

## Japan's Democracy at Risk – The LDP's Ten Most Dangerous Proposals for Constitutional Change 危機に瀕する日本の民主主義 自民党憲法改正案、最も危険な10項目

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Is it time to bring Japan's postwar experiment in liberal democracy to an end? Prime Minister Abe Shinzo and his followers seem to think so. In April 2012, the LDP published a clear blueprint for constitutional revision that would go a long way toward achieving this goal.

The Liberal Democratic Party has advocated fundamental revision of Japan's Constitution since its founding in 1955. Nearly seven decades after the end of World War II, LDP leaders remain humiliated by the thought that the country is governed under a constitution largely drafted by a team of foreign military officers.<sup>1</sup> Abe is working hard to build a coalition with the power to rip the "imposed constitution" out by its philosophical roots. He and his followers, who dominate the LDP, envision an "autonomous constitution" (*jishu kenpo*) that would radically adjust the balance between government power

and individual rights.



**Abe triumphant**

This is a critical moment in Japan's history. In parliamentary elections held on Sunday, July 21, the LDP gained thirty seats, giving the Party a total of 115 in the 242-seat Upper House. Following its sweeping victory in December 2012 Lower House elections, this means that together with its coalition partner Komeito, the Party holds secure majorities in both Houses of the Diet. Although the LDP does not control the two-thirds parliamentary majorities required to pass resolutions for constitutional change, it does control Japan's political agenda. Abe and his followers are in a good position to continue their push to revise the constitution.

Under the present constitution, the Japanese people recovered from the unimaginable suffering of total war and have come to enjoy several generations of peace and prosperity. That constitution has acted as a powerful restraint on the nation's rulers. It has never been amended. The constitution is the "supreme law" of the land. As we show below, the LDP seeks fundamental change that could have far-reaching effects.

What exactly do they have in mind? The LDP plan was spelled out in a comprehensive series of proposals ("*nihon koku kenpo kaisei san*" or "*Draft Reform to Japan's Constitution. Q & A*") published by the Party on April 28, 2012, a date selected to celebrate the 60<sup>th</sup> anniversary of the end of the Occupation. Six months later the Party published a pamphlet in user-friendly "Q&A" format to assist readers in working through the dry language of the revision proposals. All of this material is available on the LDP website (<http://www.jimin.jp/activity/colum/116667.html>).<sup>2</sup>



Japanese flag and tanks

The LDP revision plan would affect nearly all of the 103 articles of the 1947 Constitution. Most proposals are for minor changes in wording or technical adjustments that would not make a significant difference. But some LDP proposals could have a potentially devastating impact on individual rights protection in Japan. Here are the Ten Most Dangerous Proposals:

### *1. Rejecting the universality of human rights*

The LDP proposals start with a thorough rewriting of the Preamble. Several ringing declarations of democratic ideals would disappear: "We, the Japanese people....do proclaim that sovereign power resides with the people..." Deleted. "Government is a sacred trust of the people....This is a universal principle of mankind...." Deleted. "...we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world..." Deleted. (The official English version of the constitution is available here ([http://www.kantei.go.jp/foreign/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html)).

In place of these ideals, the LDP Preamble would emphasize the strength of the Japanese nation, lauding the people's pride in their country and

their willingness to defend it. It would also express pragmatic goals such as a desire to “pursue friendly relations with all nations under a philosophy of peace” and to promote “education, science and technology.”

But, in contrast to the universal principles of the present constitution, the overriding theme of the LDP version is that Japan is *different* from other countries. Thus, the first sentence of the LDP Constitution would read: “Japan is a nation with a long history and unique culture, with a *tennō* [Emperor] who is a symbol of the unity of the people....” (Appendix One presents the full English texts of the present Preamble and the proposed LDP version.)

Regarding human rights, the LDP Q&A Pamphlet further explains,

....[r]ights are gradually formulated through the history, tradition and culture of each community. Therefore, we believe that the provisions concerning human rights should reflect the history, culture and tradition of Japan.<sup>3</sup>

This replacement of universal human rights principles with a unique system of rights based on Japan’s “history, culture and tradition” has profound implications for the people of Japan and for Japan’s relations with the world. Recognition of the universal nature of human rights is the fundamental principle that underlies the postwar global human rights regime. The first article of the UN charter proclaims that

“promoting and encouraging respect for human rights and for fundamental freedoms for all” is one of the UN’s primary purposes. One year after Japan’s Constitution took effect, the UN General Assembly adopted the Universal Declaration of Human Rights as “a common standard of achievement for all peoples and all nations....” and described its purpose as securing “their universal and effective recognition and observance....”<sup>4</sup> (For the full text of the Universal Declaration, go here (<http://www.un.org/en/documents/udhr/index.shtml>.)

