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THE SO-CALLED TOCHI-KOI (ACTE DE GOUVERNEMENT) AND THE CONSTITUTION OF OUR COUNTRY

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I

I understand that Prof. Toshiyoshi Miyazawa is the first to introduce the so-called Tochi-koi (acte de gouvernement) to our country. He gave out his essays entitled "Administrative adjudication and Tochi-sayo (function of government)" in "Commemoration Essays «The problems on the Constitution and the Administrative Law» for the sixtieth anniversary of Dr. Soichi Sasaki's birth" pp. 167 et seq. and "Acte de gouvernement in the case law of France" in "Commemoration Essays on public law & politics for the sixtieth anniversary of Prof. Junji Nomura's birth" pp. 479 et seq., in which he explains that there is in France a chain of acts called actes de gouvernement excluded from the objects of trial, that why these acts are placed outside the objects of trial, that what kind of act is regarded as acte de gouvernement in the judicial precedents of that country, and so forth. At that time in Japan, however, what is called acte de gouvernement did not arouse special interest among the academic circles owing to the fact that the matters of administrative litigation was restricted to a greater extent and that it was a matter of course that the power of administrative adjudication could not extend to the act of state of our country corresponding to acte de gouvernement of France.

Whereas, with the results, followed from the revision of the previous Constitution of the Empire of Japan to the present Constitution of Japan, that administrative litigation as well as civil and criminal litigations was included in judicial function, every case on public law came to be judged

by a court of justice without any restriction on the matters of administrative litigation.¹⁾

The rule, then, seems to have been set up that act of state in our country corresponding to what is called *acte de gouvernement* in France is to be inquired by a court so far as it is contested as a legal problem. Accordingly the problem on the so-called *acte de gouvernement*, left out of actual consideration in our state system in the past, has turned to be actual one attracting attention of our law circles. Writings on it have gradually come out in papers and works. In course of time, however, while the question called for the academic interests, a concrete problem arose which urged a practical solution in this respect. It was the case on the Confirmation of Membership of the House of Representatives and the claim for Annual Payment, 1952, Tokyo District Court No. 156 (decision on Oct. 19, 1953)²⁾ and the following appealed case on the Confirmation of Membership of the House of Representatives etc., 1953, Tokyo High Court No. 2021 (decision on Sept. 22, 1954).³⁾ In this case the point disputed as a pre-merits question in both judgements was on the ability of a court to inquire whether or not the act of state, the dissolution of the House of Representatives, was in conformity with the Constitution. The State, the defendant and appellant, maintained that a court has no jurisdiction over the matter, while Mr. Gizo Tomabechi, the plaintiff and appellee, held on the contrary. The courts, on the other hand, answered in affirmative at both the first and second trials. The State dissatisfied with the decision and appealed to the Supreme Court, in which the case is in pendency at present. The Supreme Court is sooner or later to give a decision on the case.

Thus, all of a sudden, the actual urgency to solve the problem has fired the enthusiasm in the academic circles for the study on it followed one after another not only by the comments on the above precedent but by the fundamental studies with the theme of the so-called

1) See Tatsugoro Isozaki: "The Administrative Law (An Introduction)" pp. 170 et seq.

2) The docket on the administrative cases, vol. 4, No. 10, pp. 2450 et seq.

3) The docket on the administrative cases, vol. 5, No. 9, pp. 2181 et seq.

acte de gouvernement itself.⁴⁾ The Public Law Society of Japan has also took up acte de gouvernement as one of the subjects to study at its fifteenth congress in May, 1955.⁵⁾ The study was of variety: some introduced precedents and doctorins on acte de gouvernement in such foreign countries as America, England, France and Germany, some looked into the theoretical basis of acte de gouvernement in case that it was accepted, some examined if such acte de gouvernement could be accepted in our country and other considered these points at once in an essay. Through the works already made public there seems to be comparatively many writers who hold the view that acte de gouvernement should be accepted also in our country.

