The Guarantee of Local Autonomy:-from the viewpoint of tradition and modernity in constitutionalism-

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1 Introduction

As the 21st century approaches, there are voices demanding decentralization of power as we reevaluate our national structure. At the same time, the guarantee of local autonomy has become a focus for efforts toward political reform. Receiving special attention was the final report presented to prime Minister Hosokawa on October 27, 1993 by The Third Extraordinary Administrative Reform Promotion Committee (第三次臨時行政改革推進審会議) (hereinafter referred to as "Third Ad Reform Committee"). The report proposed the enactment of the Basic Decentralization of Power Act (地方分権基本法) as well as pointed out the need for legal provisions for transferring various types of authority concentrated within the central government to local autonomous bodies. However, such calls for the transfer of power were also made in the reports of the First and Second Ad Reform Committees and went largely unheeded due to resistance from the central government and bureaucracy.

Nevertheless, although the actual implementation of local autonomy meets with predictable dissenting voices and resistance from the bureaucracy, there is greater national consciousness of the issue of local autonomy and it has evidently become a part of the government's itinerary.

In order to make a thorough study of this subject, it is first necessary to

review the spirit of local autonomy from the standpoint of constitutionalism. This article will follow the development process of modern constitutional government and the way in which the indigenous right of autonomy and local rights, which constitute the principle of local autonomy, have been treated. Observation will also be made of how such rights have been interpreted within the Japanese Constitution and their present status. Finally, this paper also presents specific examples to illustrate the importance of establishing the right of autonomy and local rights in solving the present problems surrounding local autonomy.

2 Local Autonomy and the Modern Constitutionalism

When discussing local autonomy in modern nations it is necessary to lock at the relationship between the post-Revolution central government that appeared in France and local governments. The French Revolution effectively ended the type of local autonomy of Middle Age cities linked to the past through ancient traditions and brought about a modern state based on the concept of national sovereignty. The National Assembly following the Revolution abandoned the traditional local autonomy of the *ancien réqime*[1] and entrusted a portion of domestic administration to a newly formed local administrative system of prefectures (*département*), counties (*arrondissement*), and municipalities (*commune*). At the Constitutional Convention, Thouret proposed the expression local rights (*pouvoir municipal*) which appeared in the *Decree* of December 14, 1789. Article 4 of that *Decree* stipulates "Municipal agencies have two types of duties to carry out. The first are those that are inherent to the rights of the municipality and those that are inherent to the general administration of the state and delegated to the offices of the municipality." Concerning this point, however, there is also the opinion that as long as affairs in the jurisdiction of the municipality coexist with dele-

gated agency functions, local rights cannot exist in true form. Nevertheless, the 1789 Constitutional Convention effectively dissolved the antiquated Middle Age municipal autonomy and made way for a new local administrative system to which functions belonging to municipalities were entrusted. This was a municipal revolution whose ideological origin was the term "pouvoir municipal."

However, this call for local rights did not become reality in France's road toward modern constitutionalism and was displaced by the influence of 1793 Jacobean democracy. In 1799, under Napoleon, the local administrative system ceased to be a constitutionally recognized institution. This can linked to the idea among French statesmen that the existence of old traditional local autonomy under the French Constitution that guaranteed the indivisibility of the Republic and National sovereignty was a hindrance to modernization.

However, the idea of local rights and the concept of local autonomy as a constitutional institution were later inherited by the Belgian Constitution that was enacted in February, 1831. Shortly after, it was incorporated into the (proposed) 1849 Frankfurt Constitution as an opposing theory to German's constitutional monarchy[2].

Incidentally, the ideas of local rights that spread in Germany could be seen in the Stein City Code of the 1809 Prussian laws. Otto von Gierke wrote "The traditional collective was broken down by the French Revolution, land and citizens were numerically divided, and cities became merely geographical parts of the state. People's sovereignty was applied and unlimited autonomy was adopted, but as a consequence, the healthy spirit of Gemeinwesen was lost. Although the original ideas of natural law excludes intermediate entities between the State and the individual, in Germany there exists a tendency to construct society from bottom to top along the ideas of natural law."[3] As can be gathered from Gierke's assertion, the Stein

City Code went contrary to the method of the French Revolution and attempted to carry out modernization on a different path in a manner similar to the moderate English method. That is, while France was attempting to improve the livelihood of its citizens with a new constitution from top to bottom without involving municipal or prefectural ordinances, the Stein City Code of Prussian Germany made an effort to build a new national livelihood by laying a foundation that went from bottom to top.

Along with the ideas of the Stein City Code, Gierke developed the opinion that local entities were completely separate from the State and were natural creations of independent origins. In other words, since a corporate body was a natural creation (naturicher Gebilde), like natural man, it had indigenous rights. Therefore, it was impermissible to base its existence on national duties transferred from the State. He further asserted that "Municipalities are entities that have universal rights as entities in themselves, particularly the rights to determine a public budget and to raise autonomous taxes."[4]

However, this opinion (the indigenous rights school) was to receive criticism from Georg Jelinek, Julius Hatschek, and others in the mainstream (the derivative school) of German publicism that came into being from the latter half of the 19th century and into the 20th century.[5] According to *Peters*, the derivative school is based on the opinion that "Even if we suppose the existence of the indigenous rights of local entities, fundamentally speaking, they are based on the mandate of the state and as themselves are not original rights but are connected to the 'benevolence of the state (Staatsgnaden)' "[6].