The LDP program clearly rejects this global consensus on human rights. Japan has been an important supporter of the UN since it joined in 1956. Denial of the universal nature of human rights would not only have an impact on the Japanese people, but would also mark a major change in Japan’s foreign policy.

What elements of “history, culture and tradition” should provide the basis for human rights in Japan? The Q&A’s authors do not tell us directly, but several proposed changes in constitutional wording and statements in the Q&A pamphlet indicate a clear direction. We will examine some of these proposals below.

## *2. Elevating maintenance of “public order” over all individual rights*

The LDP would revise key language of Article 12 of the Constitution to read that the people “shall be aware that duties and obligations accompany freedoms and rights and shall never violate the public interest and public order....”

What are these “duties and obligations”? The LDP doesn’t say. Such open-ended language would serve as an invitation to zealous officials eager to identify duties and obligations that may limit or even override individual rights. The most disturbing aspect of this text, however, is that “freedoms and rights” would be subordinated to “public interest and public order.” “Freedoms and rights” are specified in the present text of the constitution, but the new expression “public interest and public order” is undefined. In their Q&A pamphlet, LDP authors explain,

“Public order” here is “social order” (*shakai chitsujo*); it means peaceful social life (*heibon na shakai seikats*). There is no question that individuals who assert human rights should not cause nuisances to others.<sup>5</sup>

So the LDP target appears to be individuals who “assert human rights” and thereby “cause nuisances to others.” Although the public order limitation would apply to all constitutional rights, we can expect that it would have an especially powerful chilling effect on speech rights and other forms of protest. Every public march or other political demonstration slows traffic and causes “nuisances” to others. Most

democratic societies accept such inconveniences as a necessary cost of freedom, especially for protection of the right to speak out. Japan’s courts have shown little respect for such rights, however, repeatedly ruling in favor of police action to manage public demonstrations and otherwise restrict public speech.<sup>6</sup>

Some readers may recall the case of the “Tachikawa Three,” who were detained for 75 days in police jails in 2004 on trespass charges after they placed antiwar flyers in the mailboxes of Japan Self-Defense Force members. See here (<http://www.japantimes.co.jp/community/2008/05/20/issues/tachikawa-three-claim-ruling-marks-crisis-for-japan-and-its-democracy/#.UdyHBkEjySo>). Citing the present constitution’s free speech guarantee, a Tokyo District Court panel ruled the defendants not guilty/ But this judgment was overturned on appeal and the conviction was upheld by the Supreme Court.<sup>7</sup>



Under the LDP plan, the hostile attitude of the police and the courts toward public demonstrations would gain an unshakable

foundation in the constitution itself with express language declaring that an undefined (and therefore potentially limitless) “public interest and public order” would be superior to individual rights.

*3. Eliminating free speech protection for activities “with the purpose of damaging the public interest or public order, or associating with others for such purposes”*

Just in case a future court might overlook the change to Article 12, the LDP would also revise Article 21 of the Constitution, which presently makes the simple, powerful declaration that “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.”

The LDP proposal adds this proviso: “Notwithstanding the foregoing, engaging in activities with the purpose of damaging the public interest or public order, or associating with others for such purposes, shall not be recognized.”

This change not only strips free speech protection from activities that might have the purpose of damaging the “public order,” it would also remove protection from the right of association. So even if *I* did not go down to the demonstration on that fateful day, if am a

member of some citizens group that *did*, I might be prosecuted, too.

*4. Deleting the comprehensive guarantee of all constitutional rights*

Widespread recognition of the primacy of human rights as a fundamental condition of civilized society is a relatively recent phenomenon. As noted above, the Universal Declaration of Human Rights was not created until its drafters were driven by recent memories of the most destructive war in human history.

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

The LDP proposes to simply delete these words. The Party provides no explanation for this in its Q&A pamphlet, so we can’t be entirely sure about its motivation. I assume that Party leaders are most offended by the notion of an “age-old struggle of man to be free.” It seems that the last thing they would recognize is the legitimacy of a “struggle” against an entrenched political

structure. Popular struggle clearly conflicts with their superior goal of maintaining public order. For LDP leaders, perhaps the most shameful characteristic of these words is their obvious provenance. The American military officer who drafted them was likely inspired by the 18<sup>th</sup> Century revolutions in France and America. What could this possibly have to do with the “history, tradition and culture” of Japan?

### *5. Attack on the “individual” as the focus of human rights*

The Western heritage of Japan’s Constitution is apparent throughout the document, perhaps most clearly in Article 13, which begins, “All of the people shall be respected as individuals,” and protects their “right to life, liberty, and the pursuit of happiness.” These words are a direct quotation from the U.S. Declaration of Independence. The LDP drafters deleted Article 97, but couldn’t quite bring themselves to delete Article 13’s reference to “life, liberty, and the pursuit of happiness.” But they did insist on changing one especially offensive word: “individual.” (*kojin*) In the LDP version, “All persons shall be respected as people.” (*hito*)

The concept of the autonomous rights-bearing individual is the core of the Western theory of natural rights. Such individuals are anathema to the LDP view of the relationship between people and government. Immediately following its

rejection of universal rights in favor of rights based on “the history, tradition and culture of Japan,” the LDP Q&A pamphlet addresses the western influence on Japan’s Constitution: “[T]he current Constitution includes some provisions based on the western theory of natural rights. We believe these provisions should be revised.”<sup>8</sup>

Numerous LDP proposals, including the priority accorded to public order, identify the natural rights provisions the LDP wants to change. The Party’s attack on the status of the individual and on individual rights would certainly result in a reduced constitutional status for Japan’s citizens. Although they do not call for outright revival of the Meiji Constitution or imperial sovereignty, it appears that Party leaders believe the people should occupy a position closer to that of “subjects” under the Meiji regime.

In place of the rights enjoyed by citizens in a constitutional democracy, subjects are more likely to be obligated to fulfill duties owed to some superior power.

### *6. New Duties for the People*

The doctrine of “constitutionalism” holds that sovereign people adopt constitutions in order to create and empower governments *and* to impose limits on governmental powers.<sup>9</sup> This idea of limitations on government power is a tough sell with Japanese powerholders. As explained by

one leading constitutional scholar, “The problem is that the idea of constitutionalism is a foreign concept to us Japanese....Before we learned the idea from Westerners, we did not know the idea of imposing law on rulers. Law had always come from rulers; obedience to the law had been a virtue of the people; rulers had *ruled* by law instead of *being ruled* by law.”<sup>10</sup> (emphasis added)

By declaring protection for a long list of constitutional rights and freedoms, the 1947 Constitution clearly imposes limitations on government power. The LDP proposes to flip this idea on its head. Instead of imposing limitations on government power, the LDP constitution would impose duties on the people.

The first set of new duties would appear right up front, in Article 3. New language would state that “[T]he national flag is the rising sun flag (*nishōki*) and the national anthem is *kimigayo*,” and that “[T]he people must respect the national flag and national anthem.”

The flag and anthem are the most inflammatory symbols of the era of Japanese imperialism and war. They are so controversial that when the Diet passed legislation formally recognizing them as Japan’s national symbols in 1999, then-Prime Minister Obuchi and other LDP leaders promised there would be no mandatory duties. Nonetheless, local governments (led by Ishihara Shintaro’s Tokyo metropolitan government) adopted regulations mandating that public

school teachers participate in flag and anthem ceremonies. Many teachers view such ceremonies as a revival of rituals that attended their country’s disastrous age of militarism. They refused to comply, claiming that the ceremonies caused them grave emotional anguish. They were punished with pay cuts, removals from classrooms and other penalties. (See here (<http://apjff.org/-John-Spiri/2703>) for an example of one teacher’s civil disobedience.)

In 2011, Japan’s Supreme Court cut off their constitutional protection by issuing a series of judgments rejecting the teachers’ claims to freedom of conscience guaranteed by Constitution Article 19 and upholding the orders to stand and sing. (See here (<http://apjff.org/events/view/125>).)

Tokyo and other local governments have exercised the power to force public school teachers to pay obeisance to these symbols against their will. The LDP’s proposal would take the next step – it would empower the government to extend flag and anthem duties to the population as a whole. This would include the descendants of Chinese, