

Hiroshima, America, and the Constitution

～ A Talk of a Japanese Professor of Law with a Disability ～

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2014 年 9 月から数か月間、アメリカ合衆国最古の州立大学であるノースカロライナ大学で長期出張の機会を与えられた。同年 11 月 12 日、同大学で講演を行った。その内容については帰国後様々の機会に触れてきたが、英語の原稿そのものはどこにも発表していない。退職を控え、広島大学が与えてくれた貴重な果実のひとつを残したいと考えた。すでに相当の時間が経ち時機を逸する内容も含まれているが、講演の内容を以下に記したい。

■introduction

The American begins a lecture by a nice joke. If that is the case, do you know what the Japanese begins with? The correct answer is like that. We, the Japanese begins with the excuse. Because I am Japanese, I must say an excuse. My English is terrible. You may not say, “It is not necessary to say such a thing. I understand it just to have heard it one second.” It is the essence of the Japanese culture not to say even if you think so.

■self-introduction

We now proceed to the main issue. At first let me introduce myself.

I was born and raised in Hiroshima, Japan. Now I teach and research constitutional law at Hiroshima University.

And, since I was seven months old I have been living with crippled legs and right arm weak of muscular strength resulting from poliomyelitis.

Polio was known as the disease that former President Franklin Roosevelt suffered from, and thereby the study of polio seemed to advance, but, in fact, he seemed to have a different disease called Guillain-Barre syndrome.

Being disabled had a great effect on my way of life. I lived in the facility of children with physical disabilities since 5 years old. I spent ten years being segregated in the facility only for children with disabilities, I had both happy and tough times, but we were forced to realize how we were far apart from "normal". After I finished living in the facility, I entered a "normal" high school.

It was reported in the local newspapers that I had been admitted from the facility to a common high school. I thought that society did not treat people with disabilities equally. This is because they were surprised for the child with a disability by a commonplace to enter the high school. They treated it as if it was a great event.

■outline of my talk

For me having such a background, the constitution which guarantees human rights and pacifism is very important. And the United States which brought the constitution to Japan is special for me. Human rights are the important idea which changed my life, and pacifism continues being a thread of guidance for me living in Hiroshima.

Today, I want to talk to draw a comparison between American and Japanese societies from the viewpoints of me as a constitution researcher and the person with a disability.

(1) Japanese Constitution and the United States

■Japan and United States

An American historian points out the conflict with the international intention and the traditional intention in the undercurrent of the Japanese history.

※James L. Huffman, *Modern Japan -A History in Documents-*, Oxford University Press, New York, 2004

The same tension—between a thirst to understand foreign institutions and a determination to assert and preserve native traditions—continued to shape the whole of Japan’s modern era, propelling change at times, inviting calamity at others. (at 12)

- ・ ancient Japan — China
- ・ modern Japan(mid-1800s ~)— Western Powers
- ・ post-World War II (1945 ~ present)—United States

I agree with this analysis. Particularly, in terms of the legal system, it is certain that Japan came under an overwhelming influence from the foreign countries.

Ancient Japan’s legal system was imported from China. After the Meiji Restoration, Japan established a modern legal system by learning from Germany, France and other countries. For example, after the controversy between French democratic model or German imperial model the Meiji Constitution (Great Japanese Imperial Constitution) was established in 1889, under overwhelming influence of Germany.

After World War II, Japan came under influence of the United States. Especially, as you know, the present Japanese Constitution was drawn up under American guidance.

■Constitution of Japan (1946)

I omit the details, but the enactment of the Constitution of Japan in 1946 was the product of the history that some following factors overlapped. First, Americans on occupation in Japan had a sense of duty and strong enthusiasm for non-militarization and democratization of Japan. Secondly, Japanese political leaders tried resisting against the occupation army because they were deeply attached to Japanese tradition, but they also had a sense of duty of constructing modern Japan. Finally, at time of the establishment of the Japanese constitution, the Cold War had not yet gotten into full swing, so idealistic atmosphere was strong.

Conservative political leaders in Japan had a feeling of resistance for the Constitution coerced by the foreign country after the war throughout. That feeling is indicated in the present argument over constitutional reform and the right of collective self-defense.

But I think that Japanese people in general receive the baseline of this Constitution. It shows that this constitution has never revised. This may be because the Japanese people do not mind such as the constitution very much. I will go into detail later on in the presentation.

But in Japan, it is a known fact to show a stronger vector of the traditional recurrence sometimes. The tendency seems to be strong recently. The constitutional amendment draft of the Liberal Democratic Party announced two years ago proposes to change present Constitution Article 11 in this way. As a reason of correction, the party describes it as follows.

※present Constitution of Japan (1946)

Article 11. The people shall not be prevented from enjoying any of the fundamental

human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.

※Liberal Democratic Party Constitutional Amendment Draft (04/27/2012)

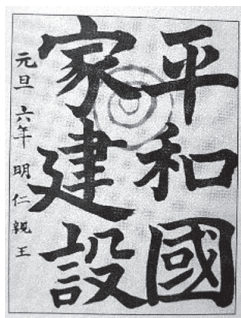
Article 11. The people shall enjoy any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution are eternal and inviolate rights.

“Because this provision was based on the theory of God-given human rights of Europe (that is, theory of natural rights of man), we changed it.”

If things which Japan originally did not have is no use, are the Chinese character (Kanji), science and technology and hamburger no use?

■Article 9 – Pacifism

I think that it is pacifism to be one of the most important idea brought by the Constitution of Japan.



“Constructing A Peaceful Nation”
Imperial Prince Akihito, when he
was eleven-years-old
Jan. 1, 1946
(James L. Huffman, Modern Japan -A
History in Documents-, Oxford University
Press, New York, 2004)

By the way, Japan has a custom called kakizome, the calligraphy practice to write important things at the beginning of the New Year. This is a calligraphy written by Imperial Prince Akihito, the present Emperor [at that time], when he was eleven-years-old on new year's day of 1946, the year after the end of World War II. It was

“constructing a peaceful nation” that the prince of the primary schoolchild wrote. This shows symbolically that then Japanese people thought peace to be precious.

※Constitution of Japan(1946), Article 9

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized. . . .

In Chinese-Japanese war & WWII, many Japanese were hurt and injured many people of other countries. The Constitution of Japan Article 9 to provide renouncement of war and non-maintenance of forces did not come out of the idealism, and it was a product of the political compromises in international relations of those days. I do not think that then the Japanese understood the historic significance to have of Article 9. But many Japanese people received Article 9 with solid sense from their own experiences full of hardships.

For the people who lived in Hiroshima, the significance of this article would be great among other things. There continues to be effects of the event 69 years ago like it happened yesterday. The mother of my wife is an Atomic-bomb victim. For people in Hiroshima, Article 9 is more meaningful, even if there are differences in the political positions.

■fundamental human rights

Another inheritance that the Constitution brought in the Japanese society is fundamental human rights.

It was when I was a high school student that I knew the weight of the term human rights with an actual feeling. Everyone but me was a healthy student. It was an abnormal circumstance for me. I was not bullied, but I was troubled by the sense of isolation and inferiority. At such time, I encountered the provisions about constitutional human rights in the class of social studies.

※Constitution of Japan(1946)

Article 97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.

Article 13. 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 considerations in other governmental affairs.

“fruits of the age-old struggle of man to be free” ! “survived the many exacting tests for durability” ! And, “pursuit of happiness” ! These quotes that Americans conveyed to the Japanese with a sense of mission and desire touched my heart over a national border and the times. It was an encounter with the universe that could change the reality full of pain. I had a feeling that my view of the world changed.

Many people who were in the disadvantageous position of the world would have acted to reform their own difficult situations being awakened to their own dignity by knowing human rights.

I visited Negro Leagues Baseball Museum in Kansas City, Rosa Parks Museum in Montgomery last month and The Old Slave Mart Museum in Charleston last week. I was very moved to know that victims of discrimination and prejudice stood up to gain

their own dignity. Words of “am I not a man (woman)?” as a voice of hearts of slaves left a strong impression on me.

This was a voice of hearts of the Japanese persons with disabilities who had been forced to isolation in the name of protection. In recent years Japanese people with disabilities have raised ideas of freedom and the right of self-determination and demanded alteration of the policy for the disabled to the government. I will explain more about this later.

(2)constitutional positioning in the societies—United States and Japan

The United States Constitution is the oldest present constitution in the world. And the Constitution of Japan has not been revised for the longest time.

There is a paper by American jurists who analyzed the constitutions of 188 countries and investigated whether each right is determined by each constitution from 1946 through 2006, by decade.

