

### Chronology of the Modernization process in Japan (1)

- 1853 Admiral Perry's fleet of "Black ships" from U.S.A. appeared in the gulf of Edo. The admiral asked for the opening of Japanese ports and conclusion of a friendship and commercial treaty.
- 1855 "Convention of *Kanagawa*" (treaty of friendship) was concluded between United States and Shogunate, followed by "Anglo-Japanese Friendship Treaty" with England and "Treaty of *Shimoda*" with Russia. Shogunate abandoned its isolation policy since 1633. Several ports (*Yokohama*, *Hakodate*, Kobe and so on) were finally opened for foreign ships.
- 1858 Tokugawa Shogunate (徳川幕府) was forced to enter into the "Treaty of Amity and Commerce between United State of America and Japan". It was a so-called "unequal treaty". In following years, the Shogunate concluded similar treaties with other European countries (England, France, Netherlands, and Russia). The most important partner of trade was England. Japan exported raw silk and imported wool and cotton. The powerful feudal lords (大名) such as *Satsuma* (薩摩) and *Choshu* (長州), and more importantly, the Imperial Court (朝廷) did not agree with Shogunate's decision to open ports. They all asserted aggressively the total war against the Western countries.
- 1863-4 *Satsuma* and *Choshu* opened battles against the fleet of England and other Western countries. As its result, their capital cities were temporarily occupied by the Western troops. Some young warriors of *Satsuma* and *Choshu* realized immediately that Japanese army would have no chance against the Western powers. They took over the political leadership and quickly changed their policy. Now, their targets were not foreigners, but Shogunate in Edo. They together founded an alliance against Tokugawa Shogunate. They knew that Japan would not be able to release its society from the traditional feudal structure of politics and economy if it would stay under the leadership of the Shogunate.
- 1867 In order to keep internal peace, Tokugawa Shogunate handed back its sovereignty to the Imperial Court. The allied lords were however not satisfied with it. They demanded also the hand back of its whole territories from the Shogunate. The Shogunate refused it.
- 1868 The war broke out between the Shogunate and the allied lords (明治維新). After the surrender of the Shogunate, the imperial alliance declared the "*Restoration of the Ancient Imperial Regime*" (王政復古). The new government was built on the model of Ritsu-Ryo system (律令体制) from the 8. century. The government was referred to as "Dajokan" (太政官) and its departments or ministries as "Sho" (省).
- 1871 Meiji government abolished the feudal lordship (藩) and despoiled the political power from the whole feudal lords. The administration was nationwide centralized, and feudal territories were reorganized to prefectures (県). Transportation and distribution became absolutely free.
- A new family registration system was introduced. At this time, the whole population was still classified into three groups, namely peers (華族), former warriors (士族) and commons (平民). However, marriage between different classes was allowed. Furthermore, debt servitude and human trafficking were absolutely prohibited. In this year, the Ministry of Education (文部省) was founded, and the compulsory education began.

## Social Restructuring by Meiji Government

During the rule of the Samurai-warrior class, each community in villages and cities was governed by a quasi-autonomous organization, and official authorities (Samurai governors) controlled such communities only indirectly. Principally, they did not intervene in everyday life of people.

Together with the fall of Tokugawa Shogunate, such a traditional administrative system ceased to work. Consequently, Meiji government had to develop a new centralized solid administration system which should be directly executed by new public officials. For this purpose, the government planned following three measures:

- (1) **Family** as *administrative unit* (based on Samurai family model) and also as modern *investor*
- (2) **Confucian education** in school and army (moral teaching of Samurai class)
- (3) Establishment of **a national religion** (National Shintoism)

### (1) Family reform

Traditionally, Japanese people lived in a community order and customary family system. Such systems were not hierarchically organized. Meiji government tried to reform such community organizations and family system of people according to the standard of the former Samurai class. A traditional Samurai family was ruled by a powerful head of family, and other members, especially female members were subordinated to him. Only the eldest son could enjoy the right to succeed to the position of the head of family and the entire estate of the family (so-called "*patrimony*"). Other children had to remain under the control of the head of family. The most important moral principle was *loyalty and obedience* to the head of family.