Later, provisions related to local autonomy appeared in Germany as the result of Article 127 of the Weimar Constitution and Paragraph 2, Article 28 of the German Basic Law. The provision in Article 127 of the Weimar Constitution can be interpreted not as an active guarantee of autonomous rights[7], but simply as a declaration. In these circumstances, *Hans Peters* and

others publicists such as *Carl Schmitt*, who appeared in the later part of the Weimar period, began actively reviewing the right of autonomy. *Carl Schmitt* showed that, according to the theory of institutional guarantee, instead of simple "empty fundamental rights, " the local autonomy provisions of the constitution "have normative meaning and bind the legislative government; They have the function of providing the minimum guarantee against infringement by law in local autonomy." *Schmitt* stated: "If the guarantee is to have any substance, the legislative government cannot have a complete free hand in dealing with municipal organizations, with specific fields of activity, or even with any establishment under state supervision.For example, there can be no doubt that transferring all management of the affairs of local entities to the executive branch of the state (staticher Podesta) would infringe on the substantial assessment of our nation's own autonomy; that discarding the rights of municipalities to administer the indigenous properties under the supervision of the state would, in our opinion, infringe on the very substance of local government; and that laws calling for immediate incorporation of municipalities of 10, 000 or less, or 100, 000 or less, would destroy the concept of our nation's traditional municipalities as well as their autonomous government."[8]

It is generally believed that Paragraph 2, Article 28 of the present German Basic Law expresses the institutional guarantee opinion. In other words, the municipal rights and the rights that guarantee the incorporation of municipalities (right of autonomy) stipulated in Paragraph 2, Article 28 of the Basic Law "do not guarantee local rights of pre-nationalistic character, nor do they guarantee the fundamental rights of local entities in the sense of subjective civil rights or the "freedom of municipalities (Gemeinderfreigheit)" that became an issue with the Frankfurt Constitution of 1849. Instead, they have the nature of an institutional guarantee (institutionaelle Garantie, Einrichtungs Garantie) that guarantees the legal institutions (Rechtseinrich-

tung) of municipalities and municipal federations (incorporations; added by writer)." He also asserts that, as an effect of the introduction of this institutional guarantee into the Basic Law, "Not only has the complete abolition of local self-government as a legal institution become impermissible, but the legislative government has been obliged to not infringe on the essential substance (Wesensgehalt) or the core (Kern) of self-government or encroach on the right of self-government until it is virtually disappeared."[9]

This institutional guarantee theory is still a popular view in Germany and has been disputed in academic circles and in court cases concerning the issue of what constitutes the essential substance or core of a local autonomous administration that cannot be infringed upon by legislation.

3 Guarantee and Development of Local Autonomy in Japan

(1) Local Autonomy under the Meiji Constitution

Under the Meiji Constitution, local autonomy was interpreted as a matter of national legislative policy and not treated as a constitutional matter. On the other hand, local autonomy was not completely ignored since it was discussed in the drafting process of the Meiji Constitution. Eventually, however, the Privy Council deleted it from the final draft. The reason for this omission can be linked to the fact that the local entities were not seen as having any independent nature. It was also true that local autonomy was apt to be thought of as existing under the umbrella of the "government structure." An explanatory statement asserted that local autonomous bodies (municipalities) "are preparatory training for a national constitutional government and have a nature similar to that of the Stein City Code of Prussian Germany promulgated in 1808."[10] Actually, in April 1888, the City Code (Shisei) and the Town and Village Code (Chosonsei) were enacted as structures of local autonomy along similar lines as the Prussian system

City, town, and village assemblies were made legislative organs, assembly members were to be directly elected by persons who qualified as taxpayers, the mayoral office of the municipality became an executive branch, and it was decided that the central government would sanction approval upon an assembly's recommendation. Upon the promulgation of the City Code and the Town and Village Code, the Meiji Government at the time explained that "The City Code and the Town and Village Code is promulgated out of the desire to promote the benefit to local communities and to advance the happiness of the populace, to respect and further expand the old customs of neighborhood solidarity, and to recognize the need to guarantee the rights of cities, towns and villages by laws." Consequently, local autonomy in Japan was different from that of France where the intent was to break down traditional local autonomy to institute bureaucratic local autonomy. In the case of Japan, not only was local autonomy seen as a preparatory step toward a national constitutional government, it was connected to the desire to respect the old customs of neighborhood solidarity. Along with the City Code and the Town and Village Code, the Code for Urban and Rural Prefectures (Fukensei) and the Country Code (Gunsei) were enacted in 1890. This resulted in a modern institution of local autonomy that consisted of prefectures, cities, towns, and village.[11] In reality however, the implemented system was largely non-representative as many parts of local administrative functions were carried by prefectural governors who worked as part of the national government. In other words, prefectures, cities, towns and villages were merely local entities set up to somehow reflect the public consensus of their inhabitants.

However, as Japan moved towards a military structure in Showa years and especially after 1931, democracy itself was viewed with skepticism and the local autonomies were criticized for their deficiencies and for the financial borden they represented. Consequently, supervision by the central

government was drastically increased and local autonomies degenerated into the smallest units of national policy.[12]

(2) Local Autonomy as Guaranteed by the Japanese Constitution

The Post-War Japanese Constitution includes a separate chapter with four articles concerning local autonomy. However, it was not the Japanese Government that introduced these provisions into the draft of the Constitution. They were, instead, a product of GHQ direction.[13] Constitutional guarantee of local autonomy means that any alterations or abolition of the various regulations or basic provisions concerning local autonomy in Chapter 8 have to be made through the process of constitutional amendment. This is an essential difference with the local autonomy recognized under the Meiji Constitution. According to the general viewpoint at the time, "the provisions related to local autonomy did not stop in prohibiting the abolition of local institutions without constitutional amendment, but also prohibited any stipulations related to the organization and administration of local public entities without legislation (the power of laws over local governments' regulations), and even went a step further by carrying a positive meaning that guaranteed that the legislative branch was bound to the concept of the 'principle of local autonomy.' "[14]

The ideas of natural law were no doubt inherent in the basic human rights found in the Japanese Constitution. However, how were they interpreted in the context of local public entities? Knowing this is crucial in studying the exact nature of the rights of autonomy. For this purpose, let us start with the drafting process of provisions related to local government.

Local government reforms were promoted by the GHQ civil government and were subject to the same kind of debate that took place in the enactment process of government institutions.

First, GHQ set up a steering committee within to see that local autonomy was clearly specified in the constitution. However, two different opinions

appeared concerning the content of the provisions to be introduced. One group, led by Merle Rowell strongly advocated "home rule, " while the other, led by Charles Kades, believed that some central supervision was inevitable. On February 13, 1946, General Whitney, legal chief of SCAP (Supreme Commander of Allied Powers) drafted a compromise proposal between the two opinions and presented it to Joji Matsumoto, chairman of the Investigation Committee for Constitutional Affairs.