※Mila Versteeg & David S. Law, The Evolution and Ideology of Global Constitutionalism, 99 California Law Review 1163 (2011)

Rank	Rights-related provision	Japan	U.S.	1946	1976	2006
1	Freedom of religion	○	○	81%	88%	97%
2	Freedom of the press and/or expression	○	○	87	86	97
3	Equality guarantees	○	○	71	88	97
4	Right to private property	○	○	81	83	97
5	Right to privacy	○	○	83	81	95
6	Prohibition of arbitrary arrest and detention	○	○	76	79	94
7	Right of assembly	○	○	73	75	94
8	Right of association	○	×	72	77	93
9	Women’s rights	○	×	35	70	91
10	Freedom of movement	○	×	50	58	88

11	Right of access to court	○	○	68	62	86
12	Prohibition of torture	○	○	37	45	84
13	Right to vote	○	○	63	69	84
14	Right to work	○	×	55	67	82
15	Positive right to education at state expense	○	×	65	65	82
16	Judicial review	○	×	25	51	82
17	Prohibition of ex post facto laws	○	○	41	60	80
18	Physical needs rights	○	×	44	57	79
19	Right to life	○	○	33	41	78
20	Presumption of innocence	×	×	8	37	74
60	Right to bear arms	×	○	10	4	2

Human rights provisions of Japanese Constitution meet all higher 19 items of the rights that became just mainstream in the world.

■why does the constitution exist?

Both Constitutions may seem to take root in each country firmly. But I see both Constitutions' positioning in each society to be significantly different.

First of all, I think the difference in understanding about the constitutional significance of existence in the two countries is major.

About *raison d'être* of constitution, it is written in an American constitutional book directed at citizens as follows.

“Every society sets rules to live by. Our Constitution established the United States government and determined its relationship with the people and the individual states.”
(at 9-10)

“The Constitution not only designed a government but also placed limits on it to prevent arbitrary rule.”(at 10)

Here, constitutional significance is explained as “legal norm empowering government” and “legal norm limiting government”. This is a justifiable recognition

for the constitution based on the constitutionalism.

(Donald A. Ritchie & JusticeLerning.Org, *Our Constitution*, Oxford University Press, New York, 2006)

I think that the American people probably do not make an objection against such an explanation. But, in Japan, it cannot be said that this becomes the common sense. In the beginning of constitution class for the freshmen of Hiroshima University, I say that a constitution is not a rule to restrain people, but it is intended to limit the power of the state. Many students are surprised very much. This is not because students don't study hard. It is because this point is not emphasized by the education of schools.

Secondly, In American politics everything comes down to the Constitution. In a book for citizens on the Constitution, it says,

“In American politics everything comes down to the Constitution. No one disputes its status as the basic document that describes our system of government, yet we disagree about what it means.”(Morgan Marietta, *A Citizen's Guide to the Constitution and the Supreme Court*, Routledge, New York, 2014 (at 1))

Since I came to the United States, I read newspapers which I can access on the internet carefully every morning. What I understand is that most problems can become the constitutional issue in America.

Both supporters and dissenters of same-sex marriage perform argument based on constitutional rights. Judge Robert J. Shelby, whom President Barack Obama appointed to the U.S. District Court in Utah last year, issued an opinion on Friday declaring that a right to same-sex marriage is "deeply rooted in the nation's history and implicit in the concept of ordered liberty." (CNSNews.com 12/21/2013)

On the other hand, two pastors in Idaho, who fear they could be penalized for refusing to perform newly legal gay marriages at their private wedding chapel, have filed a lawsuit, saying an Idaho anti-discrimination law violates their right to free speech and religious liberty. (Reuters,10/12/2014)

For the Ebola crisis, constitutionality of precautionary measures is national subject of concern.

Nurse Kaci Hickox has been released from a New Jersey-imposed quarantine based on her possible exposure to West Africa Ebola patients.

“This is an extreme that is really unacceptable, and I feel like my basic human rights have been violated,”Hickox said. (National Constitution Center, 10/27/2014)

How is this in Japan? A lawyer told me with a straight face that he was mostly not conscious of the constitution since graduation from university. When I took out a written opinion based on the constitution in a certain criminal case, the court did not handle it seriously. In Japan, it cannot be said that the constitution often become the standard of evaluation at the trial not to mention in everyday life. I feel envious of the constitution in the American society.

But, in other words, this may mean that the United States is a society which must guarantee to go by the constitution.

I spend most of my vacant time watching TV. Of course this is because I want to be used to English language. Because my English is terrible. I am surprised that there are many Commercials of law firms and court programs such as Judge Judy, The People’s Court, Judge Joe Brown. How much do American like laws? But I feel discomfort in law being publicized so much. Is the median between Japan and the United States approach just right?

(3) strength of liberty

■ strength of liberty in United States

I think the highest merit of the United States to be strength of liberty.

It is Barnette case that I recall vividly in United States Supreme Court decisions.

