replaced by legislation conforming to the new charter. This problem has been solved in different ways by various nations in connection with far-reaching constitutional changes. Thus constitutions have sometimes provided that certain principles would become effective only after a certain period from their enforcement or that the existing laws be continued until superseded by new enactments.[34]

In the case of Japan particular care was taken not to jeopardize the prompt efficacy of the challenge expected from the Constitution to the past legal and political order. Therefore, when the Constitution was promulgated on November 3, 1946 it was defined in Article 98 as the supreme law of the nation and provided that "no law, ordinance, Imperial rescript or other act of government, or part thereof, contrary to the provisions thereof, shall have legal force or validity." As the Constitution was to be enforced on May 3, 1947, this meant that either all legislative changes necessary to bring the laws into harmony with the new constitutional principles must be accomplished within six months, or a chaotic legal vacuum would ensue since a large part of the existing law would have lost validity on constitutional grounds. It became clear from the outset that hasty implementation within the fixed time limit would not only discredit the very idea of reform, but also be physically impossible. The Japanese government, to solve this dilemma, resorted to the expedient of submitting to the Diet provisional bills, called bills for temporary adjustment pursuant to the enforcement of the Constitution. This legislation born of an emergency situation, was mainly used for the revision of the Civil Code and the Codes of Civil and Criminal Procedure.[35] It contained only the skeleton of the absolutely necessary revisions of these Codes, leaving much to constructive interpretation by the courts. It was provided that these provisional laws should become invalid at the end of the year 1947, thus indicating their temporary character and causing the Cabinet to speed up the final revision to replace them.[36] In the meantime the reform work has, generally speaking, been completed and all provisional laws have made way for definite revisions of the whole body of the Codes.[37]

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[34] See for instance, the CONSTITUTION OF THE FRENCH REPUBLIC of 1946, Articles 103 to 105, and the WEIMAR CONSTITUTION OF 1919, Articles 167, 169, 173 and 174.

[35] These provisional revisions were enacted by the 92nd Session of the last Imperial Diet, December 27, 1946 to March 31, 1947.

[36] As far as the provisional revision of the two procedural Codes was concerned, this deadline had to be extended subsequently.

[37] The final revision of the Civil Code and the two procedural Codes was enacted in the 2nd Session of the National Diet, which lasted from December 10, 1947 to July 5, 1948.

The temporary legislation, however irregular, proved convenient as a method of trial and error. The experiences made in the transitional period could be utilized in preparing the final enactments. While most of the provisional reforms were retained, some of their innovations did not stand the test of practical application and were either eliminated or altered.

It should be noted that the device of provisional legislation for obvious reasons did not appear feasible with respect to the fundamental changes in the organization and functions of the three branches of the government, as necessitated by the new Constitution. A clear basis for their structure and a definition of the scope as well as the limitation of their powers by legislation was needed at once, since here no gaps could have been filled by judicial interpretation. The Court Organization Law, the first law in the field of judicial administration, was not a revision but a completely new enactment. This was passed by the Diet in its 92nd Session, together with the closely related Public Procurators' Office Law.[38]

(b) *Planning by Agreement.* It will be of interest to the American reader to learn what methods and technique have been applied with regard to the collaboration between SCAP officials in charge of the reforms and the representatives of the Japanese government. A description of this psychologically important aspect will substantiate and corroborate the previous statement that the occupation influenced the legislation by advice and assistance rather than imposed it by the fiat of the conqueror. In all their almost daily contacts with the Japanese the American legal experts were guided by the deep conviction that no revision would survive the occupation unless the Japanese themselves could be persuaded that the new law or provision thereof meant a real improvement and not just the incorporation of an alien element into their law. Because they were conscious of the danger that even "advice" given by members of the occupation to subjects of the occupied nation might easily be misinterpreted as a milder form of direction, they demonstrated their determination to refrain from any high-handedness by throwing the discussion into the open. The revision of the Code of Criminal Procedure may serve as an illustration of a com-

[38] Legislation concerning the legislative and executive branches of the government, such as the Cabinet Law, Law No. 5 of 1947, O.G. No. 237, January 16, 1947; the House of Councillors Election Law, Law No. 11 of 1947, O.G. 269, February 24, 1947; and the Imperial House Law, Law No. 3 of 1947, O.G. No. 237, January 16, 1947 were adopted even before the Court Organization Law.

plicated and, from the standpoint of civil liberties, a most important legal reform. After the preparatory research had been finished, Allied lawyers met Japanese drafting officials "on the working level" in order to receive full information on the Japanese view and to clarify the major controversies involved. The Americans then deliberated for two weeks in order to arrive at an agreement among themselves before they faced the Japanese. When this was done, the sixty odd major problems which remained unsolved were formulated in writing on different "problem sheets," which contained a brief analysis of the controversial issue and proposals for alternative solutions as a basis for the discussion with the Japanese. For the purpose of assisting the Cabinet in drafting the bill for the amendment of the Code, a high-level committee was established. Apart from only four members of the Allied occupation, more than thirty representatives of the Japanese ministerial and legal world took part in its conferences, namely, top officials of the Attorney General and of the public procurators' offices, as well as judges of the Supreme Court. In addition, for the first time in Japan's history the legal profession as such was given the opportunity to contribute to legislative official planning. Representatives of the leading Tokyo Bar Associations were admitted to the conferences. So was the newly established Japanese Civil Liberties Union. The Committee had daily meetings for three weeks in the spring of 1948.

The work with this Committee was one of the most fascinating and inspiring experiences of the American participants. Its progress and final success confirmed their belief that the democratic process is practicable within the framework of a military occupation. The hardship and strain involved in the method applied, was offset by the rewarding result. The atmosphere very much resembled that of a standing legislative Committee in a Western parliament. There was complete freedom of argument and criticism and the Japanese, at first reluctant and cool, made ample use of it after they had convinced themselves that the Allied representatives were genuinely anxious to hear their opinions. The relationship between the occupant and the occupied seemed eventually to be forgotten over the feeling of an international fellowship among jurists who have in common the ardent concern for the improvement of a law. The Allied representatives frequently served as moderators in the controversies between different Japanese groups such as the public procurators, on the one hand, who stressed the interest of the state in a vigorous enforcement of the criminal law, and the

lawyers, on the other hand, who jointly with the representatives of the Civil Liberties Union put the emphasis upon individual rights. As a matter of course, the judges' view was motivated by the endeavor to enhance the prestige of the judiciary and to relieve the courts from an overload of work. Amazingly enough, occasionally the Japanese went beyond the Allied reform proposals and suggested innovations which at first blush had appeared premature. Thus the judges of the Supreme Court successfully advocated a radical simplification of the existing appeal system in the criminal procedure. The result of the conference was agreement on the solution of all problems discussed by the committee. These solutions were usually reached by compromise according to deeprooted Japanese tradition. This might be considered the only deviation from the democratic process, which is characterized by the majority rule. Some timid attempts were made to submit problems after discussion to voting among the Japanese. However, it became clear at once that they disliked to overrule each other because they were afraid that those in the minority might "lose face."