Such an autocratic family order had been the basis of Japanese feudalism. At the beginning of the modernization, the government conceived to use this old system as basis for the whole Japanese society. In other words, the government forced people to live in a life style quite similar to former Samurai families. The head of family in each household should play a role as agent of the government and rule the whole family in accordance with governmental policies. In such a way, each family should work as terminal administrative unit for the government. At the same time, the government expected from the head of family to play a role as investor for the modern industry. This was another reason for the succession by the eldest son alone.

### (2) Confucian education

In the *Edo*-era, Confucianism was authoritative moral teaching exclusively for Samurai-warrior class, and common people (farmers, craft workers, and merchants) had nothing to do with it. For the most part of commons, teachings of Japanese Buddhism were favorite religions. Now, Meiji government tried to teach the Japanese Confucianism to common people in education and military trainings in order to hammer *the principle of loyalty and obedience* into their head. The government needed well-educated and disciplined soldiers and sailors in order to execute its expansion plans.

### (3) National Shintoism

Shinto was a traditional mythology and a native religion in the community life. Each community possessed Shinto shrine, but there was not any nationwide organization of shrines. Meiji government missed a national religion like Christianity in Western countries. They planned to organize shrines and put them under the control of a state authority. In this way, a nationwide hierarchical system of shrines - "National Shintoism" - was artificially set up, and Imperial family was put on the top of the hierarchy. The government combined the new Shinto belief - "Emperor is a living God" - with the Japanese Confucianism together and used as political tool in order to strengthen the loyalty and obedience of the people.

### Chronology of the Modernization process in Japan (2)

- 1872 The prohibition against dealings in the land was abolished. But the land outside of city areas still had no price.
- 1873 Meiji government issued the certificate of land title (地券), and determined the land price. The people obtained the property right in its modern meaning on the land on which they had enjoyed the possession under the rule of the customary law during the feudalism. However, new owners of the land were not actual farmers (tenant farmers), but former “**landlords**”. In return, they had to accept the obligation to pay the property tax (3% of the land price - *not of annual income!* ). Through this reform of the land property and the taxation system (地租改正), the feudal system of land tenancy (小作) was rather legitimated. The annual government revenue was secured by this reform.
- The National Bank (国立銀行) was established.
- The compulsory military service was introduced. Hereby, the former warriors lost their status and privileges completely. They were officially integrated into the normal class (“*commons*”).
- The Ministry of Interior (内務省) was founded for the public security (police service) and the encouragement of the modern industry (殖産興業).
- 1874 The great part of the population was deeply disappointed with the new policy of the government - joblessness under the former warriors, a heavy tax duty and other duties such as compulsory education and military service on the small farmers. They jointed together and began to protest against the government – “*Popular Movement for Freedom and Democracy*” (自由民権運動).
- 1881 After the escalation and nationwide spread of the movement, the government announced the Imperial Edict to set up a parliament in the year of 1890.
- 1884 The government began with the preparation for promulgation of the first constitution, and enacted the government ordinance of the new nobility (華族令). Such officially authorized new status was necessary for the assignment of the members of the House of Lords (貴族院) in a coming parliament.
- 1885 The ancient Ritsu-Ryo system was finally abolished, and “*Dajokan*” was replaced with “Cabinet”.
- 1889 Promulgation of “**the Constitution of the Empire of Japan**” (大日本帝国憲法).
- 1890 The first election for the House of Representatives (衆議院). The voting right was entitled only to male tax payers (“landlords”, qualified voters were only 1.1% of the entire population! ).
- 1894 A new treaty of commerce was concluded between England and Japan. One of the unequal provisions (extraterritorial jurisdiction) was abolished.
- 1911 Japan reestablished the customs autonomy against the Western countries.