The draft proposal outlined by GHQ consisted of three Articles that contained ① rules for the direct election of chiefs (governor, mayors, etc.) and legislators (representatives to prefectural and municipal assemblies), ② the right of citizens to enact charters, and ③ the right to establish special ordinances by the consent of the majority of voters.[15] The Japanese Government, notably the Ministry of Interior, expressed disapproval of direct election. At the end of deliberations, however, the Constitution came to provide for the following: ① rules and regulations governing local public entities to be fixed in accordance with "the principle of local autonomy"; ② the direct popular vote of chiefs and assembly members in all local public entities; ③ the right to manage local government property, affairs, and administration and the guarantee that any special laws applicable to a local public entity is subject to the consent of its voters.

If we compare the GHQ draft and the Government's proposal, we can see that the Government trend to avoid the issue of equality between the national government and local public entities that was underlined in the GHQ draft proposal. While respecting local autonomy based on the principle of local government, the government changed the provisions made by GHQ for direct popular vote of executive leaders (governors, mayors, etc.), legislators (members of prefectural and municipal assemblies) and officers to simply say that selection of such officials "must be through the election by citizens of local public entities." However, GHQ did not approve of this

deletion of "direct" from direct popular vote. Further, the GHQ provision that stipulated "Their right to create charters must not be taken away" was revised to "(they) may enact regulations and ordinances."

The changes of the content of the GHQ proposal reflect the government's resistance to GHQ's local autonomy constitutionalism and its intent to unify local autonomous bodies legislatively and to guarantee the superiority of the Diet over local assemblies.[16]

Although, the legal status of local public entities changed in the enactment process of the Japanese Constitution, the existence and the guarantee of the right of autonomy has been made explicit. Moreover, as with other governmental institutions, the guarantee of the right of autonomy has been heir to the same ideas of natural law which form the background of the overall constitution.

4 The Guarantee of Local Autonomy

How was the constitutional guarantee of local autonomous bodies explained by theoretical precedent? The "Annotated Japanese Constitution Vol. II" published in 1954 implied the new constitution guaranteed local autonomy in the sense of collective autonomy and residents' autonomy. It stated "The idea of the right of autonomy of local public entities are indicated. We can discern a standpoint that guarantee the *indigenous and equal right of autonomy* that cannot be taken away. However, it is not meant to be interpreted to mean that local autonomy is absolute and that all restrictions from a national standpoint are to be rejected."[17] It is clear here that the *indigenous equal right of autonomy* is affirmed with attached conditions.

Shozaburo Sugumura presented "Points at Issue in the Local Autonomy Chapter of the Constitution" in the issue No. 9 (1953) of *Koho Kenkyu.* He wrote "There is some reservations over whether or not the *indigenous rights*

opinion can be included in our interpretation of the constitution ... (However) our nation's constitution provides a separate chapter for local autonomy instead of including it in the chapter of citizen's rights and duties ... As the rights of local public entities are guaranteed by constitutional provisions, it is certain that they have a powerful authority that is different from other public entities. In this meaning, (these rights) are fundamental rights."[18]

The above are repreertative of the school of though that establishes the guarantee of local autonomy as a natural indigenous right. In *Gyosei Ho* (1955), Jiro Tanaka offered the following criticism of this view: "Moreover, the absolute view of local autonomy as indigenous is not only impermissible from the argument of legal structure, but also cannot escape criticism for going too far as a policy argument. The reason is that while local public entities are often territorial communities, they are also public functioning entities that exist as an integral part of the national government structure that exists beyond their borders. It is not possible for local public entities to be separated from the national government."[19] Tanaka's view represented the popular viewpoint that saw local autonomous bodies as branches of the national government organization.

However, along with these popular viewpoints that existed at the time, appeared contradictory arguments that asserted that the guarantee of local autonomy had little significance. Yoshimiki Yanase stated "The main significance of Article 92 (the principle of local autonomy; added by writer), is that it provides an exception to the principle of centralized executive power stipulated in Article 65 and makes possible local autonomy which was not possible under Article 65. In other words, instead of guaranteeing the institution of local autonomy, it provides the grounds for its existence. The language used of the beginning, suggests that the main purpose of the article is to recognize or to allow the institution of local autonomy. De-

spite its extreme lack of meaning as a guarantee of local autonomy, this provision is not completely without meaning."[20]

There were reverberations among publicists in response to the criticism against the prevailing opinion. For example, Nobunari Ukai makes the following rebuttal by pointing out that "Aside from providing articles related to the organization and administration of local public entities based on the principle of autonomy, the constitution must certainly recognize local autonomy in some kind of form as long as we do not permit such a *contradictio in adjecto* to the principle of local autonomy that does not recognize local autonomy."[21] Yanase's interprets "the principle of local autonomy" as the reason of existence for local autonomies. Consequently, this leads to the logic that if the reason for existence is zero, then the substance of local autonomy is naturally zero, denying the very existence of local autonomy. The severe criticism towards this logic made by many scholars was to be expected.

From the later half of the 1950s through the 1960s appeared many written works related to the principle of autonomy. Among these were *Chiho jichi no honshi* (The Principle of Local autonomy) by Ryokichi Arikura (KENPO KOZA [Yuhikaku, 1959]), *Chiho jichi no honshi* (The Principle of Local autonomy) by Toshimasa Sugimura (KENPO ENSHU [Yuhikaku, 1959], *Chiho jichi no honshi* (The Principle of Local autonomy)" by Hideo Wada (HOGAKU SEMINAR No. 60, 1960), *"Chiho jichi no honshi" to sono kino* (The Principle of 'Local autonomy' and Its function)" by Suruki Akagi (SHISO No. 443, 1961), *Chuo shuken to chiho bunken* (Centralized power and the Separation of Local power) by Shozaburo Sugimura (TOSHIYOSHI MIYAZAWA KANREKI KINEN; NIHON KENPO TAIKEI 3 [Yuhikaku,1963]), and *Chiho jichi no hosho* (The Guarantee of Local autonomy) by Yoriaki Narita (TOSHIYOSHI MIYAZAWA KANREKI KINEN: NIHON KENPO TAIKEI 5 [Yuhikaku, 1964]). The works by Arikura[22], Sugimura, and Wada made basic