After the termination of the conference, the Cabinet submitted the bill to the Diet in the form finally agreed upon.

It should be emphasized that the active participation of the occupation in the planning for the revision of the Code of Criminal Procedure was the exception due to the significance of this legislation from the standpoint of fundamental human rights. While similar procedures were applied in some of the other revisions, the initiative was left to the Japanese with the occupation representatives restricting themselves completely to the role of observers and critics.

In this connection it may be noted that another form of contact between the occupation and the Japanese legal world has proved extremely useful for the mutual understanding. Regular meetings take place with the judges of the Supreme Court and representatives of the Attorney General's Office, where current problems of the actual administration of justice are discussed. These conferences, informal in character over a cup of green tea, serve also as a source of information on how the new laws are applied in practice, and what further improvements are needed. Semi-official and private meetings with lawyers, University professors, and parliamentarians are designed to provide the reactions and opinions of groups and individuals outside the official hierarchy.

In most of these contacts the real handicap lies in the difference of

language rather than that between Western and Oriental philosophy. When recognized on their merits and analyzed objectively, the two legal systems are not necessarily irreconcilable and might allow a sound synthesis in many respects. To be sure, there remains a nucleus of a conservative or, one may say, reactionary group, particularly among the ministerial bureaucracy and the older judges, who are opposed and hostile to any idea or institution not fully Japanese. But, on the whole, the occupation has resulted in a great eagerness of Japanese jurists to acquaint themselves or to improve their familiarity with Anglo-Saxon law. Many have expressed the wish to travel to the United States and add to this theoretical knowledge the observation of the working in practice of the American legal system. Nothing would, indeed, further promote the mutual understanding between jurists of the continental and common law school as the materialization of such a plan.

II. The Substance of the Legal and Judicial Reforms[39]

1. *Judiciary*

Japanese judges in the past enjoyed functional independence, but their official status and remuneration was that of civil servants. The courts were under the jurisdiction of the Minister of Justice who was responsible for their budget as well as for the appointment and promotion of judges. Obviously, this arrangement endangered genuine independence, inasmuch as ambitious and opportunistic judges were tempted to adjust their opinions to the presumptive wishes of the government. In criminal cases of a political nature resistance to such temptation required a particularly high degree of personal courage and integrity. In addition, the public procurators, in their capacity as prosecutors of the state and administrative officials under the direction of the Minister of Justice, were closely attached to the courts and frequently served as observers of the judges' attitudes. The new Constitution separates the judicial branch of the government from the executive and vests the whole judicial power in a 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.[40]

[39] This Article restricts itself to a brief analysis of the organizational changes connected with the administration of justice and of the revision of the basic legal Codes. No discussion is included of political, social, and economic reforms, such as the Election Laws, the Local Autonomy Law, the National Public Service Law, the labor legislation, and the land reform.

[40] Article 76 of the Constitution of Japan.

The court system continues on a nationwide basis. Although the local entities, such as prefectures, cities, towns, and villages have been empowered to enact local by-laws within the limitation of the Local Autonomy Law,[41] the establishment of prefectural or municipal courts has not yet been authorized, but is under consideration.

The new Court Organization Law[42] sets up a system of inferior courts, consisting of High Courts, District Courts, Family Courts, and Summary Courts.[43] The High Courts have taken the place of the former Appellate Courts, while the District Courts combine the functions of the old District Courts with some of those of the abolished Local Courts. The Summary Courts on the lowest level are an essential innovation, comparable to the American justice of the peace. In criminal cases they also replace the former police courts, which have gone out of existence.

As to jurisdiction, the Summary Court is in charge of less significant claims and tries petty criminal offenses. Otherwise, the District Court is the regular court of first instance. The High Court decides on appeal in questions of both fact and law, while the Supreme Court as the court of last resort is, as a rule, concerned only with issues of law.[44]

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[41] Law No. 67 of 1947, O.G. No. 312, April 17, 1947.

[42] Law No. 59 of 1947, O.G. No. 311, April 16, 1947, as amended.

[43] At the present time there exist eight High Courts, six High Court Branches, forty-nine District Courts, the locations of which roughly correspond to the prefectural districts—228 District Court Branches, 49 Family Courts, 228 Family Court Branches, and 559 Summary Courts.

[44] The Japanese Law distinguishes between *jokoku* appeal, *koso* appeal, and *kokoku* complaint. *Jokoku* is an appeal from a judgment of an inferior court, usually restricted to issues of law and comparable to the French revision. *Koso* is an appeal involving both questions of fact and law. In the civil procedure the character of this appeal as a complete trial *de novo* has been retained, while in the criminal procedure it has been basically altered. (See subsequent article of R. B. Appleton, *Reforms in Japanese Criminal Procedure Under Allied Occupation.) Kokoku* is a complaint against rulings and orders other than judgments of the inferior courts. To give a more precise picture of the somewhat complicated jurisdiction, the Supreme Court as the court of last resort, has jurisdiction over *jokoku* appeals and *kokoku* complaints prescribed specially in codes of procedure. The High Court is basically an appellate court. It decides on *koso* appeals from judgments in the first instance rendered by District Courts; on *kokoku* complaints against rulings and orders rendered by District Courts; and on *jokoku* appeals in civil procedure from judgments in the second instance rendered by District Courts or from judgments in the first instance rendered by the Summary Courts. Only in exceptional cases does the High Court decide as a court of first instance. The Law mentions only the trial of offenses related to Civil War (riot, etc.). The District Court decides in the first instance unless the Summary Court or High Court has jurisdiction. In civil matters it also decides on *koso* appeals and *kokoku* complaints from judgments rendered by the Summary Court. Finally, the Summary Court is in charge of civil claims where the value of the controversy does not exceed five thousand yen (now about fourteen dollars) and of the trial of criminal offenses punishable with fine or lighter penalty and with fine as optional penalty. Only in the case of theft can the Summary Court impose penal servitude not exceeding three years.

In addition to these general rules the jurisdiction of the various courts is created in individual cases by special statutes.[45]

The Court Organization Law, in order to relieve the judges of the Supreme Court from an overload of work, actually one of the gravest problems facing the Japanese administration of justice, provides that not all fifteen judges[46] who constitute the court must participate in the decision of every case however trifling. Decisions may be rendered either through a grand or a petty bench. The details are left to the rules of the Supreme Court,[47] except that the law requires a quorum of at least three judges for the petty bench and the decision of the grand bench, consisting of all justices, when questions of constitutionality are involved or when the Supreme Court wants to deviate from a precedent.[48]

The High Court is a collegiate court which, as a rule, is composed of three judges one of whom acts as presiding judge. Only in the exceptional cases where it tries offenses as a court of first instance must the number of judges be five.[49] The District Court handles cases through a single judge except when the collegiate court consisting of three judges rules otherwise, in certain cases of felonies, and when it acts as appellate court in civil procedure.[50] Finally the Summary Court always handles cases through a single judge.[51]

Recently a new type of court with special functions has been established, namely, the Family Court.[52] One division of this court is concerned with arbitration, conciliation, and limited determination of controversies within the family, such as questions of marital relationship and divorce by agreement, parental power, custody of children, and guardianship.[53] This division has taken over many functions formerly exercised by the family council, which was connected with the old semifeudal house system. The second division constitutes the new Juvenile Court in charge of decisions formerly made by a quasi-official

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[45] Amendment to the Law for the Election of Member of the House of Representatives, Law No. 43 of 1947, O.G. Extra-5, March 31, 1947, Article 81.

[46] The former Supreme Court was composed of thirty-two judges.

[47] Issued in the meantime by Supreme Court Rule No. 5 of 1947, O.G. No. 478, November 11, 1947.

[48] Article 10 of the Court Organization Law.

[49] *Ibid.*, Article 18.

[50] *Ibid.*, Article 26.

[51] *Ibid.*, Article 35.

[52] By an amendment of the Court Organization Law. See Law No. 260 of 1948, O.G. No. 819, December 21, 1948.

[53] These functions, based on the Law for the Adjustment of Domestic Relations, Law No. 152 of 1947, O.G. No. 507, December 6, 1947, were initially exercised by the Court of Domestic Relations as a branch of the District Court, and have now been absorbed by the new Family Court.

organization, the Judicial Protective Society under the control and supervision of the Ministry of Justice. The change puts the decision of the socially important cases of juvenile offenders into the hands of an independent judge.[54]

The principle according to which judicial power shall be exclusively vested in the regular courts is implemented by the requirement of the Court Organization Law that courts shall decide all legal disputes.[55] This provision has brought about the abolition of the Court of Administrative Litigation in Tokyo. The jurisdiction of this court had been greatly restricted by law. The nonexistence of inferior administrative courts resulted in considerable slowness of procedure, and the preponderance of former ministerial officials among the judges did not contribute to the development by the court of a forceful protection of individual rights from bureaucratic interference. Such experiences discouraged the continuation of any system of administrative courts in spite of the fact that in Japan as in France and Germany, where such system proved far more effective, the legal theory clearly distinguishes between public and private law and holds that questions of public law should not be decided by the regular but by administrative courts.

As a consequence of these fundamental changes, the position and prestige of the new Supreme Court (*Saiko Saibansho*) have been strengthened tremendously. There is no identity of this court with the former highest tribunal (*Daishinin*), which among other differences, lacked the rule-making power as well as the power of judicial review.[56] There is no implementing legislation on the scope or nature of these new prerogatives, and development of both must be left to the interpretation of the Supreme Court itself. As to rule-making, the language of the Constitution by authorizing the court without modification to determine "the rules of procedure and of practice" might suggest that the procedural codes should be written by the Supreme Court instead of being enacted by the legislature. While in the conferences on the revision of the Code of Criminal Procedure individual judges expressed such view, the Supreme Court did not officially oppose the enactment

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[54] See Amendment of the Juvenile Law, Law No. 168 of 1948, O.G. Extra, July 15, 1947, which provides the details of the procedure before the Juvenile Court; and Amendment of the Reformatory Law, Law No. 169 of 1948, O.G. Extra, July 15, 1948, which is designed to modernize the institutional aspect of law enforcement against juvenile offenders.

[55] Article 3, which however, explicitly admits "preliminary determination by executive agencies."

[56] These powers are conferred on the new Supreme Court by Articles 77 and 81 of the Constitution.

by the Diet. However, according to agreement reached, the detailed elaboration of the Code was left to rules of the Court and carried out minutely.[57]

It remains to be seen whether the Supreme Court will apply its power of judicial review along similar lines to those developed in the United States during the past 150 years. Up to now no Diet statute has been declared unconstitutional in Japan. However, without defining the meaning of judicial review, several laws refer to this power. While the initial doubt resulting from the language of Article 81 of the Constitution, regarding the right of the inferior courts to determine on questions of constitutionality has been removed by the actual recognition of such right, the procedural Codes insist that whenever the consitutionality of legislative or administrative acts is challenged, *jokoku* appeal to the Supreme Court be admitted.[58] Furthermore, as has been mentioned before, questions of constitutionality must be decided by the Grand Bench of the Supreme Court.

The Constitution provides the principles for the appointment and removal of judges. While the fourteen associate judges are appointed by the Cabinet,[59] the Emperor appoints the Chief Justice of the Supreme Court upon designation of the Cabinet.[60] Other possibilities would have been either to require approval of the appointments by the Diet or to have the judges elected by the people. Both possibilities were considered, but rejected because of the undeniable danger that under the conditions prevailing in Japan the choice of the highest judges would be dependent upon the whims of party politics of an immature quality and upon bossism[61] apt to breed corruption. Still the framers of the Constitution felt that some check on the appointments of the Supreme Court judges was needed.[62] Therefore, a popular review of

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[57] See article of R. B. Appleton, footnote 44.

[58] See Code of Civil Procedure, Law No. 149 of 1948, O.G. Extra, July 12, 1948, Article 409-62; and Code of Criminal Procedure, Law No. 131 of 1948, O.G. Extra, July 10, 1948, Article 405.

[59] Article 79 of the Constitution.

[60] Article 6, Par. 2, *ibid.* This mode of appointment was inserted by a Diet amendment in order to give the Chief Justice a prestige equal to that of the Prime Minister, who is also appointed by the Emperor, after having been designated by the Diet.

[61] *Oyabun-Kobun,* feudal boss-henchman relationship. For illustrations see Justin Williams, *Post War Politics in Japan, A Symposium, Party Politics in the New Japanese Diet,* in POLITICAL SCIENCE REVIEW, Vol. XLII, December 6, 1948, p. 1171; and William Costello, *Democracy vs. Feudalism in Post-War Japan* (Tokyo, 1948), pp. 27, 29, and 85.

[62] The Court Organization Law in order to guide the Cabinet in its choice established a Consultative Committee for the appointment of judges to give suggestions regarding candidates to the Supreme Court. This committee acted on the occasion of the first appointment of the judges. However, due to the reluctance of the Japanese to

judicial appointments to the Supreme Court at ten-year intervals has been provided as an interesting constitutional innovation. In connection with the first general election of the members of the House of Representatives following the appointment of an individual judge of the Supreme Court, the voter is given an opportunity to express the desire to have that judge removed from office. When the majority of the voters favor the removal, the judge must be dismissed. The same procedure is repeated after the judge has been in office for ten years.[63] Details pertaining to this popular referendum, which constitutes a recall and not an election, are provided by the Law for the People's Examination of the Supreme Court Judges,[64] which among other features, introduces a simple form of printed ballot for the use of the voter, something new in Japan's electoral history. On January 23, 1949, in connection with the last election to the House of Represenatives fourteen judges of the Supreme Court, all newly appointed, were subject to this review, which resulted in what may be regarded a major victory on their part. Ninety-nine and six tenths per cent (99.6) of the total number of voters to the House of Representatives participated in the referendum and only 4.4 per cent of the participants voted in favor of the dismissal of judges. Still, by evaluating this seeming vote of confidence and its effectiveness as a popular check, the fact should be taken into account that the judges had been in office only for one year and a half and that the people knew little about their attitudes and decisions. Whether it will ever be possible to awaken and maintain interest in the members of the Supreme Court among large segments of the population appears more than doubtful.[65] The writer is inclined to interpret this popular review as a symbolic gesture of emphasis on the people's sovereignty rather than as an effective check on the appointment of the justices.

The appointment of the judges of inferior courts is also in the hands of the Cabinet which, however, must choose the appointees from a list of persons nominated by the Supreme Court.[66] This important provi-

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reject suggestions coming from outstanding figures of public life, such as the committee members, this device virtually had the effect that the power of appointment shifted from the Cabinet, where it belonged constitutionally, to the committee. A subsequent amendment, therefore, abolished the committee.

[63] See Article 79, Pars. 2 to 4, of the Constitution.

[64] Law No. 136 of 1947, O.G. No. 493, November 20, 1947.

[65] It will, however, be easier than before to satisfy such interest since the Court Organization Law (Article 11) has introduced the rule for the Supreme Court that dissenting opinions must be expressed in writing, while hitherto, in accordance with continental practice, the decision revealed only the opinion of the majority.

[66] Article 80 of the Constitution.

sion actually empowers the Supreme Court to determine the personnel policy regarding these judges. Their tenure of office is ten years with the privilege of reappointment, while formerly all judges were appointed for life. However, a retirement age has been fixed at seventy years for judges of the Supreme Court and at sixty-five years for judges of the inferior courts.[67]

Different qualifications are specified for judges of the Supreme Court and judges and assistant judges of the inferior courts. Summary Court judges are recruited under less rigid requirements.[68] The principle is that a certain period of experience as judge, assistant judge, public procurator, lawyer or university professor of law is a prerequisite for he appointment to the first category. In the case of the Supreme Court judges, the appointment must be made from among "persons of broad vision and extensive knowledge of law" as well as of a minimum age of forty years. However, only ten out of the fifteen judges must comply with specific requirement of a long legal career, while with regard to the remaining five the door is left open to the selection of outstanding personalities without the traditional training and background in jurisprudence.[69]

Apart from the removal by popular review, termination of the tenure of office due to the age limits, and the expiration of the ten years tenure of inferior judges, the status of the judge is guaranteed. No judge may be removed from office except by public impeachment, or unless judicially declared mentally or physically incompetent, nor shall he be transferred, against his will, to any other court or official position. No disciplinary action against judges shall be administered by any executive organ or agency.[70] The Constitution entrusts the impeachment to a court made up of members of both Houses of the Diet.[71] In implementing this important provision, the Judge Impeachment Law[72] establishes an Impeachment Committee consisting of twenty members of the House of Representatives, which performs the function of indictment, while an Impeachment Court of fourteen judges, seven from each House of the Diet, is in charge of the decision. Impeachment

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[67] Court Organization Law, Article 50. In a subsequent amendment the maximum age was raised to seventy years for judges of the Summary Courts due to difficulties of recruiting men for this low-paid category.

[68] Articles 41 through 44 of the Court Organization Law.

[69] One of the present members of the Supreme Court, Kuriyama Shigeru, for instance, has had a long career as a diplomat in European countries.

[70] Article 78 of the Constitution and Article 48, Court Organization Law.

[71] *Ibid.*, Article 64.

[72] Law No. 137 of 1947, O.G. No. 493, November 20, 1947.

trials must be public. Any person may lodge a motion of impeachment with the Committee, which may also take action on its own initiative. Because of the reluctance of the courts to apply for impeachment procedure, a subsequent amendment[73] imposed the duty on the presidents of inferior courts to notify the Chief Justice of the Supreme Court whenever they consider that there is a reason for removal by impeachment of a judge under their jurisdiction. The Chief Justice must then request the committee to institute an indictment for removal. He is also bound to do so if he has arrived at the same conclusion independently of such notification.