Things having come to such a pass as the above mentioned, what is most important to do today is, I think, that as many students as possible will give out their views as to whether the so-called acte de gouvernement can be accepted under our Constitution. In determining the matter of constitutional consequence, the conclusion, be it yes or no, is desired to be reached after heated discussions among many students. I am going to offer my own views in outline in the following chapters.

II

In treating the problem as to whether the so-called acte de gouverne-

4) Among those studies the chief works are as follows; Junjiro Yamada, "The dissolution of the House of Representatives and acte de gouvernement" (Horitsu-ronso, vol. 27, No. 4), "Acte de gouvernement in the democratic countries" (Horitsu-ronso, vol. 27, No. 5,6), "The recent legal theories on acte de gouvernement in France" (Horitsu-ronso, vol. 28, No. 2,3); Toshiyoshi Miyazawa, Isao Sato, Akira Nakamura and Hajime Kaneko, "The problems involved in the decision to invalidate the dissolution of the House of Representatives" (Jurist, No. 46); Kazushi Kojima, "On the decision of the Tokyo District Court to invalidate the dissolution of the House of Representatives" (Jichi-kenkyu, vol. 30, No. 4); Ichiro Ogawa, "On acte de gouvernement" (Kokka-gakkai-zasshi, vol. 68, No. 3, 4, 9, 10; vol. 70, No. 1, 2); Kiminobu Hashimoto, "The power of jurisdiction and political questions" (Hogaku-shimpo, vol. 59, No. 9); Shozaburo Ichihara, "The limitation of judicial inquiry" (Hitotsubashi-ronso, vol. 31, No. 5); Akira Nishio, "On acte de gouvernement" (Doshisha-hogaku, No. 33); Hiroshi Kaneko, "The study of acte de gouvernement" (Kokka-gakkai-zasshi, vol. 71, No. 8, 11; vol. 72, No. 2, 9).

5) Reports at the fifteenth congress of The Public Law Society of Japan are inserted in No. 13 of Koho-kenkyu, and those on acte de gouvernement are as follows; Toshio Irie, "Acte de gouvernement"; Junjiro Yamada, "On acte de gouvernement"; Kinuko Kubota, "Political questions in the Constitution of America"; Ichiro Ogawa, "The tendency of acte de gouvernement in France"; Hiroshi Kaneko, "The trend of comments on acte de gouvernement in Germany".

ment can be accepted in the light of the Constitution of our country, it must be at first clarified what is meant by *acte de gouvernement* and what kind of acts can fall into its category, which requires accurate studies on the institutions of foreign countries as such where it is accepted. On the latter point, however, I can do nothing at present but borrow the results as they are which have been already made public by other writers. Differing in nuance of course, all of them seem to have almost the same way of dealing with it, so that I will depend for convenience upon the study by Mr. Justice Toshio Irie, a judge of the Supreme Court, for my further consideration.

The study of "*Acte de gouvernement*" by Mr. Justice Irie appears in the *Koho-kenkyu*, No. 13, pp. 75 et seq. According to him, "*Acte de gouvernement* is the act which the legal issue arising from it can neither be inquired nor judged by a regular court because of its having highly political character". (*Koho-kenkyu*, No. 13, pp. 84-85). He further analyzes the definition, and its summary is as follows: (1) Firstly, it is an "act of state". An act of state, though it is simply called so, is the act of the supreme organs of the executive and the legislature and the act of judicature itself is not included in the category. (2) Secondly, *acte de gouvernement* is the act of the executive and the legislature which has "highly political character". By highly political character here political character is meant in the sense that it is closely connected with what the institution of state and its operation should be. In other words, when it is considered to run counter in the end to the principle of division of powers under people's sovereignty that judicial power as one of the three powers finally inquires and judges some kind of acts done by the other two powers, they are to be called acts of highly political character. (3) Thirdly, it is the matter relating to "a legal problem". *Acte de gouvernement*, but for its highly political character, is a case which is to be the object of inquiry and judgement of a court, and, therefore, an act to be distinctly beyond the power of a court is out of discussion as to whether it is *acte de gouvernement* or not. (4) Fourthly, *acte de gouvernement* is an act placed outside the inquiry and judgement of "a regular court". In those countries where the adminis-

trative adjudication is included under the function of judicature a regular court means an ordinary judicial court, which exercises over the administrative litigation, too. The question will naturally be another one, if the Constitution contains some specific provisions which permit the jurisdiction of a judicial court over acte de gouvernement or set up a special court so that it may be inquired and judged (*ibid.*, pp. 85-87).