observations of the principle of autonomy and asserted that its fundamentals give birth to constitutional constraints in legislation and administration. Narita's essay introduced the theory of institutional guarantee, which was the prevailing opinion in German publicism, and pointed out the existence of legal principles of constraints and restrictions in legislation and administration.[23] By this period, the theories of natural indigenous rights and local rights had disappeared. Around this time, the Supreme Court handed down a decision that followed the prevailing trend in a lawsuit centering around the provisions of paragraph 1, No. 2 of Article 281 of the Local Autonomy Act which abolished the public election system for chiefs of special metropolitan districts. Concerning the guarantee of local autonomy, the Supreme Court was even more positive and decided that "In order for a local public entity to deserve its name, it is not sufficient to merely treat it as such by law. In actuality, its citizens need to maintain a cooperative lifestyle that is economically and culturally intimate and have a social foundation that is based on a cooperative body consciousness, Even as seen from the standpoint of its history and its actual administration, it must be a regional entity that is granted such basic authority as appropriate autonomous legislative, administrative, and financial rights. It is also suitable to say that as long as an entity has such substance, it is impermissible to ignore that substance and take away the guaranteed authority of local autonomy by law (sup.ct.,G.B.,March 27, 1963 17 Keishu 121).

The question that can be raised is: If the institutional guarantee doctrine is introduced, just what parts of local autonomy will be guaranteed? Also, even if measures applicable to this parts or parts can be taken, such measures differ depending on the value judgment of each person. Consequently, since it is an indeterminate concept, the institutional guarantee doctrine will be apt to have a particular interpretation and be filled with value judgments. This leads to severe criticism from scholars of government who

question if it actually has any limiting effect over legislative authority and may further assert that it "tends to serve as an 'invisible mantle' for the actions of legislators" in specific instances (such as the "Popular Ward Chief Public Elections of Special Wards").[24]

However, as environmental pollution and destruction of the environment became reality from the latter half of the 1960s through the 1970s, written works appeared to bring up the restoration of the right of local autonomy and the principle of local autonomy. These include *Kenpo hassho (chiho jichi)* [Chapter 8 of the Constitution (Local autonomy)] by Syuichi Sugai (HOGAKURONSO Vol. 88, No. 4–6, 1961), CHIHO FUKKEN NO SHISO (The Idea of the restoration of Local rights) by Takashi Tejima (Nishi Nihon Shinbunsha, 1973), *Kenpo to chiho jichi* (The Constitution and Local autonomy) by Hiroshi Tokioka (in ARIKURA RYOKICHI KANREKI KINEN: GENDAI KENPO NO KIHON MONDAI [Waseda Daigaku Shuppanbu, 1974]), *Chiho jichiken no honshitsu* (The Essence of Local autonomy) *1–3* by Yasuo Sugihara (HORITSU JIHO Vol. 48, No. *2–4*[1976]), SHIMIN JICHI NO KENPO RIRON (the Constitutional theory of Municipal autonomy) by Keiichi Matsushita (Iwanami Shoten, 1976), and JICHITAI KENPOGAKU (Self-Governing Body Constitutional Scholarship) by Seikichi Haryu(Gakuyo Shobo, 1976).

The common factor to these essays was their argument that the introduction of the institutional guarantee doctrine into the explanation of the principle of local autonomy would give a free hand to the national government in intervening in local entities. That is, in political science terms, based on the recognition of crisis facing local autonomy, the essays represent a viewpoint that attempts a new theory construction to restore the local autonomy doctrine. Of course, the essential understanding of this theory construction differs with school of thought. First, Teshima's essay acknowledges residents' right of autonomy and groups' right of autonomy

and places emphasis on Article 95 of the constitutional by saying that the "Indigenous right of local autonomy (which unifies the above rights) can be read clearly from Article 95."[25] In Tokioka's essay, the principle or fundamentals of local autonomy is seen as indigenous rights. In other words, "the individuality and autonomy of a public entity, like the fundamental human rights of the individual, are the pre-nationalistic indigenous rights of a local autonomy and are inherently vital to democracy."[26] Matsumoto's essay advocates popular and decentralized sovereignty, which make the everyday actions of national sovereignty possible, and emphasizes local autonomous bodies as concrete organizational entities of sovereignty. In other words, the rights of the residents of local public entities should be obtained through popular and decentralized sovereignty and sovereignty should be reevaluated in the context of the national legal system. The essay contradicts the pyramid logic with its descending order from national government to prefecture to city, or village to resident and instead enhances the position of local autonomous bodies by constructing a reverse logic of an ascending order that goes from citizen to city, town, or village to prefecture to national government.[27]

There also appeared people's rights and indigenous rights opinions that looked at the essence of local autonomy from the point of view of the people's sovereignty theory with the assumption that sovereignty is indivisible. An essay by Yasuo Sugihara is representative of such viewpoints. Concerning the guarantee of local autonomy, he writes, "should be based on the principles of 'people's rights' which seek through government by the will of the people and, accordingly, the local public entity should be expected to be independent from the central government in the management of its duties within its own capacities based on the direct opinions of its citizens. (The central government manages only matters relating to the whole nation and citizenry based on the opinions of 'the People.')"[28] Seikichi Haryu's essay

put the right of autonomy in the context of human rights. In order words, the principle of local autonomy "should not be simply interpreted as not limited to resident autonomy or group autonomy, but as naturally incorporating the aim of modern constitutionalism to protect human rights.[29] This viewpoint sees local autonomous bodies as means for protecting human rights.

Japan's rapid economic growth from the latter half of the 1970s through the 1980s and into the 1990s has endangered local autonomy. As a result, many writings have appeared that link this sense of crisis with the need for decentralization and review the principle of local autonomy. The essays of many law scholars can be interpreted as criticisms of the view of local autonomous bodies as deriving from the national government and of the introduction of institutional guarantee. Among these are KENPO TO CHIHO ZAISEIKEN (The Constitution and Local financial rights) by Hirohisa Kitano (Keiso Shobo, 1980)[30], JICHITAI HOGAKU (Legalism of Autonomous bodies) by Hitoshi Kaneko (Gakuyo Shobo, 1988)[31], and JICHITAI KENPOGAKU (The Constitutionalsm of Autonomous bodies) by Kenji Yamashita and Takeshi Kobayashi (Gakuyo Shobo, 1991)[32].Many later works have followed the same line of thought and have discussed the crisis of local autonomy and decentralization from a viewpoint that stressed the securing autonomy and local government.[33]

5 Reevaluation of the Right of Local Autonomy and Local Rights

(1) When looking at local autonomy, it is necessary to again investigate the constitutional guarantee of local autonomy in the context of the present environment.

We can classify the schools of thought concerning the guarantee of local autonomy that have developed along with modern constitutionalism into

two categories. The first is a Jacobean type conception of autonomy that links the citizenry with the state through the establishment of national sovereignty and refuses to constitutionally recognize old traditional local autonomies considered as heirs to feudalistic elements. The second is a conception seen in Britain and the United States that constitutionally recognizes autonomous bodies as the very foundation of a democratic nation.[34]

The Japanese Constitutional Convention discussed the guarantee of local self-governing bodies along with the (legislative, administrative, and judicial) organization of the national government. The focus of those discussions was the decentralization of authority. Legally speaking, the right of autónomy and regional rights were recognized at the Constitutional Conventionally. This recognition was a prerequisite to the difference in opinions between Rowell and Kades concerning the relationship between local self-governing bodies and the central government. Although some elements of the type of local autonomy that existed under the Meiji Constitution still exist, the right of autonomy that was recognized followed the American and British patterns. This signified a true local expression of democracy. Toshiyoshi Miyazawa summed up the new constitutional idea by writing that "At the central level, various institutions surrounding the Diet are born: at the local level, the so-called local autonomy is born.[35]

As long as we stay within this viewpoint, the adoption of the institutional guarantee viewpoint should not raise any concern. There is no doubt that this viewpoint obliges the legislative and administration branches of the government to not infringe on the essential content or core of local autonomy. However, as many essays have pointed out, a judgment of what that content or core constitutes is difficult. An even greater concern rises in the fact that it is a theory which has its roots in a denial of the existence of the right of local autonomy.

What significance has the recognition of the indigenous right of auton-

omy? This question needs to be explored as a component of the "principle of local autonomy." Many written works explain the above principle as a synthesis of the autonomy of groups and of citizens. However, it is necessary to determine the specific content of each form of autonomy. Here, the autonomy of groups and of citizens are explored separately.

1) The Right of Group Autonomy

This refers to the emphasis on autonomous power versus centralized power. The following represents a viewpoint concerning the relationship between group autonomy and the state: "Since local autonomy is an *internal part* of the nation's political structure, no matter how much local autonomy is asserted, it has a self-evident limit and there is no need to mention that any infringement on the unity of the nation's political structure is not permissible."[36] The matter in question here is the interpretation suggesting that local autonomy is "an *internal part* of the nation's political structure." It is only natural that the opposing viewpoint sees local autonomy not as an internal part of the nation's political structure, but as a political structure that exists in parallel with the nation's political structure. Yasuo Sugihara states that local autonomy in based on people's sovereignty and that "the local public entity should be expected to be independent from the central government in disposing the duties within its own capacities" and that "The central government manages only matters relating to the whole nation and citizenry based on the opinions of the People."[37] Keiichi Matsushita shares the same viewpoint when he emphasizes local autonomy as a means to activate citizens' sovereignty and the decentralization of sovereignty. The problem with the popular viewpoint given earlier is the point expressed by Toshiyoshi Miyazawa: "Local autonomy has a self-evident limit and there is no need to mention that any infringement on the unity of the nation's political structure is not permissible." By infringement on the unity of the nation's political structure", the author probably means the infringement

of the laws enacted by the national government. Therefore, his statement asserts that going against the laws of the country is impermissible because it infringes on unity. The danger of this thinking is in its assumption of prior occupation by national laws. Common to the works written from this point of view is the need to clearly define what the work of the national government is and what the work of the local self-governing body is.

As long as the guarantee of the right of autonomy is to be assumed, the following should apply:

① The functions of local public entities are to be processed autonomously. In other words, one's own functions should not be submitted to the guardian supervision of the central government.

② The distribution of local functions should favor local public entities. If this rule is carried through, then the functions appropriate to cities, towns, and villages would be carried out by those entities. Functions not appropriate to cities, towns, and villages would become the functions of prefectures. Functions not suitable to the prefectures would become the work of the national government (the duties of the central government). The ideas of the Shoup Report of August 1954 serve as reference for this distribution of functions.

③ In order to establish such functions that place priority on local public entities, it is natural that the autonomous taxation rights of such entities be recognized and that the distribution of revenue sources matches the distribution of functions.[38]

According to the Local Autonomy Act enacted under the Japanese Constitution, these functions include public functions (indigenous functions), group delegated functions, and administrative functions (Local Autonomy Act Article 2, Paragraph 2). Public functions are the purpose of existence for local public entities and include mainly non-authoritarian services and the maintenance of facilities for the welfare of their residents such as rub-

bish treatment, water and sewage works, schools, hospitals, and public halls. Delegated (group) functions are those functions delegated by the national government or other local public entities on the basis of individual provisions of the law and include the functions mentioned on the Attached Tables 1 and 2 of the Local Autonomy Law such as building of hospitals for communicable diseases and carrying out steps against unemployment or National Health Insurance projects. Administrative functions are functions that were not recognized for local public entities under the old system and include the exercise of civil authority to regulate the rights and freedom of residents such as keeping control over traffic, demonstrations, private enterprises, and pollution. As a principle, the standards for carrying out these three types of functions are in accordance with regulations.

Other local public entity functions include "delegated agency functions" that are entrusted under the law to chiefs, committees, or other local agencies by the national government or other local public entities. The authority of local assemblies in relation to such functions is substantially controlled (Art. 99) and the chiefs of local public entities are treated as lower agencies of the national government and are subject to its supervision (Art. 150). The delegated agency functions comprise a large part of local public entities' work load; they represent 70 to 80 percent of prefectural districts' daily work and about 40 percent of municipalities' daily work.