Dismissal of judges for physical or mental incompetency, as well as disciplinary punishment in cases where no removal is deemed necessary, remain within the prerogatives of the courts on the basis of the Law Concerning the Status of Judges and other Court Officials.[74] When a judge of the Supreme Court or of a High Court is involved, decision is rendered by the Supreme Court, in all other cases by the High Court of the district, in which the judge holds office. Disciplinary punishment may be a reprimand or a nonpenal fine not exceeding 10,000 yen.

This brings to a close the analysis of the main reforms designed to create an independent judiciary. This aspect of the legislation deserved some elaboration because the fateful question of whether the rule of law will eventually be triumphant in Japan, as its advanced Constitution visualizes, depends foremost upon the caliber of her judges and upon the courage, integrity, and enthusiasm with which they will apply and construe the law. The legal framework for the independence of the judicial branch of the government is certainly laid. It remains to be seen whether the Supreme Court will live up to its hard and lofty task of being a guardian of the new Constitution. This task requires dynamic strength as well as imagination. There are unavoidable weaknesses in the system, such as the appointment power of the Cabinet. It is, of course, too early to judge about the first Supreme Court under the new Constitution. The period of adjustment to its own powers is still going on and no spectacular decisions have been rendered up to the present time. However, if we remember the slow growth of our own judicial institutions, we cannot possibly expect miracles with regard

[73] Law No. 93 of 1948, O.G. Extra, July 5, 1948.

[74] Law No. 127 of 1947, O.G. No. 475, October 29, 1947. Originally this Law covered also court officials other than judges, such as secretaries and clerks. In the current session of the Diet its application has been restricted to judges, since the other court officials are now temporarily subject to the National Public Service Law (Law No. 120 of October 21, 1947, O.G. No. 468). This law places the judges into the special service, which actually means their exemption from the general civil service rules.

to the tempo of development. After all, the present group of Supreme Court judges, predominantly men of advanced age, cannot "escape history." The former judges or administrative officials among them must learn to overcome the deep-seated attitude of traditional subservience to the ministerial bureaucracy and must become conscious of their independent status. This consciousness apparently comes more easily to the former lawyers in the Court who, unburdened by an official past, seem to be willing to put on a fight against interference from other branches of the government. The recent public protest of the Supreme Court against the investigation of court decisions by the Judicial Committee of the Upper House,[75] regardless of its merit, may be considered a promising indication that the Supreme Court is determined not to surrender the powers conferred upon it by the Constitution. Still more important, however, will be the extent to, and the fervor with, which Japan's highest tribunal will protect the constitutional rights of the people.

2. *Public Procurators*

The clear-cut separation of the public procurators from the courts, to which they had been attached in the past, has been the logical consequence of the establishment of a judiciary no longer dependent upon the executive. Their status and organization are dealt with in the Public Procurator's Office Law.[76] They continue to be administrative officials of the national government under the general control and supervision of the Attorney General,[77] although the Public Procurator

[75] The Committee, on the basis of Article 62 of the Constitution, according to which "each House may conduct investigations in relation to government and may demand the presence and testimony of witnesses, and the production of records," had investigated individual cases decided by the courts and criticized the wisdom of the decisions as well as the attitudes of judges. The House of Councillors refuted the charges of unconstitutional interference by referring to the principle that the Diet is the "highest Organ of State power." (See *Nippon Times* of May 21, 24, and 28, 1949.)

[76] Law No. 61 of 1947, O.G. No. 311, April 16, 1947.

[77] The former Ministry of Justice has been replaced by the Attorney General's Office in connection with the reorganization of the Police (Law for Establishment of the Attorney General's Office, Law No. 193 of 1947). This change was mainly motivated by the separation of the courts from the executive branch of the government, which in the field of administration of justice left to the Ministry of Justice only the supervision over the public procurators. It was felt that a reorganization on the central level should emphasize the importance of such development. This resulted in the abolition of the Ministry of Justice, the name of which had been associated with ill-fated experiences of the past. The mission of the newly created Attorney General's Office has been defined in the law as that of the supreme legal advisor to the Cabinet. In this capacity it is also in charge of drafting legislation of bills to be submitted by the Cabinet to the Diet. Thus the Attorney General's Office has absorbed functions formerly performed by the Legislative Bureau of the Cabinet which also was dispensed with "in the interest of governmental efficiency and economy." A Civil Liberties Bureau has been established in the Attorney General's Office, something never heard of before in a Japanese bureaucratic agency.

General as the chief of all procuratorial organizations enjoys a considerable functional independence. Thus, in individual cases the Attorney General can control public procurators only through the Procurator General.

As far as litigation is concerned, the public procurators are under the rule-making power of the Supreme Court to the same extent as the defense counsel. Their role has essentially changed to that of a party in the trial, a fact which finds its symbolic expression in the transfer of their seats from the place beside the bench to one in front of and below the court, on an equal level with the defense counsel.

The procurators' organization is made up of separate offices which correspond to the new type of courts. The Supreme Procurator's office, headed by the Procurator General, corresponds to the Supreme Court; the High Procurators' offices, headed by Superintending Procurators, to the High Courts; the District Procurators' offices to the District Courts; and the Local Procurators' offices to the Summary Courts.

As to the functions of the public procurator, it should be noted that he is the sole agent of the government in charge of prosecution. He may also investigate any offense and is responsible for the execution of criminal judgments.[78] Additional tasks are entrusted to him by specific laws. Thus he represents the public interest in divorce cases and suits concerning the status of children.

As in the case of the judges, the possibility of election was considered but finally rejected for similar reasons. The public procurators remain appointed officials. However, here again some check on their appointment was deemed advisable. Therefore a high-level committee was established by an amendment to the law[79] for the purpose of advising the Attorney General, either on his request or on its own initiative, with regard to the question of whether or not a public procurator should be removed from office as unsuitable to perform his duties. A periodic examination of all procurators is to be conducted by the committee every three years. This "Committee for the Examination of Qualifications of Public Procurator" consists of members of both Houses of the Diet, the Procurator General, and representatives of the Attorney General, the Supreme Court, the bar associations and the law schools.

In addition to this outside influence in the personnel policy, a popu-

[78] His part in the Criminal Procedure is treated in the article of R. B. Appleton, footnote 44.

[79] Law No. 31 of 1948, O.G. Extra, May 1, 1948.

lar check upon the functions of the public procurators has been introduced in the form of an Inquest of Prosecution,[80] which might be characterized as a mild beginning of a grand jury system. It investigates cases where the procurator did not institute public action, although he should have done so. The findings of the Inquest are, however, of an advisory nature only.[81]

3. *Lawyers*

It was realized early that the change in the position of the Japanese judiciary, if it was to result in a modern administration of justice, should be accompanied by an elevation of the legal profession. In the hierarchical society of the past the lawyers did not enjoy the same prestige as government officials or judges. Their influence on legislation was negligible and their role in public life at large less significant than that of their brethren in Western countries. In the transitional phase, since the termination of the war, the leading bar associations of Japan made a concentrated effort to free the lawyers from governmental supervision formerly exercised by the Minister of Justice and continued by the Attorney General. There was general agreement on the need for relaxation of these controls. However, the question of whether the bar associations should be given complete or semi-independence became the subject of lengthy controversies between the three organizations concerned. While the Attorney General favored some limited continuation of the supervisory functions of his office, the Supreme Court held that the lawyers should be subject to its rule-making power and control. The bar associations, on the other hand, rejected both alternatives and strived for full autonomy of the legal profession Due to this difference of opinions the revision of the Lawyers' Law[82] had to be delayed for a long time, the occupation taking no position with regard to the issue. Gratifyingly enough, it was finally settled among the Japanese on the basis of the view of the bar association. At present a sweeping amendment to the Lawyers' Law, drafted as a member bill by the Attorney General's Committee in the lower House, is under discussion in the Diet.[83] As long as it has not been passed into law, a detailed analysis of its contents would be premature. Suffice it to point out here that, generally speaking, the affairs con-

[80] Law No. 147 of 1948, O.G. Extra, July 12, 1948.
[81] On details regarding this institution see article of R. B. Appleton, footnote 44.
[82] Law No. 54 of 1933.
[83] [EDITOR'S NOTE: This revision of the Lawyer's Law has since been passed by the Diet.]

nected with the legal profession will be left to autonomous self-rule by the bar associations. A bar association shall be established in the area under the jurisdiction of each District Court, and the Japan Federation of Bar Associations will be the nation-wide top organization with the various bar associations as well as the individual lawyers throughout the country as its members.

All bar associations will have broad regulatory powers which cover matters such as codes of professional ethics and standards for fees. The rules of the local bar associations are subject to approval by the Federation.

The Japan Federation of Bar Associations keeps a name list of lawyers. Registration in this list is the prerequisite for admission to the bar. Application for registration must be made through the local bar association which the candidate wants to join. Upon recommendation of a Qualification Examination Committee the local bar association may refuse to forward the request to the Federation for specific and legally defined reasons. In this case the applicant may complain to the Federation which, on the recommendation of its own Qualification Examination Committee, either rejects the complaint or directs the local association to forward the request. Similar procedures are provided in case the local association wishes to have the registration of a lawyer cancelled. In both instances the person adversely affected by the determination of the Federation may bring action in the Tokyo High Court.

An important exception from the rule that administrative determination is made by the Federation of Bar Associations is provided for with regard to the admission and disbarment of foreign lawyers. They may be admitted to the Japanese bar even though they do not comply with the usual professional and educational requirement, provided they have a "proper knowledge of Japanese law." There is also a mode of admission to a more limited practice of law by persons qualified as lawyers of a foreign country. If they are not familiar with Japanese law, they may give advice to a foreign national and on questions related to foreign law. Here the Supreme Court passes on both forms of admission after having heard the opinion of the Federation. The same procedure applies to disbarment. Similar regulations are contained in the existing Lawyers' Law which leaves the decision to the Minister of Justice (Attorney General) the admission. However, up to now a foreigner could be admitted to the practice of law in Japan only if the same treatment was granted Japanese nationals in his own country.

By abandoning this principle of reciprocity the drafters of the bill have established a commendable example of good will toward international understanding.

4. *Civil Law*

The reform of the Civil Code was restricted to the Fourth and Fifth Books of this Law, which cover the fields of domestic relations and inheritance. The other three books dealing with general legal principles, Property Law, and Obligations have remained virtually untouched, since no immediate need for a revision of these basic parts existed on constitutional grounds.[84] Yet the revision of the Civil Code, even within this limitation, is of momentous importance for every man and woman, since it directly affects human relationship within the family. The Japanese thinks of himself as part of the family rather than as individual. This attitude, based on Confucian philosophy, has even been projected into the political sphere where the state takes the place of the largest family unit of supreme rank with the Tenno (Emperor) as the *pater familias*. Such attitude has influenced the ethics of Japanese society in manifold ways. Respect of parents and care for relatives by blood and marriage are certainly commendable traits. So is the love of one's country. However, feudalistic influences added to these positive elements the postulate of a complete subordination of the individual to the higher unit whether family or state.[85] Closely connected with such hierarchical set-up was the inferior role of women in Japanese society. The family system, integrated in the Civil Code, was based on these principles. The family unit was not the family in the Western sense, consisting of father, mother, and unmarried children, but a kind of clan group, namely the so-called "house." The head of the house (*Koshu*), usually the oldest male of the group, perhaps a grandfather or granduncle, wielded considerable legal and economic powers over the other members of the house, regardless whether he actually lived with them or not. His consent was required whenever a member of the house wanted to change his residence or be a party to marriage, divorce, or adoption. The sanction for noncompliance was expulsion from the house. The economic implication of such expulsion becomes evident by the fact that the head of the house owned most of the family property, succession to which was tied up with succession

[84] The same is true of the Commercial Code, a partial amendment of which is, however, under consideration at the present time.

[85] Similar doctrines with regard to the state in the Hegelian philosophy, although of different historical origin, greatly influenced the German development.

to the headship of the house. Since he had the duty to support needy members of the family, expulsion from the house frequently meant being deprived of the means for a living.

Obviously, this institution was not reconcilable with the new constitutional principles of individual dignity and equality. Moreover, the Constitution requires that marriage shall be based only on the mutual consent of both sexes and that it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. While this new conception would have made implementing legislation mandatory in any case, the Constitution explicitly demands that "With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce, and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes."[86]

Still, the occupation was extremely reluctant to take the initiative with regard to this legislation. It was clear that the authoritative features of the "house" system were doomed to disappearance. But how far the system as such could be continued in a modified form was a subtle and controversial question, the decision of which it appeared wise to leave to the Japanese themselves. This was one of the important instances where the occupation exercised that self-restraint to which the first part of this article refers. The problem was thoroughly discussed among the Japanese in planning committees, in the press, and in public hearings of the Diet. Strangely enough, the final decision reached was a complete abolition of the house system. This outcome was considerably influenced by the vigorous arguments of leading women. It should be understood that the women are the largest group to benefit from such a radical change in the sphere of domestic life.

The revision of the Civil Code[87] implements this decision and replaces the "house" by the modern small family. Succession into property now takes place at equal shares among descendants, regardless of sex, and the surviving spouse, whether husband or wife, is entitled to legal shares.

All restrictions on the legal status of women as wives and mothers are abolished. This covers management of the wife's property, grounds for divorce, parental power and custody of children. Other important changes along the lines of greater emphasis upon individual inde-

[86] Article 24 of the Constitution.
[87] Law No. 222 of 1947, Official Gazette 520, December 22, 1947.

pendence have been integrated with regard to marriage, guardianship, and inheritance.[88]

Closely connected with the revision of the Civil Code is a reform of the old *Koseki* (Family Registration) system, which was based on the abolished house system. The actual significance of this institution is evidenced by the rule that all essential events in the lives of the people, such as birth recognition, adoption, marriage, divorce, and death, must be registered in order to give them legal effect. While the continuation of registration as such was not considered in conflict with constitutional postulates, but convenient and even indispensable under the Japanese law, the system had to be adjusted to the change in the basic family unit, apart from the need of an overdue modernization and simplification. The new Family Registration Law[89] serves these purposes.

5. *Criminal Law and Procedure*

The need for a modernization of the existing Codes on the basis of a more advanced theory of criminology had been recognized by many Japanese jurists as well as laymen for some time.[90] Nevertheless, projects of an essential revision never materialized. Now a sweeping reform of the substantive as well as procedural elements of the criminal law became imperative in the light of the elaborate safeguards which the new Constitution provided in its Bill of Rights for the protection of the individual involved in the criminal process. The change in the position of the Emperor, the constitutional renunciation of war, and the new principle of equality of the sexes affected important parts of the Criminal Code. The substance of the revision of this Code as well as of the Code of Criminal Procedure will be treated in separate articles.

6. *Habeas Corpus Act*

The Constitution provides that no person shall be deprived of life or liberty, nor any other criminal penalty be imposed, except according to procedure established by law. The broad scope of this provision, the application of which is not restricted to arrest and detention within the criminal procedure, called for the introduction of some form of relief from illegal restraint of personal freedom. In a country where involuntary servitude of women and children had been almost customary, the

[88] An elaborate analysis of the new Civil Code will follow in a subsequent article.
[89] Law No. 224 of 1947, O.G. Extra, December 22, 1947.
[90] Thus an Extraordinary Legislative Committee pointed to the defects of the Penal Code in 1926 and passed a resolution in favor of its revision. In 1931 a Special Committee was established, which submitted plans for such revision to the Government.

need for protection from physical restraint was undeniable. The Anglo-Saxon writ of Habeas Corpus appeared so alien to continental law that no attempt was made by the occupation to suggest it as a model for Japanese legislation. Therefore, the problem was thoroughly studied and discussed among the judges of the Supreme Court and lawyers and members of the Diet with the result that a member bill for a Habeas Corpus Act was finally submitted by the Chairman of the judicial Committee of the House of Councillors on his own initiative. When the law[91] was enacted in the second session of the National Diet in the summer of 1948, the Supreme Commander publicly expressed his satisfaction as follows: "With the provision of the privilege of the Writ of Habeas Corpus, Japan now assumes a place among those people of the world who live under positive safeguards of the sanctity of individual life, liberty and human dignity."

Without going into the technicalities of the law, the limited nature of its relief should be pointed out. It applies only to illegal restraints. Therefore, the court cannot go into the merits of a detention, provided that it has been made by the authority having legal power to do so. Whether the Supreme Court will broaden the interpretation of illegality as covering abuse or grossly arbitrary use of such power remains to be seen. Specific time limits are provided for speedy judicial action. In spite of its limitation the remedy, in making the courts the guardians of the personal freedom of the people, should have tremendous ideological value. Here again the question of whether the right of Habeas Corpus will develop into a real protection of personal liberty depends upon the spirit in which it will be construed by the courts.

7. Civil Procedure

The revision of the Code of Civil Procedure[92] was not directly required by the new Constitution. Being of a rather technical nature, it will be of little interest to the American reader. One of the main changes was aimed at a simplification of the existing appeal system, which permitted four instances in the petty cases starting in the lowest court. The result had been unbearable delays in the procedure. A continuation of this slow system was all the more out of the question as the new Supreme Court, consisting only of fifteen judges, had to be relieved from the burden of deciding on insignificant issues. Therefore, the new Code provides that decisions of the Summary Court may be

[91] Habeas Corpus Act, Law No. 199, O.G. No. 699, July 30, 1948.
[92] Law No. 149 of 1948, O.G. Extra, July 12, 1948.

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appealed from by *Koso* appeal to the District Court and that the parties may lodge a *jokoku* appeal against the second instance decision of the District Court with the High Court which, as a rule, decides in the last resort. Thus in civil procedure the Supreme Court is no longer the only court to hear *jokoku* appeals. However, exceptions are made when constitutional issues are involved as well as in the interest of uniformity of judicial interpretation. The law authorizes the Supreme Court to determine by rules when a High Court deciding on *jokoku* appeal must transfer the case to the Supreme Court.[93]

8. *Administrative Procedure*

The Constitution establishes the principle of judicial review of administrative acts. The implementing legislation goes far beyond opening the way to contests in the courts on constitutional grounds. While the abolished Court of Administrative Litigation had jurisdiction only in cases specifically listed in the law,[94] the regular courts are now authorized to annul or alter any illegal disposition made by an administrative office as well as other actions concerning public legal relations. This general clause, which subjects the executive branch of the government to judicial control with regard to legality, might be characterized as an amazingly liberal step toward the protection of the individual from bureaucratic encroachment. Already conferred upon the courts by the provisional revision of the Code of Civil Procedure, that power was reaffirmed and finally established in the Law For Special Regulations concerning the Procedure of Administrative Litigations[95] which provides that, as a rule, the Code of Civil Procedure shall apply to such type of actions.