As general examples of acte de gouvernement the said Justice indicates the following points: (1) The fundamental matters relating to organization of the President, the Cabinet and the Diet (inauguration of the President, appointment of the Prime Minister and the members of the Cabinet, and examination of qualification of and disciplinary measures against the Diet members); (2) The fundamental matters relating to management of the President, the Cabinet and the Diet (the official acts of the President under the Constitution; organization, business, the quorum and the method of resolutions of the Cabinet council; business, the number of the members and the method of resolution of the both Houses of the Diet); (3) The matters relating to the reciprocal negotiations among the President, the Cabinet and the Diet (convocation and dissolution of the Diet; presentation, amendment and withdrawal of legislative and other bills at the Diet); (4) The matters of fatal consequence to a nation as a whole (diplomacy, state of siege and war etc.) (*ibid.* p. 93) I will henceforth call this list "List A of Mr. Justice Irie".

He further presents the following list corresponding to the above one, in case of taking the position of accepting acte de gouvernement under our Constitution: (1) The fundamental matters relating to organization of the Cabinet and the Diet (appointment of the Prime Minister, appointment and dismissal of other ministers, examination of qualification of and disciplinary measures against the Diet members, selection of the president, the vice-president and heads of the standing committees at both Houses); (2) The fundamental matters relating to management of the Cabinet and the Diet (organization of the Cabinet, business and method of decision of the Cabinet council, the advice and approval of the Cabinet for the Emperor, designation of the interim deputy for the Prime Minister and the competent minister; the quorum, business

and method of resolution at the plenary session of both Houses of the Diet; the quorum, business and method of resolution at the committees of both Houses of the Diet); (3) The matters relating to reciprocal negotiations between the Cabinet and the Diet (convocation of the Diet, dissolution of the House of Representatives; presentation, amendment and withdrawal of legislative and other bills at the Diet); (4) The matters of fatal consequence to the nation as a whole (diplomacy, the order for defence moving, the order for moving for the public peace, declaration of the state of emergency) (ibid., pp. 102-105)..... I will henceforth call this list "List B of Mr. Justice Irie".

III

Whether the so-called *acte de gouvernement* can be accepted in our country depends entirely upon how the question is answered that whether or not the legal problem deriving from the unconstitutionality of such acts of state as are enumerated on the above List B of Mr. Justice Irie is regarded to be inquired and determined at a court in spite of its having highly political character. It should be answered only under the provisions of the Constitution of our country.

Of the provisions of our Constitution those directly connected with the above question are perhaps both Article 98, paragraph I and Article 81.

(i)

In the first place, Article 98, paragraph I stipulates, "This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity". It can not be otherwise in theory that Constitution, so far as it is the Constitution of a nation, is the supreme law of the nation and that no law, ordinance or other act of government contrary to it have validity. Furthermore, our Constitution does not leave the axiomatical matter only to the theory but creates it as a constitutional norm and grants the constitutional force and effect to the theory. That is because law, ordinance or other

act of government contrary to the Constitution may possibly be transacted as valid if there is no other ground than that they have no validity in theory, and the supremacy of the Constitution can not help being violated to that extent. The practical inability of holding the supremacy on the part of the Constitution may produce the consequences that legal order of a nation would be fundamentally corrupt, that normal administration of state affairs would not be expected and that at last it would lead a nation to its catastrophe and farther reduce the people to the direct distress. This we have deeply experienced in the immediate past. On the supremacy of the Constitution the positive effect should be bestowed and maintained lest we should purchase such bitter experience again. With this end in view Article 98, paragraph I was laid down. This provision should never be overlooked in the manner that it is no more than the mere expression of the self-evident fact.