The idea behind the allotment of functions to local public entities as shown above is not admissible from the viewpoint of local rights and especially the right of group autonomy. Consequently, it is only natural that delegated agency functions are subject to extremely close scrutiny by Ad. Reform Committees.

2) Right of Resident Autonomy

This refers to government by the people in local regions. This viewpoint differs from the idea of the Jacobean type of local autonomy based on peo-

ple's sovereignty and requires the democratization of local autonomy for the democratization of the overall national government structure. The opposition of ideas between Rowell and Kades during the enactment process of Japan's constitution concerning the nature of local autonomy has already been introduced. Common to both opinions, however, was the idea that participation of residents in government allowed by resident self government would lead to more effective participation of citizens in the national government structure.[39] This idea is not out of the ordinary if we suppose that their purpose was to carry out local democracy in Japan where bureaucracy was deeply rooted. The specific content of participation of residents in government include the following:

① The will of residents is reflected in local public entities through assemblies and chiefs. Unlike in the national government, two-dimensional representation is required in local public entities.

② The will of residents must be reflected accurately in assemblies (through social representation).

③ The representing assembly members and chiefs must carry a responsibility toward residents. Also, because local autonomy is held in high regard, Article 95 of the constitution stipulates that any "special law applicable only to one local public entity" must be subject to a vote by residents. This is an example of residents' autonomy.

3) Autonomy as a Guarantee of Human Rights

Local public entities must be where resident's freedom and human rights, not to mention the right to their way of living, are protected and defended. In JIJITAI KENPOGAKU, Seikichi Haryu writes "While the principle of local autonomy, along with residents' autonomy and group autonomy, has been taken as a problem of government organization, it has not been treated as a doctrine of human rights." Following this statement, he also wrote "The principle of autonomy in Article 92 should not be simply interpreted

as limited to residents' autonomy or group autonomy, but as naturally incorporating the aim of modern constitutionalism to protect human rights. A local public entity that is separated from a basic aim of faithfully protecting human rights is nothing at all. The organs of government exist for the bill of rights."[40] Similarly, Yasuo Sugihara asserted "As clearly stated in the Japanese Constitution, especially Articles 11, 13, and 97, as the government of the central administration, the government of local public entities exists to guarantee human rights and should be interpreted as being obliged to respect human rights to the maximum extent. It is not possible to interpret these prescriptions as not being applicable to the government of local public entities. It also follows that the 'principle of local autonomy' should be interpreted as incorporating this meaning. Such being the case, as a principle, if necessary to guarantee the human rights of residents, local public entities should be able to act on all matters autonomously regardless of the existence or non-existence of legal basis or legal prescription."[41] Although the Haryu and Sugihara's assertions that the purpose of local autonomy was to protect the human rights of residents seem a commonplace, they have an aspect of freshness if we consider that they were developed after the war when the guarantee of human rights was separated from the guarantee of local autonomy.

(2) The human rights guarantee of residents in local public entities made by the Japanese Constitution specifically means the guarantee of freedom rights, social rights, political rights, etc. The realization of the guarantee of residents' human rights may specifically accompany the enactment and reform of independent laws, ordinances, general plans, etc. However, there have been cases where their legislation has been contested on the question of whether or not they were conform to the constitution and existing laws, some of the points of contention are presented below.

1) Constitutionally and Legally Withheld Matters and Their Relation to

Regulations

Examples include control of property (contents) permitted by regulation (the legalism of property rights), the levying of taxes permitted by regulation (the legalism of taxation), and the enactment of penalties permitted by regulation (the principle of legality).

① Property Control Permitted by Ordinance

Paragraph 2, Article 29 of the constitution stipulates that "Property rights shall be defined by law, in conformity with the public welfare." Consequently, the question of whether or not the control of property rights can be permitted by regulations becomes a problem. Actually, regulations concerning property rights have been continuously enacted since the 1960s. For example, these include the Sloped Land Constitution Control Regulation, Ground Water Pumping Control Regulation, Reservoir Conservation Regulation (Nara Prefecture), Pollution Prevention Regulation, Environmental Protection Regulation, Environmental Assessment Regulation, Consumer Protection Regulation, and the Retail Shop Control Regulation. Since these regulations control property rights, they have been the subject of debate to be in conformity with the constitution. If they are unconstitutional, regardless of the welfare demands of a public entity, controls over property rights cannot become laws by regulation except when there is individual legal mandate. Controls must be based on a law with complete formal meaning.[42] On the other hand, those who assert that it is constitutional point out that Paragraph 2, Article 29 of the constitution does not exclude control of property rights permitted by regulation and thus allows such control. The reasons for this interpretation include the following:

i) The right to enact regulations provides a single exception to the Diet being the only lawmaking organ.

ii) Regulations are enacted at local assemblies which have democratic foundations and thus have no essential differences with laws.

iii) As shown by constitutional debate, Article 29 of the constitution shows that legal formality is necessary for the definition of property rights. Consequently, it clearly presents a rule over legal power by the nation by stating that a simple government order cannot make such a definition of property rights and does not exclude regulations in anyway.[43]

From the viewpoint of indigenous right of autonomy, 2) and 3) are sound reasons. Of course, even if property rights are controlled by regulations, the regulations that oppose the principle of *autonomy will be subject to a "double standard" that is the legal principle of property rights control.*

What made such property controls by regulations decisive was the "Regulation Concerned with Rationalizing Tokyo Land Dealings" of October 1986 that stipulated land market price controls. Although this regulation was abolished in 1987, it was called on "extention" regulation of the National Land Use and Planning Law (1974) and its legality was recognized and it thus contributed to the advancement of the legality of regulation enactment.[44]

② Taxation Permitted by Regulation

Article 84 of the constitution lays down the provisions for the legalism of taxation. Consequently, the matter of whether or not local self-governing bodies may carry out taxation by regulation has been a matter of contention. Since the enactment of the Japanese Constitution, the legality of taxation by regulation has been recognized based on the authorization of the Local Tax Law. The following are related opinions; i) Definition by regulations within the framework of the Local Tax Law provide an exception to the legality of taxation and should be allowed; ii) Article 84 must be interpreted as pertaining to regulations; and iii) the right of taxation must be approved as a part of the right to independent finances and as an indispensable element of local entities if they are to be independently governed.[45] Therefore, the right to taxation should be understood as being guaranteed

by Articles 92 (the principle of local autonomy) and Article 94. Although recent judicial precedent concerning taxation also warrant taxation permitted by regulation, they do not recognize specific items taxed by regulation. For example, In the decision of the Akita-shi National Health Insurance Tax Regulation , Sendai High Court stated "If Article 92 of the constitution is referred to ... we must state that taxation (local taxes) by regulation is required and, in this meaning, the said "law" of Article 84 should be interpreted as pertaining to regulations concerned with local taxes." (Sendai High Court.; July 23, 1982, 33 Gyoshu 1616. The Fukuoka District Court decision on the Omuta Electricity Taxation Lawsuit is also an example: "The constitutionally recognized right of taxation of local public entities is an abstractly sanctioned power of levying and collection of taxes for general local public entities. The constitution does not recognize taxation rights for specific local public entities concerning specific taxation items." (966 Hanrei Jiho 3 [Fukuoka Dist. Ct., June 5, 1980])

③ Penal Regulations Permitted by Regulations

Article 31 of the constitution stipulates the *principle of legality* by stating that penal regulations must be in accord with laws. Although the establishment of penal regulations of the constitution, if we take the viewpoint that autonomous local regulations are enacted based on the right to autonomy, the enactment of penalties do not constitute a violation of Article 31. Academic opinions and court decisions make the same affirmation.[46] A Supreme Court decision is one example: Article 31 should be interpreted as not stipulating that penalties must necessary be determined by national law and that, by the delegation of legal power, definition by regulations below national law is possible. This is made clear by Proviso 6, Article 73. However, it goes without saying that the delegation of legal power must not be an unspecified and general blank power of attorney." (16 Keishu 5–577 [Sup. Ct., May 30, 1962])

However, from the point of the guarantee of autonomy, the idea that the right to impose penalties is by right the function of the state and does not belong to local self-governing bodies is not permissible and the enactment of penalties by regulation is a power directly delegated by Article 94, That is, penalties are not based on Paragraph 5, Article 14 of the Local Autonomy Law. It also goes without saving that penalties enacted through regulations must conform to those enacted through national laws.

2) The Relationship of Laws and Regulations

The relationship between laws and regulations is an issue linked to the question of how wide is the range of local self-governing bodies' powers to enact regulations. Article 94 stipulates that "Local public entities may enact regulations within the scope of the law." Based on this stipulation, a regulation cannot be enacted as long as there is no explicit delegation by a law. It is to be expected that the idea that laws take precedence has been the dominant opinion until recent years. However, there has been efforts to overcome this opinion including the debate over the enactment of "*uwazumi jorei* (supernatant regulations), "

Uwazumi jorei refers to the practice of carrying out control with regulations of even greater severity than existing laws with the same objectives. A representative example is provided by pollution regulations. At present, regulations by national law do not restrain regulations by local self-governing bodies, and the enactment of public pollution prevention regulations with emission standards stricter than national regulations that set minimum standards for the whole nation and citizenry are permitted. One opinion states that "Regardless if a need for emission standards stricter than those of the national law is objectively recognized, in the case where a certain national law must be interpreted as prohibiting a regulation that would fulfill such a need (in other words, when there is no margin to interpret the regulation's constitutionality), the pertinent law would oppose 'the

principle of autonomy' of Article 92 and be invalid."[47]

This opinion can be interpreted as approving the autonomy of local self-governing bodies' enactment of regulations. This is not out of the ordinary if viewed from the standpoint that the indigenous right to autonomy should be approved.

The national government has not faced environmental problems using only public pollution laws, but has opened the way for *uwazumi jorei*. I must mention that *uwazumi* (supernatant) standards have been clearly specified by regulations enacted by prefectures over the Air Pollution Control Act and the Water Pollution Prevention Act and by regulations enacted by prefectures and municipalities over the Noise Regulation Act and the Vibration Regulation Act.

7. Conclusion

The guarantee of local autonomy is a wide topic, but in this article, we have analyzed the development of local and indigenous autonomy rights, which are the theoretical starting point of local autonomy, from their appearance at the Constitutional Assembly following the French Revolution.

Although local and indigenous autonomy rights were defined as a constitutional guarantee of local autonomy under the German Weimar Constitution, they were interpreted and justified as having mere declarative significance. As a response, Carl Schmitt proposed the concept of institutional guarantee. As mentioned in this article, this concept forms the foundation of local autonomy thinking in Germany.

Despite the fact that local autonomy was confirmed under the Japanese Constitution amidst great discord between GHQ and the Home Ministry, it is clear that local self-governing bodies were guaranteed as autonomous structures holding local and indigenous autonomy rights. As a matter of fact, the academic opinion at the time of the constitution's enactment supported such guarantee. However, the ideas of the right of autonomy (indigenous

rights) had not been subject to sufficient theoretical analysis before local rationalization and promotion of efficiency and is being replaced by the previously mentioned concept of institutional guarantee. Although this concept seemed to have validity when it was first introduced as a legal principle to provide legislative and administrative limits over the wasting away of local autonomy, it received criticism for being an "invisible cloak" for legislators. Consequently, there has been a movement to return to the original principle of autonomy in academic thought. This can be interpreted as a revival of the indigenous right of autonomy.

This article has emphasized the recognition anew of the indigenous right of autonomy and, through an analysis of collective autonomy and resident autonomy explained by the principle of self government, has proposed the establishment of local autonomy as a guarantee of human rights. It has also made a legal observation of the emerging relationship between law and regulations from the aspect of the right of local government. It goes without saying that the specific investigation of the establishment of the right of local autonomy and the functions of local-self governing bodies is aimed at strengthening local autonomy.[48]

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1. Yoshikazu Kawai stated: Although local authority and intermediate authority were lacking in substance during the absolute monarchy, they were not completely denied and their abandonment in France took place with the declaration of August 4, 1789.
   Kawai, Yoshikazu, KINDAI KENPO NO SEIRITSU TO JICHIKEN SHISO (1989) at 542.
2. Narita Yoriaki, *Chiho jichi no hosho* in NIHONKOKU KENPO TAIKEI No. 5 of MIYAZAWA TOSHIYOSHI KANREKI KINEN (1964), at 207.
3. Kawai, *supra* note 1, at 445.
4. Narita, *supra* note 2, at 207.
5. *Id.*, at 208.
6. *Id.*
7. *Id.*, at 214.