There are, however, some important restrictions upon the citizen's right to litigation. The old rule that he must exhaust the administrative channels before he can institute an action has been retained. The law requires a preliminary petition,[96] defined as "request for examination,

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[93] Rule No. 5 of the Supreme Court, O.G. No. 459, October 9, 1947, implements this provision in detail.

[94] This system was based on what the continental theory called "principle of enumeration."

[95] Law No. 81 of 1948, O.G. Extra-1, July 1, 1948.

[96] The petition, which is to be submitted to the administrative agency specified in the law authorizing the contested act, should not be confused with the petition in the broader sense of Article 16 of the new Constitution. This latter provision gives every person the right of peaceful petition for the redress of damage, for the removal of public officials, for the enactment, repeal or amendment of laws, ordinances or regulations and for other matters. It has been implemented by the Petition Law, Law No. 13 of 1947, O.G. No. 284, March 13, 1947, which requires that such petition be made in writing and that it be given "sincere consideration."

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objection or any other complaint." Only after this petition has been rejected by the administrative office in charge of the determination is the way open to the courts. The law provides for two exceptions to this rule: (1) If the administrative office does not decide on the petition within three months, action can nevertheless be instituted. This prevents the office from obstructing litigation by delay; and (2) the court itself may dispense with the petition if serious damage is anticipated.

It might be argued that the Law confers excessive powers upon the courts. However, they are only concerned with the question of legality and cannot decide on the wisdom or administrative expediency of the contested act. There is little justification for the apprehension that the Courts may not exercise a reasonable degree of judicial self-restraint in the application of the Law. Moreover, the mere existence of the people's right to challenge administrative acts on legal grounds will serve as healthy check on the still powerful Japanese bureaucracy.

Still, the danger of judicial interference with the proper functions of the executive branch of government was clearly seen in connection with the injunctive power of the courts. Therefore, the Law provides, as a rule, that the courts cannot stop or suspend the administrative disposition by an injunction when action for its invalidation has been instituted. Injunctions are admitted only if the court considers them urgently necessary to prevent irreparable damage which may result from the execution of the disposition. Even in such case injunction is excluded if the suspension of the execution is against the public interest. Finally, when the Prime Minister declares that the national interest is affected, an injunction must be rescinded. For political reasons, he will make use of this exceptional power only in cases of great nationwide importance.

Conclusion

In an article of this length it was possible to give only the highlights of the judicial and legal reforms enacted to implement the new Constitution. The main objectives of this legislation have been the independence of the judiciary and the strengthening of its prerogatives; the promotion of fundamental human rights; and the protection of the individual from too much governmental interference with his private life. The approach to such broad elements of legal and political philosophy affects the very structure and interrelationship of governmental institutions as well as the position of the individual citizen in society.

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Because the law of the land reflects that approach in all its basic enactments, the ideological revolution behind the reforms has necessarily resulted in a fundamental change of the Japanese legal system. In evaluating this change, the fact should be taken into account that under the prevailing circumstances the implementing legislation had to be enacted in a breathtaking tempo. While the drafting of important Codes took sometimes twenty years in continental countries, the postwar revision of a great number of such Codes was carried out in Japan within the short time from the autumn of 1946 to the summer of 1948. Yet, the ideal method of thorough lawmaking could not have been used in a situation which called for a swift break with the past. Consequently, even the normal degree of perfection cannot be expected in this particular case. Mistakes and omissions will certainly be discovered. However, these shortcomings can be remedied by subsequent amendments. As a matter of fact such process of improvement is going on at present. In any case, the essential legal groundwork for a new social and political order has been laid.

The administration of justice is now going through the unavoidable difficulties of transition from the old to the new system. Judges, public procurators, and lawyers are daily faced with problems of law for the solution of which no precedent exists. Nevertheless, the impression prevails that their adjustment to the changes will be smoother and more rapid than anticipated by those who expected an almost chaotic confusion.

More important than this technical aspect of transition, however, is the question of whether the Constitution and the implementing law will be applied by the courts effectively and in the right spirit. A long process of reorientation in the light of the new position of the judiciary will be necessary to replace the analytic and formalistic judge of the past by the creative type which the country needs. The legal profession also must become increasingly conscious of its mission as defender of civil liberties. Without such transformation in the attitude of those connected with the administration of justice the legal reforms would be nothing but blueprints in the textbooks of law.

Still, the judges and lawyers are only instrumentalities of society at large. Above all others, the most fateful issue will be the reaction of the people. What do the Constitution and the new laws mean to them? Has the new order, integrated into the reforms, become part of their lives and conquered their hearts or do they look at them as something

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alien and imposed by the occupant? Would they be willing to fight for their new rights if their rulers attempted to put the clock back? It is evident that the post-occupation survival of the reforms depends upon the answer to these questions. One should beware of both too much optimism and pessimism. Traditional attitudes toward the government or the family and centuries-old customs are hard to change overnight. This is particularly true in the case of the rural population which is less flexible than the urban and lacks the same educational possibilities. On the other hand, the danger that the reforms will be repudiated by the bulk of the people because of their connection with the Allied Occupation has been minimized by the method of collaboration with the Japanese who have shown themselves amazingly responsive and cooperative. What happened was that, in this meeting of two different civilizations, generally speaking, the Japanese were impressed by certain legal institutions of other countries and were willing to adopt them. This willingness was motivated mainly by the recognition of the need for a progressive change in their legal system. Reforms which would have been due in any case merely materialized earlier and more rapidly under the influence of the occupation. To be sure, there are groups among the former ruling classes who criticize the new legislation as un-Japanese, but they use this criticism merely as an argument against innovations which they would have fought even more if there had been no occupation at all.

There are indications that the people are beginning to become increasingly mindful of their constitutional rights. Particularly, women leaders have been quick to grasp the benefits of the new order for their sex. The labor movement, strengthened in the postwar period, can become an effective weapon against suppression of civil liberties, provided it avoids extremism. The final outcome is tied up with the political future of Japan, which will be influenced by unpredictable international developments and domestic economic and social conditions. Only if the people make courageous use of their new rights for the prevention of any authoritarian form of government, regardless of the brand, will the broad program visualized in the reforms be fulfilled.