had the right participate in the first election after the enforcement of the Meiji Constitution. The limited sphere of parliamentary competence might be reflected through the fact that the prime minister was appointed by the Emperor on the recommendation of senior statesmen. Thus, the Cabinet was responsible to the Emperor, but not to the Diet.

The new Constitution adopted in November 1946, as we have seen above, introduced popular sovereignty, whereby sovereign power resides with the people in accordance with Article 1 of the Constitution. Looking at other post-war constitutions, we must admit that democratisation is always ensured through the majority principle. However, again, the difference between the American approach and Japanese reality is touched upon in Article 1 since it says that the Emperor's position is deriving "from the will of the people with whom resides sovereign power" Contrary to American notion of popular sovereignty, Japanese did not elect their Emperor and could not remove him from office.³ Although popular sovereignty is granted by the Constitution and the Diet became the highest organ of the state power, and the sole law-making organ of the State, the practical side of popular sovereignty is seems to have developed in a unique Japanese way.

5. The practical side of popular sovereignty

The Showa Constitution, as we have seen incorporate the modern Japanese constitutional monarchy including popular sovereignty. For the first and widely accepted reading, the Emperor has become symbol of the state and the unity of the people.

Prince Takeda, grand-grand son of late Emperor Meiji has published an interesting and different approach concerning the source of sovereignty and status of the Emperor under the new Constitution. He points out that "under the Meiji Constitution, the Emperor did not directly participate in political decisions – the same as the «symbol» provided for in the modern Constitution. Because of this, even after the promulgation of the new Constitution, the result was that that there were no essential changes to imperial power." In his paper he makes clear distinction between the term "imperial sovereignty" and "sovereignty of the people" claiming that under both Constitutions "the people make decisions about national politics, and the one who puts them into practice is the Emperor". He points out that "citizens cannot exercise sovereignty on their own, and neither can the Emperor".

This is actually the key to understand his concept by dividing sovereignty into a formal and practical side. Formal side would mean authority, and the practical side refers to power. If we think of legislation, the power to adopt or amend laws is conferred upon the Members of Parliaments by the people, but putting an adopted law into effect, depends primary upon the Emperor who promulgates it. Prince Takeda emphasizes that formal does not equal worthless. He concludes that "sovereignty

³ INOUE, K.: *MacArthur's Japanese Constitution. A Linguistic and Cultural Study of its Making*. University of Chicago Press, 1991, 187.

based on the bond between the Emperor and the people in both the old and new Constitution”⁴, i.e. “*kunmin ittai*”(oneness of the Emperor and his people).

Let me allow mentioning one other aspect of Takeda’s paper. First of all, the term “symbol” of the state and the unity of the people. He points out that this role is deeply rooted in Japanese history and Emperor Hirohito was not the first to become symbol of the State. He holds that “national polity was upheld even after the end of the war and ... the fundamental role of the Emperor didn’t change even in the post-war era.”

Regarding the term *tennō*, a similar conclusion is drawn in Yanabu’s paper on the Japanese culture of translation. He writes that in 1946, when the Japanese Diet considered the draft of the Constitution, the special state minister Kanamori Tokujiro was once asked about the meaning of the translated word “*shōchō*” and he was not able to provide proper answer. This confirms those allegations which say that the Commander Douglas MacArthur produced the English version of the draft and he created the term “symbol of the state”. On the surface, this new term in the new Constitution differs totally from the pre-war definitions, but in reality, agreeing with the direct or indirect approach of numerous articles of Prof. Higuchi, the meaning of this translated word “*shōchō*” does not seem to be equivalent to the original term of “symbol”. This is a crucial point, not just in the case of the Emperor and not just in the case of Japanese law, but in any other case, when different legal systems or even cultures try to the apply similar definitions.

Similarly, remarks of former staff member of the General Headquarters (GHQ) of the Supreme Commander for Allied Powers regarding their approach during the drafting of the new Constitution, seems to be unambiguous:

“We aimed to create a limited monarchy that has the Emperor as a symbol of the unified nation, without sovereignty. The word ‘symbol’ was difficult to translate into an appropriate Japanese term, but eventually we were able to find the Japanese counterpart that the Japanese government happily accepted.”⁵

Regarding the concept of “symbol”, the difficulties emphasized earlier by Prof. Yanabu has been shared by the GHQ staff member, but regarding sovereignty the evident intent of the Allied Powers has been briefly but clearly summarized, whereby the Emperor should not enjoy any rights connected to sovereignty. It might be added that the approach of the former staff member is echoed in the great majority of the international literature on this issue.