West Virginia State Board of Education on January 9, 1942, adopted a resolution ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag."

In the lawsuit raised by Jehovah's Witnesses who refused the national flag salute, and were removed, the Supreme Court decided as follows and accused the act of the state, even in World War II. "The action of a State in making it compulsory for children in the public schools to salute the flag and pledge allegiance violates the First Amendment. Under the Federal Constitution, compulsion as here employed is not a permissible means of achieving "national unity." (West Virginia State Board of Education v. Barnette, 319 U.S. 624 [1943]). I remember like it happened yesterday that I read this decision when I was a student and was impressed.

But it may be an overstatement that the United States always guarded liberty and equality even under war. Shortly after the Imperial Japanese Navy attacked Pearl Harbor, President Roosevelt issued an Executive Order authorizing to remove all individuals of Japanese ancestry from designated "military areas" and place them in internment camps. In the suit about constitutionality of what is known as the Japanese American internment, the Supreme Court decided as follows. Although legal restrictions based on race immediately suspect, the Japanese was not excluded because of hostility to his race, but because of the military urgency of the situation, the measure was permitted. (Korematsu v. United states, 323 U.S. 214 [1944])

This shows that when a nation faces a crisis, freedom and equality become easy to be downplayed for reasons such as national unity, military urgency and/or prevention of infection.

There were superior dissents not to adapt to the situation even in the national crisis in the United States. Justice Jackson stated that the nation's wartime security concerns were not adequate to strip Korematsu and the other internees of their constitutionally protected civil rights, and Justice Murphy ruled “I dissent, therefore, from this legalization of racism It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.”

It's so great!

I like America because it admits to an error openly. Mr. Korematsu's conviction was overturned decades later after the disclosure of new evidence challenging the necessity of the internment. The evidence had been withheld from the courts by the U.S. government during the war. Both Congress and President perform the honorary recovery of the Japanese-Americans. Civil Liberties Act of 1988 contained a formal apology to the Japanese Americans interned during the war, and in 1998, President Bill Clinton awarded Fred Korematsu the Presidential Medal of Freedom.

■In Japan?

On the other hand, what kind of situation would then Japan be in? The Maintenance of the Public Order Act (Chian-iji-ho) punished organization and participation of any group that advocates the abolition of the Emperor system and socialism. Under this law, many liberalists and priests were detained as well as communists.

After such an experience, mental freedoms are guaranteed in the present Constitution. Currently Japan is governed on a different principle from prewar time.

But I am not confident whether there is the readiness that the Japanese government and the nation refuse to compromise on liberty even if we encounter a national crisis.

(4) excess of liberty ?

■negative election Ads

At the sight of me who yearns for liberty like this, I think that there is an aspect of the excess of the liberty in the United States. I was dumbfounded by the election Ads that I watched on TV at the hotel on the first night in the United States.

Although I knew negative campaigns were permitted in the United States, I was slightly saddened by them when I saw with my own eyes. I thought that I felt this way because I was Japanese and that it might be natural for the American people.

It did not seem to be so. In 2014, in the midterm elections for the Senate, North Carolina had the most intense negative campaigning in the country. The news that a 3rd grade pupil at an elementary school wrote a letter of complaint to both candidates appeared in the newspaper. She told, “All I hear in your ads are you saying mean things about each other.” “Seeing the ads on TV makes me sad and I don’t want to vote.” (The News & Observer 10/28/2014) “”

At around the same time, we got news that the Ministry of Justice resigned in Japan. The reason of resignation was that it was the election law violation that she distributed round fans (Uchiwa) to the voters of her electoral district. Japanese election law punishes that politicians give voters money or material. Though Ministry Matsushima answered that uchiwa is not material, but discussion memorandum, she resigned after all.

In Japan, election campaigns are regulated strictly. The political party can do a TV ad, but the candidate individual cannot do it. The use of the internet is limited strictly too. The upper limit is set so that money is to be usable for campaign. These are

significant limitation of the political speech, but are justified on the ground of maintaining fairness of election. By the result, the election of Japan is criticized to only calling the name repeatedly.

The freedom of speech is important. Active controversy is essential in order to maintain the democracy. The American way is more right in this sense. Like Japan, it goes too far to prohibit by the law widely. But I am worried the electoral campaign concentrates on only saying bad things about the opposition camp on TV and the internet using large amounts of money. I do not think that it helps maintenance of democracy.

■liberty vs public order?

But it is dangerous to limit liberty by national interest and public interest.