The act invalid is limited to one contrary to the provisions of the Constitution. An act of state which is not so regarded offers no problem under this article. For instance, in case a certain organ of the State could perform a certain act at its own discretion under the Constitution, no problem would occur as to the unconstitutionality of the act since there is no provision in the Constitution to direct the organ how to carry it out. Such kind of act has, from the beginning, nothing to do with this article. What is made invalid by this article is restricted to an act of the State contrary to the provisions of the Constitution.

In the second place, an act invalid on account of its departure from the provisions is to be either law, ordinance, imperial rescript or other act of government. It means every act of government. It does not matter whether it is legislative, judicial or administrative act. From the view point of the organ which carries it out it includes every act done by the Emperor, the Diet, each House, courts and the Cabinet, respectively or conjointly with more than two organs. Every act of state enumerated on the List B of Mr. Justice Irie belongs to the acts of government stipulated in this article. It is hardly possible to deny it on account of its having highly political character. It is possible only when the Constitution signifies the intent in its own provisions. If,

however, such an exception could be admitted, this provision would be almost mutilated. Presumably the main purpose of this provision which stipulates invalidity of an act of government contrary to the provisions of the Constitution is to make the supreme organs of the three powers unable to do unconstitutional act. It is of no doubt that almost all the acts of the supreme organs of the three powers have, more or less, highly political character. If they were, in spite of their unconstitutionality, admitted to have validity because of their highly political character, then the natural consequence would follow that the provision saying, "no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions of the Constitution, shall have legal force or validity" would degenerate into mere formality and every act of government of the utmost importance would be, in fact, dealt with as valid in spite of its unconstitutionality. Since the consequence is clearly inconsistent with this provision, such a particular case could not be and in fact is not stipulated in the Constitution. Therefore, even the acts of the state on the List B of Mr. Justice Irie will have no legal force and validity in the light of this provision so far as they belong to the acts of government under this provision and are contrary to the provisions of the Constitution.

Attention must be paid to that provision saying "no law.....shall have legal force or validity". An act of government by an organ of the State contrary to the constitutional provisions is to be ipso facto invalid and never to be declared null and void by other organ of the State. It is not worth consideration at all that an organ of the State, with regard to the alleged invalidity of an unconstitutional act of government of other organ, would disregard or overrule the latter's competence. The question is simply whether the act of government by the organ of the State is ever unconstitutional and whether it is possible to leave its determination to the other organ of the State. It is not set down in this provision but in Article 81.

(ii)

As was already considered, no act of government contrary to the provisions of the Constitution has legal force or validity, but it is so

only when its unconstitutionality is determined. It is, however, itself a difficult problem to determine the constitutionality of an act of government, which may hardly be solved in many cases if the solution is left to the parties contesting each other. Consequently it creates a necessity for some organ of the State which solves it authentically. Our Constitution assigns a court for the organ of the State responsible for it. Article 81 reads, "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act".

Each organ of the three powers has, of course, tentative power to interpret the provisions of the Constitution and carries out its individual acts regarded as constitutional according to its own interpretation. It goes without saying that the act would be valid as conformable to the Constitution if there were no contestation as to its constitutionality. But so far as the constitutionality of an act is once contested according to the recognized line, neither the Diet nor the Cabinet can force its own interpretation or decision on the other organ, no matter how firmly they may be confident of the constitutionality of the act done. In other words, the Diet or the Cabinet has no authentic power to determine the constitutionality of the act. This power is possessed by and only by a court. A court here means a regular court designed in the Constitution for the organ in charge of judicature. It may be thought of to set up such courts besides a regular court of justice as the Courts of Constitutional or Administrative Litigation and to give them the above-mentioned power, but the present Constitution confers the power upon a regular court without admitting the specific courts as was just mentioned.