8. *Id.*, at 217.
9. *Id.*, at 222.
10. Watanabe, Sotaro, JICHI SEIDORON (1931), at 96.
11. Refer to Watanabe, id., at 90 for a detailed narrative.
12. Hogaku Kyokai Hen, CHUKAI NIHONKOKU KENPO (1961), at 1371; Yoshida, Yoshiaki, NIHONKOKU KENPORON (1990), at 187.
13. Narita, supra note 2, at 232.
14. Narumi, Masayasu, SENGO JICHITAI KAIKAKUSHI (1982), at 44.
15. *Id.*, at 45.
16. *Id.*, at 50.
17. Hogaku Kyokai Hen, *supra* note 12, at 1362.
18. Sugimura, Shozaburo, *Kenpo no chiho jichi josho ni okeru mondaiten*, in KOHO KENKYU No 9 (1953) at p. 96. Sugimura changed to the institutional guarantee theory in his essay *Chuo shuken to chiho bunken* in MIYAZAWA TOSHIYOSHI KANREKI KINEN Vol. 3. He writes "The mode of guarantee taken by the constitution is occupied largely by institutional guarantee and does not take the form of a guarantee of the rights of individual local entities."
19. Tanaka, Jiro, GYOSEIHO (1955), at 108.
20. Yanase, Yoshimiki, *Kenpo daihassho ni tsuite* in KENPO TO CHIHO JICHI (1954), at 15.
21. Ukai, Nobunari, *Kenpo ni okeru chiho jichi no honshi* in TOSHI MONDAI Vol. 2 & 3, No. 4 (1953), at 10–11.
22. Arikura, Ryokichi, *Chiho jichi no honshi* in KENPO KOZA 4 (1959), at 122.
23. Narita, *supra* note 2, at 287.
24. Akagi, Suruki, *'Chiho jichi no honshi' to sono kinou* in SHISO No. 443 (1961). This essay also appears in Muroi, Tsutomu, CHIHO JICHITAI (1977).
25. Tejima, Takashi, CHIHO FUKKEN NO SHISO (1973).
26. Tokioka, Hiroshi, *Kenpo to chiho jichi* in GENDAI KENPO NO KIHON MONDAI (1974), at 177.
27. Matsushita, Keiichi, SHIMIN JICHI NO KENPO RIRON (1975); also in recently published SENGO SEIJI NO REKISHI TO SHISO (1994), at 278.
28. Sugihara, Yasuo, *Chiho jichiken no Honshitsu 1–3* in HORISU JIHO Vol. 48, No. 2–4 (1976) and *'Chiho jichi no honshi' ni tsuite* in HOGAKU SEMINAR SOKAN: GENDAI CHIHO JICHI (1979), at 46.
29. Haryu, Seikichi, JICHITAI KENPOGAKU (1976), at 21.
30. Kitano, Hirohisa, KENPO TO CHIHO ZAISEIKEN (1990), at 26.
31. Kaneko, Hitoshi, JICHITAI HOGAKU (1988), at 13.

32. Yamashita, Kenji and Takeshi Kobayashi, JICHITAI KENPO (1991), at 107.

33. Kobayashi, Naoki, KENPO SEISAKURON (1991), at 368. Appears recently in Kamono, Yukio, *Chiho jichiron no Doko to mondaiten* and Okuma, Yoshikazu, *'Chiho jichi no honshi' wo meguru riron douko*, both in KOHO KENKYU No. 56 (1994).

34. Ti, Gentaro, TOKKIBIRU BEIKOKU NO MINSHU SEIJI (1984), at 43; Higuchi, Yoichi, KENPO (1994).

35. Miyazawa, Toshiyoshi, *Chiho jichi no honshi in KOHO NO GENRI*(1967), at 278.

36. *Id.*

37. Sugihara, Yasuo, KENPO I (1987), at 384.

38. *Id.*, at 389; Kitano, *supra* note 30, at 50.

39. Miyazawa, *supra* note 35, at 280.

40. Haryu, *supra* note 29.

41. Sugihara, Yasuo, KENPO KARA CHIHO JICHI WO KANGAE RU (1994), at 35 and *Chiho jichi no hoshi* in HOGAKU KYOSHITSU No 165 (1994), at 13.

42. Takatsuji, Masami, *Zaisanken ni tsuite no ikkosatsu* in JICHI KENKYU Vol. 38, No. 4 (1962), at 3.

43. Yamashita and Kobayashi, supra note 32, at 193.

44. Yoshida, Yoshiaki, *Jorei to chiho jichi* in NIHON CHIHO JICHI GAKKAI HEN: JOREI TO CHIHO JICHI (1992), at 38.

45. Summary of this opinions is in Yamashita and Kobayashi, *supra* note 32, at 196.

46. There are many essays on penalties and ordinances and many opinions, but a detailed account appeas in Higuchi, Yoichi. Sato, Yoshiharu. Nakamura, Mutsuo. and Urabe, Norio, CHUSYAKU NIHONKOKU KENPO (1988), at 141 (contributed by Mutsuo Nakamura); Yamashita and Kobayashi, *supra* note 32, at 194; and Kaneko, *supra* 31, at 63.

47. Sugimura, Toshimasa, KENPO TO GYOSEIHO: TOWARERU GYOSEI NO SHISEI (1973), at 62–63. Same viewpoint includes Muroi, Tutomu, *Kogai gyosei ni okeru horitsu to jorei* in HOGAKU SEMINAR No. 177 (1970), at 68: and Kaneko, Hitoshi, JOREI WO MEGURU HORITSU MONDAI (1978), at 69.

48. Naoki Kobayashi analyzes the direction of local self-government based on the assumption that the present strengthening of local self-government from the viewpoint of constitutional policy is a necessary trend required by the new times. (Supra note 33, at 368.)