### **Modernization (industrialization) – A Heavy Burden charged to Farmers**

Through the land reform in 1872-73, landlords (dominant farmers and merchants) obtained ownership of land, but the most part of the farmers had to stay in the lower status as tenant farmers ("peasants") and suffered from almost same exploitations by the new regime as by feudal lords in *Edo*-Period. Under the rule of feudal lords, tenant farmers had to offer 40 - 50% of their harvests to the feudal rulers and 20 - 30% to the landlords. Also under the Meiji regime, they had to pay 35% to the government and 35% to the landowners. The government covered whole costs for its modernization and industrialization policy with this tax revenue from the farmers.

The government founded many governmental enterprises in fields of textile, mining (coal, copper, silver, cement etc.), shipbuilding and arms industry, and constructed railways across the whole country. Such factories and other facilities were privatized for very low prices (1/5 - 1/2 of invested value) as soon as the management could be stabilized and the profitability was secured.

### **Popular Movement for Freedom and Democracy**

Through the abolishment of the feudal territories and the centralization of administrative power, the most part of the population was equalized as "commons". Former warriors lost their privileges, business and earning. In 70s, such jobless former warriors and heavily exploited farmers joined together and began to protest against Meiji government. They were inspired by the Western democracy and claimed the government for election (universal suffrage) and parliament. Their resistance was spread nationwide and intensified. Some leaders of the movement published also private drafts for constitution based on French or English model. Some of them proposed "constitutional monarchy", other groups demanded even abolishment of imperialism and establishment of genuine democracy. The government threw in their new police troops and oppressed the freedom of speech and press, restricted the freedom of assembly. Even with such a hard oppression policy, however, the revolt of oppositional groups could not be suppressed. Finally in 1881, the Emperor proclaimed that Imperial Diet would be opened in the year 1890.

### **Establishment of Constitutional Monarchy**

Despite of the Imperial Edict which promised election and parliament, the leaders of Meiji government did not have any intention to introduce democracy. They began to investigate constitutions in European countries and chose *Prussian* Constitutional Monarchy as model for Japan. The government invited a legal adviser from *Prussia*, Mr. *Herman Roessler*. Under his support, the government began with drafting work of constitution. In order to secure their ruling position and to block out political parties from the governmental decision making even after the coming opening of parliament, the government set up a "New Nobility" in Western style (*Prince, Marquis, Count, Viscount, Baron* etc.). These New Nobles were members of Imperial Family, former feudal lords and other supporters of Meiji government; they should be appointed to members of the coming "*House of Lords*" which should work as barrier and firewall against political parties in "*House of Representatives*". On the other hand, the leaders of Meiji government had also a fundamental distrust to the traditional nobles in Imperial Court.

Furthermore, the government decided to introduce a cabinet system, but just on this issue, a hard dispute arose among members of the government. In the government, there were two groups, namely Realists and Extremists. For the Realists (*Hirobumi Ito*), Prussian Prime Minister Bismarck was an ideal figure for the powerful leader in a constitutional monarchy. Prime Minister should always stay in a leading position, and other Ministers should support him. Also Emperor and Old Nobles in the Imperial Court should not intervene in the political decision making process. Emperor's attendance in the Cabinet meeting should be refrained. But for the Extremists (*Kowashi Ino-ue*), Emperor should be a genuine leader of the nation, and the Parliament could be a place where representatives of the nation would have opportunities to meet Emperor and feel a spiritual unity with him. Prime Minister and his

Cabinet should be mere moderators between Emperor and the nation. In the most important points, the vision of the Realists was adopted in the Constitution of Empire of Japan in 1889. However, this dispute could not be settled down completely. So, this Constitution did not have any provision on the Cabinet. Its duties and competence, especially the relation between Prime Minister and other Ministers could not be clearly defined. The Constitution had only one article about ministers;

**Article 55.** The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

According to this provision, Ministers should offer their service directly to the Emperor, the control by Prime Minister was not mentioned. Finally, the controlling competence of Prime Minister in the Cabinet could not be so powerful as the Realists had hoped. The most crucial point was the control power over the Imperial Army and Navy. Deployment of conventional forces and budget for it were matters of “*Imperial prerogative*” (Art. 11 and 12). In other words, these matters stand outside of the control by the Prime Minister and his Cabinet, they could be decided by the Imperial Army and Navy themselves in the name of the Emperor.

### Fatal Error in Constitution

In the Constitution of 1889, the Emperor was the sovereign and the origin of the state's power. The supreme command over the Imperial Army and Navy was reserved to him. Moreover, the Emperor possessed the competence to issue prerogatives on a wide range of matters. For the Realists in the government, it should mean a solid position of the Prime Minister and his Cabinet in the politics.

In the first decade of the Constitutional Monarchy in Japan, the majority of the Diet (House of Representatives) was always “*oppositional (!)*”, it means, members of popular political parties. The Cabinet assigned by the Emperor tried to ignore the intensive criticism by the Diet. But such an autocratic attitude could not be carried out for a long time. The Cabinet was forced to seek a way to cooperate with political parties and the Diet. A conventional rule was gradually established in the Diet; a leader of the major party in the Diet should be assigned to Prime Minister, and he should appoint other Ministers. In this way, the principle of “Cabinet in Parliament”, or “*Spell of Party Cabinet*” could be put into practice in Japan even though the Constitution did not provide it.

But this “Party Cabinet” suffered from a fateful failure; Ministers of Imperial Army and Navy had to be nominated by the military headquarters, and they were always active officers in a high rank. Imperial Army and Navy enjoyed their outstanding position in the Constitution. They stood directly under the supreme command of the Emperor, and they were not obliged to obey the command of the Cabinet. As a result, these two Ministers had a *veto* in the Cabinet meeting. The Prime Minister and his Cabinet could not do anything when the military Ministers denied their agreement.

The Imperial Army and Navy really began to use this veto as the Cabinet wanted to reduce arms in accordance with the request by League of Nations. The Party Cabinet in Japan had to fall under the control by the Imperial Army and Navy. The supreme command and the outstanding competence of the Emperor in the Constitution, which should have been reserved for the Cabinet in the vision of the Realists, were in reality carried by the Imperial Army and Navy. In 1930s, the Cabinet itself was assigned according to the will of the military powers, and the military regime opened the front against China and began with the invasion in Asia.

## « Additional Commentary to “the Constitution of the Empire of Japan” in 1889 »

### Theoretical Background of the Constitution – “True Nature of the Japanese Nation”

It was true that the promulgation of the Constitution was a compromise to the “*Popular Movement for Freedom and Democracy*”. At the same time, however, the Meiji government attempted to abolish the ancient “Ritsu-Ryo System” and to replace it with a modern state system. This system had mainly two functions.

Firstly, this system should ensure the absolute supremacy of the government. For the leaders in the government, such an extraordinary position of the government seemed to be an absolute requisite for the execution of the drastic modernization policy which would put heavy burdens on the population. Secondly, this system should resist the philosophy of Western democracy and prevent democratization of the state organs. The decision making procedure should firmly be protected against influences of political parties.

For this purpose, a philosophical, legal theory of the “*True Nature of the Nation* (国体, Kokutai)” was developed as the theoretical foundation of the Constitution. The original idea of this theory was formed by a nationalist and Confucian Aizawa Seishisai (会沢正志斎, 1782–1863) in Edo period. It was a combination of the Confucian theory and the Shinto mythology. This theory clearly distinguished the “*True Nature of the Nation*” or “*Spirit of the Nation*” on the one hand and “*polity* (political system)” or “state organs” on the other hand. According to this theory, “*Kokutai*” of the Japanese nation, namely “*everlasting divine rule of imperial family*” or “*imperial sovereignty*”, was never changed since its formation. It was merely “*polities*” which had been changed in the Japanese history, e.g. introduction of “Ritsu-Ryo System”, establishment of Shogunate, and Meiji Restoration and so on.