What a court determines is nothing but the point of constitutionality of the act at issue. If the act was constitutional, then the court would so determine, and vice versa. It can never exert an influence upon the effect of the act. When the act is determined to be constitutional, it is valid. It is so not because the court makes it valid but because it is the constitutional effect derived directly from the determination of the constitutionality of the act. When the act is determined to be unconstitutional it is invalid. It is so not because the court makes it invalid

but because it is the constitutional effect derived directly from the determination of its unconstitutionality. It should not be taken for in the manner that the court is able to determine for itself not only the constitutionality or unconstitutionality of an act but also its validity or invalidity.

As to the very determination of the constitutionality of an act of government, however, the Constitution confers the power exclusively upon a court, and therefore the decision of the court is so far authentic, to which both the Diet and the Cabinet should be obedient. Even if the Diet and the Cabinet regard the act as constitutional, they can not neglect but obey the determination of its unconstitutionality so far as the court has so determined. In this respect, it may be properly said that the court is predominant over the Diet or the Cabinet. This is, however, the position which is expressly conferred to the court by the Constitution and not the position which the court won for itself by overwhelming the other two organs. If one would condemn the court in its predominant position, the critic would be walking altogether in the wrong direction and the condemnation should rather be directed to the Constitution itself which provided such division of powers.

What the court determines, at first, is on the legal issue as to whether an act of government conforms to the Constitution and is not on other questions as to whether it is suitable from the viewpoint of politics or public good. There is not a shadow of doubt about it in the light of the express provision of Article 81 which reads, "...to determine the constitutionality ...", and it is also clear from the fact that the court is the judicial organ with its proper function of maintaining law under the Constitution. In other words the court is considered, in the Constitution, most suitable as an organ to determine the constitutionality of an act of government. If the court had been designed in the Constitution to determine the issue of an act of government in regard to politics or public good, it must have assumed quite an unsuitable function, but in fact such unreasonableness is not provided in the Constitution. It is certain, on the other hand, that if the court determined the unconstitutionality of an act of government the act would be of no

validity and the consequence would be brought about that the act concerned done by other organ as the political decision would end in fiasco. From this fact, however, one should not misunderstand it in the way that the above determination of the court will influence upon the political decision of other organ. First of all, the above consequence in such a case is produced not because the court made the decision which would influence upon the decision of other organ, but because it is the legal effect which is directly provided in the Constitution and which is derived from a legal fact that the court determines the unconstitutionality of the act. The reason why the political decision of other organ comes to naught lies in the fact that it is the legal effect that the determination of the legal issue as to the constitutionality of the act depends at first hand upon the provisions of the Constitution. The court does not make it so. Secondly, we should not make a wrong estimation of the difference of importance between the legal and political issues in this case. Other organs are able to make political decisions according to what is recognized by the Constitution. Political decisions will be indeed of both necessity and importance, but such necessary and important decision can be made only through the recognition of the Constitution, without which there is no ground for it to be made. Political decisions, therefore, could be appraised only on the assumption that it is made in conformity with the Constitution. Accordingly it is a natural consequence, in case of its being unconstitutionally made, that the Constitution makes it invalid and allows no room for its political appraisal. It is only the legal problem as to the constitutionality of the act that the court touches here and if the court determined it in the negative, the political appraisal as to the act would never be made and the act would come to naught. It is so, however, not because the political significance of the act is neglected by the court but because it accords with the provisions of the Constitution.