Furthermore, the new Constitution was not able to abolish all pre-war imperial rituals and customs, as it is shown by the last enthronement ceremony. As we have seen above, under the new Constitution the Emperor was deprived of all his previous religious prerogatives concerning Shintoism. Article 21 of the new Constitution provided freedom of religion and the separation of state and church. The Imperial

⁴ TAKEDA, T.: *Did the Emperor of Japan really fall from being a ruler to a symbol?* In http://www.apa.co.jp/book_report2/02.html

⁵ Handbook on the Research Report on the Constitution of Japan, 2005, 5. <http://www.sangiin.go.jp/eng/report/ehb/ehb.pdf>

House Law of 1909 which regulated enthronement ceremonies was formally abolished in 1946. What happened in the evening of 22–23 November 1990? The traditional great food offering (daijosai) ceremony was performed by the new Emperor on the basis of long traditions according to the provisions of the abolished act. A secret ceremony based on Pre-war imperial norms was carried out, which showed “that the imperial institution is grounded not in a rational political consciousness but in impregnable tradition.”⁶ The ritual involved several mythical religious symbols: the Emperor wore white silk ceremonial clothing and a bamboo hat, ate sacred rice and drank sacred wine etc. This lasted several hours and many elements of the ceremony were repeated in the different halls of the Imperial Palace, in November 1990.

Another example concerns imperial succession. According to the centuries-old rules, the most important condition is still today to have male descendant in the imperial family. The question has arisen from the 1990’s onwards: who can theoretically have the right to be the successor after the present Crown Prince since all the newborns in the imperial family were female. It was 6 February 2006 when the Pregnancy of Princess *Kiko*, the wife of the younger son of Emperor Akihito was announced. In the following months millions of Japanese expressed their wish for a male heir.⁷

These short explanations might have proven that the symbolic role of the Emperor and sovereignty of Japanese people is in every day life, interpreted slightly differently from the original concept of the Allied Powers in 1946.

6. Reforming the concept?

The amendment of the Constitution, especially with regard to the status of the Emperor or to the famous “peace-clause”, Article 9 or to the traditional patriarchal family system (ie) was first raised in 1948, since then it has been put on the table several times for different reasons.

As for the topic of this paper, the Research Committee of the House of Representatives has to be mentioned which published its final report in April 2005 and considered that “more than 80 percent of the public today are satisfied with the Emperor system; in that sense, the present Emperor-as-symbol system could be said to be the most stable form of the Emperor system in history.”⁸ This approach is in line with those suggestions that the Constitution, after 64 years, should be amended in order to be “kuni no katachi” (the shape of Japan) in the 21st century, to provide „vision and commitment”⁹ for today’s Japan society. If amended, however, the Emperor-as-

⁶ TAKAMI K.: From Divine Legitimacy to the Myth of Consensus: The Emperor System and popular Sovereignty. In HIGUCHI, Y. (ed.): *Five decades of Japanese Constitutionalism in Japanese Society*. University of Tokyo Press, 2001, 11.

⁷ Note: the Prince Hisahito was born 6 September 2006.

⁸ [http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/report.pdf/\\$File/report.pdf](http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/report.pdf/$File/report.pdf), p 366.

⁹ TAKII, K.: *The Constitution of Japan and Ito Hirobumi’s Design*. Gaiko Forum, Fall 205, 10.

symbol system should be retained in harmony with popular sovereignty, whereby the position of the Emperor shall continue to derive from the will of the people.

This universal constitutional principle has its Japanese interpretation as we have seen in the different cases concerning the succession to the throne either from the viewpoint of the ceremonies or regarding the discussions on the recognition of female succession.

As a last point to this topic, although the conceptual shift from imperial sovereignty to popular sovereignty took place in 1946, the people were granted fundamental rights without the real experience of Western revolutions. As Prof. Higuchi pointed out, this might lead to the fact, that even today the Chrysanthemum Taboo is deeply rooted in the society, “despite the constitutional guarantee of free speech.”¹⁰ This means, that the Emperor was deprived of sovereignty in 1946, but still today he is granted high respect which places him “far above” ordinary Japanese citizens.

7. Conclusions

On the basis of the aforementioned we may conclude the followings. The Japanese Constitution of 1947 corporate popular sovereignty whereby the people were granted “most high and perpetual power” according to Bodin’s definition. The Japanese electors became the source of the supreme power through their MPs in Diet, which is the “highest organ of the state power” according to Article 41 of the Constitution.

The new Constitution abolished imperial sovereignty and the Emperor became symbol of the state and the unity of the people, but this didn’t entail significant changes to the role of the Emperor in the national polity. This also means that the Emperor doesn’t only perform formal tasks and fulfils a moral role, but still today in reality expresses authority.

As the Constitution was put into force in May 1947, nobody could forecast the scope of “shōchō”. More than 60 years later we may see that the Japanese term of symbol involves several interpretations which are different from the original word. This might stem from the fact that several Pre-war traditions and customs could not be abolished in 1945–46, like the principle of “kunmin ittai” (oneness of the Emperor and his people).

To sum up, dividing sovereignty into formal and practical side might be the key to understand the unique characteristics of Japanese popular sovereignty and constitutional monarchy. Moreover, the investigation of practical application of theoretical concepts may add to our understanding about Japanese legal culture, about comparative constitutional law and history.

¹⁰ TAKAMI op. cit. 24.