At this point I am very fearful of the Constitutional Amendment Draft of the Japanese ruling party. If freedom of speech can be limited by vague words “the public good and public order”, the speech that is inconvenient for the public power will be easily regulated.

※present Constitution of Japan (1946)

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

※Liberal Democratic Party Constitutional Amendment Draft (04/27/2012)

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

Notwithstanding the provisions of the preceding paragraph, activities intended to harm the public good and public order, and associations for such purposes shall not

be permitted.

■”Ordered Liberty”

I borrowed an interesting book in Davis Library. The author insists on “ordered liberty”, “responsibility as accountability to community”, whereas usual liberalism promotes “liberty as license”, “responsibility as autonomy”.

※James E. Fleming & Linda C. McClain, *Ordered Liberty : Rights, Responsibilities, and Virtues*, Harvard University Press, Cambridge, 2013

Liberalism, critics claim, promotes “liberty as license” rather than securing “ordered liberty.” (at 1)

Our Analysis of the rights-responsibilities dichotomy will emphasize that a leading source of the problems in this area is the failure to distinguish and relate two different conception of responsibility: responsibility as autonomy or self-government and responsibility as accountability to community. We examine the tensions between pursuing accountability and protecting autonomy. (at 2-3)

Ordered liberty means “liberty to secure conditions favorable to the pursuit of happiness.” This argument is still abstract, but I want to pursue the way of true liberty.

(5)constitution for people who are in the disadvantageous position

People with disabilities recently have shared desires for the movement for the disabled to attach great importance to personal liberties and autonomy. The symbol is the establishment of Convention on the Rights of Persons with Disabilities. It was the Americans with Disabilities Act of 1990 (ADA) that became a pioneer of such trend.

■Americans with Disabilities Act (1990)

※Americans with Disabilities Act of 1990

Title I (Employment)

Equal Employment Opportunity for Individuals with Disabilities

Title II (State and Local Government)

Nondiscrimination on the Basis of Disability in State and Local Government Services

Title III (Public Accommodations)

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities

The Act prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, state and local government services, public accommodations, commercial facilities, and transportation. Previously, if a wheelchair user with occupational ability is denied employment because of different levels in the company, it was not considered to be discrimination. On one occasion, I went to vote for an election, but I gave it up because the polling place was the second floor. Of course this is the illegal discrimination under ADA.

President Bush said at the signing of this act, "Independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream." These words show that the constitutional human rights which should be guaranteed by all people did not include people with disabilities in effect.

ADA has not solved all problems having to do with people with disabilities. But it is certain that this law became the star of the disabled all over the world. This wave will extend to Japan before long.

■not protection, but liberty

The Constitution of Japan guarantees the right to live (seizonken). “All people shall have the right to maintain the minimum standards of wholesome and cultural living...”(Article 25). Tatsuo Morito of Primary President Hiroshima University significantly contributed to prescribe this right in the Constitution.

The Japanese government concentrated power on the improvement of the welfare for the disabled after the period of the high growth of the economy in 1970’s. However, it made large amounts of facilities, and planned stability and protection for the disabled. That would have the family of the disabled feel relieved, but many persons with disabilities were not able to understand.

For example, my childhood friend with cerebral palsy cannot move his hands and feet. After leaving the handicapped children’s school, he entered a facility in the mountains. When he was over 30 years old, he felt that he didn’t want to stay there until he died, and he began living an independent life borrowing an apartment in downtown. He pursued independent living beginning in Berkley, Ca. We did not need to hesitate to get help of another person to live based on our preference! This thought was fresh for the Japanese people with disabilities. They had known only the right to live, but knew the importance of liberty and equality.

The change to the policy for the disabled based on liberty and equality advances little by little. While we continue to learn from the United States, we will make use of a characteristic to have the right to live in the Constitution unlike the United States and want to make an effort in the future so that human rights are guaranteed by all people with disabilities.

■Japan and America are different, but ...

That is all for the contents which I prepared today.

During my time in the United States, I had been substantially impacted by American figures unlike Japan. It is this scene that I was most surprised to watch on

TV. It was a program that the father of a child of a teenage woman was ascertained by the DNA test. On the TV screen, a neighbor who had an affair with the teenage woman, his wife and a girlfriend were doing the quarrel of the grapple. I was stunned because I have watched such a scene only in a drama.

As days pass, I gradually started to have a deep emotion that people of either country are not very different. As an airplane approaches the airport, we see the world where people live in. Then I think that there may be no such difference in the human activity. I want to prevent myself from putting extreme weight in the difference while understanding the difference.

Thank you for listening.