Based on this half-mythological theory, the Meiji government justified the establishment of its new regime (“Restoration of Imperial Rule”) and the promulgation of the Constitution of 1889 at the same time. The Meiji Government argued that the constitutional system of the state concerned merely a new “*polity*” and that the Constitution could be given only by the impersonation of “*Kokutai*”, namely by the Emperor, in accordance with it. In this way, the government completely rejected any participation of political parties or people's representatives in the drafting work of the Constitution. “*Kokutai*” should be absolutely superior to any polity, any constitution. Any constitution might not and could not affect “*Kokutai*” itself.

### Declaration of “*Kokutai*” and the Supreme Command of the Emperor

The Constitution declared the “*Kokutai*” (Art. 1). Regarding the “*Imperial Sovereignty*”, the Constitution rejected the “Division of State Powers” (Art. 4). This article was modeled after German constitutions :

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

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

The formulation: “... according to the provisions of the present Constitution” in Art. 4 did not mean any duty of the Emperor to follow the constitutional provisions, but it meant simply that the constitutional provisions concerned the “*polity*” only. The Emperor stood over the Constitution (Art. 3), and the “*Law on Imperial Household*” should be sacred from any control by state organs (Art. 2, 17, and 74).

Above all, this concept of “*Kokutai*” had its significant effect in the military competence of Emperor:

**Article 11.** The Emperor has the supreme command of the Army and Navy.

**Article 12.** The Emperor determines the organization and peace standing of the Army and Navy.

**Article 13.** The Emperor declares war, makes peace, and concludes treaties.

Any military decision of the Emperor could be sacred and completely free from any intervention of other state organs including the Cabinet and the Diet. Consequently, the Imperial Army and Navy could enjoy a kind of immunity from responsibility to the state organs.

#### “Polity (state organs)”

At the second level of state system, namely “polity”, the Constitution followed the modern principle of “Division of Powers”:

**Article 5.** The Emperor exercises the legislative power with the consent of the Imperial Diet.

**Article 37.** Every law requires the consent of the Imperial Diet.

**Article 57.** (1) The Judicature shall be exercised by the Courts of Law according to law, in the name of the Emperor.

(2) The organization of the Courts of Law shall be determined by law.

**Article 58.** (1) The judges shall be appointed from among those, who possess proper qualifications according to law.

(2) No judge shall be deprived of his position, unless by way of criminal sentence or disciplinary punishment.

(3) Rules for disciplinary punishment shall be determined by law.

According to Art. 5, the executive power of the state should be exercised directly by the Emperor. In the vision of the Realists in the government, however, it should mean that the Cabinet has the exclusive authority to exercise this power in the name of the Emperor. In any case, neither the Emperor nor the Cabinet has to take any political responsibility for his or its executive actions. Contrary to the democratic concept of the “Division of Powers”, each minister should carry his responsibility in relation to the Emperor, but not to the Diet or the people :

**Article 3.** The Emperor is sacred and inviolable.

**Article 55.** The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

#### Outstanding Competence of the Emperor (and the Cabinet)

Moreover, this Constitution provided several issues which should be put under the exclusive power of the Emperor (Art. 6 ~ 16). In the name of the Emperor, the government (or Cabinet) could break its limitation especially with “*Imperial ordinances*” :

**Article 8.** (1) The Emperor, in consequence of an urgent necessity to maintain public safety or to avert public calamities, issues, when the Imperial Diet is not sitting, Imperial ordinances in the place of law.

(2) Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

**Article 9.** The Emperor issues or causes to be issued, the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Consequently, this extraordinary power of the Emperor imposed profound restrictions on the legislative power of the Diet, regardless of the question who or which organ would really exercise this power.

Above all, the Diet had no competence to control over the “*Imperial issues*”. The most important one of them was appointment of Prime Minister and other State Ministers (Cabinet). Another one was “Supreme Command over the Army and Navy” (Art. 11) and “peace standing of the Army and Navy”, namely its scale and formation, equipments and budget for them. These issues were almost “sacred matters” laying beyond the competence of the Diet :

**Article 6.** The Emperor gives sanction to laws, and orders them to be promulgated and executed.

**Article 12.** The Emperor determines the organization and peace standing of the Army and Navy.

### Limitation on the Other Competence of the Diet

In the modern concept of “Constitutional Democracy”, the control power over financial issues of the state is the essential competence of the Diet. Regarding taxation, expenditures and revenue of the state, the Constitution of 1889 acknowledged this principle, too (Art. 62, 64, 65). However, the Diet had to suffer significant restrictions upon its competence also in the field of finance (Art. 63, 67, 71) :

**Article 62.** (1) The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.  
 (2) However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.  
 (3) The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

**Article 63.** The taxes levied at present shall, in so far as they are not remodelled by a new law, be collected according to the old system.

**Article 64.** (1) The expenditure and revenue of the State require the consent of the Imperial Diet by means of an annual Budget.  
 (2) Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

**Article 65.** The Budget shall be first laid before the House of Representatives.

**Article 67.** Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet, without the concurrence of the Government.

**Article 71.** When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual existence, the Government shall carry out the Budget of the preceding year.

### Restrictions upon Judiciary and Jurisdiction

The independence of the Judiciary (Regular Court, Court of Justice) could be protected relatively well.

However, the European concept of judicial competence justified several restrictions on the competence of the regular court.

Firstly, the scope of the jurisdiction of regular court was closely limited to criminal and civil cases. Administrative litigation was deemed to lay beyond the jurisdiction of regular court :

**Article 61.** No suit at law, which relates to rights alleged to have been infringed by the illegal measures of the administrative authorities, and which shall come within the competency of the Court of Administrative Litigation specially established by law, shall be taken cognizance of by Court of Law.

The law on the administrative litigation, however, rejected the possibility of lawsuit except in cases listed in the law. Consequently, the judicial protection against “infringements by the illegal measures of the administrative authorities” had to be quite insufficient.

The second restriction of the jurisdiction regards “*Judicial Review*”, namely control over the question “Constitutionality or Unconstitutionality” of legislation and activities of administrative authorities. The traditional European concept of “Division of Powers” denied this special competence of the Judiciary. Under the Constitution of 1889, the competence to decide this question was acknowledged only to the “*Privy Council*”, and only the government was allowed to submit this question to the “*Privy Council*”.

### **Tremendous Restrictions upon Human Rights**

The Constitution of 1889 provided the protection of basic Human Rights in the Chapter II “Rights and Duties of Subjects”. However, the judicial protection of these rights was put under the significant restriction by “*Legislative Reservation*” or “*Reservation by Law*”. It was always possible for the government to suspend the constitutional protection of these rights and also to infringe them by way of legislation or “*Imperial ordinance*”. The Judiciary could do nothing against such a “legal infringement” of Human Rights due to lack of the competence of “*Judicial Review*” :

**Article 23.** No Japanese subject shall be arrested, detained, tried or punished, unless according to law.

**Article 25.** Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

**Article 26.** Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

**Article 28.** Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

**Article 29.** Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meetings and associations.

After the fall of “Party Cabinet” in 1930s, the legal effect of these articles was completely spoiled by the government. The freedom of speech, press, religious belief, public meetings and associations including labor unions and political parties were treated as indication of crime against Emperor and “Spirit of the Nation” :

**Article 31.** The provisions contained in the present Chapter shall not affect the exercises of the powers appertaining to the Emperor, in times of war or in cases of a national emergency.