The court determines the constitutionality of any law, order, regulation or official act. First, the act of government on which the court makes inquiry and decision is required to be such kind of acts as the court can determine their constitutionality. As was mentioned above,

such an act as not to bring the problem of unconstitutionality is excluded as a matter of course from the acts referred to in this article, since there is no provision to regulate it in the Constitution. Instead, the court can inquire and determine every act as to which its constitutionality can be determined at all. Since it is provided in Article 98, paragraph I that no act of government contrary to the provision of the Constitution shall have legal force or validity, the constitutionality of every act of government is, if doubtful, required to be inquired or determined. This being carried out by the court according to Article 81, the court should be able to determine the constitutionality of every act of government. This is why Article 81 provides, "any law, order, regulation or official act" The acts of state on the List B of Mr. Justice Irie are of course included in "any act" in this article. No matter how highly political character these acts of government may possess, their constitutionality are necessarily determined by the court so far as they are not excluded from the Constitution itself.

The court has the power to determine the constitutionality of every act of government. To put it in another way, the court has the duties of the above determination. If the court should reject the determination without having constitutional ground, it would itself venture to violate the Constitution by neglecting its duties. Consequently, since the Constitution does not provide the exceptional case that constitutionality of the act is not inquired and determined on account of its highly political character, the court can and should, now that it comes into question, inquire and determine the constitutionality of the act, however highly political character it may have, and therefore, that of the act of state on the List B of Mr. Justice Irie.

IV

As has been considered, it comes to be clear after making a careful examination of both Article 98, paragraph I and Article 81 that the court can inquire and determine the constitutionality, whenever it is contested, of the act of state under our Constitution, however highly political character it may possess. It must be concluded, therefore, that the so-called *acte de gouvernement* can not be accepted under our

Constitution. A chain of acts of state on the List B of Mr. Justice Irie would be, as he also admits, nothing but *actes de gouvernement* if they were accepted in this country, but on the contrary if they were not accepted here, these acts of state would never be *actes de gouvernement* and would, of course, be object of inquiry and determination of the court.

There are some writers who maintain that, while they admit that the above interpretation would be unavoidable if the provisions of Article 48, paragraph I and Article 81 should be taken literally, there can be another way of interpretation, namely teleological one, according to which *acte de gouvernement* can be, on the contrary to the above interpretation, admitted in our country.¹⁾

On the interpretation of the Constitution just as that of other laws it is often argued which interpretation should be given, literal or teleological. I do not take so formal a view of the matter as it should depend by all means upon either of the two. What is more important is to grasp the true purpose and spirit of the Constitution. Since the purpose and spirit of the Constitution are generally considered to be most adequately expressed through the wording of the provisions, it seems to cause no inconvenience to interpret the provisions of the Constitution just as their wording expresses. If this way of interpretation could be called literal interpretation it would be the principle as the interpretation of the Constitution. But, as the case may be, it may sometimes happen that the purpose and spirit of the provisions are considered impossible to be grasped if it was taken just as they were expressed in their wording. In such a case we have to understand the purpose of the provision, which will be shown in the wording of the provision concerned, by considering at the same time the relevant provisions or the Constitution as a whole. If this way of interpretation could be called teleological interpretation, it would be no more than supplemental as the interpretation of the Constitution. Literal interpretation, though

1) They are, for instance, Mr. Justice Irie (*Koho-kenkyu*, No. 13, pp. 100-101), Prof. Ogawa (*Kokka-gakkai-zasshi*, vol. 70. No. 1, 2, pp. 90-92), Assistant Prof. Kaneko (*Kokka-gakkai-zasshi*, vol. 72. No. 9, pp. 29-33), etc.

it is called literal, never means only to interpret the wording of provisions mechanically without considering the purpose of the Constitution. Its rationality comes from the consideration that to take the wording of the provision as it is accords exactly with its purpose. In this sense not only the so-called teleological interpretation but also literal one is teleological.

Be the matter as it may, according to those who follow the so-called teleological interpretation, *acte de gouvernement*, contrary to my view, can be accepted in our country, and various explanations are made. I have further, however, to criticize the explanations of the opponents. But I will reserve it for another occasion.

P.S.

As to the interpretation of Article 81 of the Constitution many points are in controversy and views are not necessarily in accord with. Here I took up this provision, without referring to these points disputed, to the extent that it is necessary to clear whether the so-called *acte de gouvernement* can be accepted or not.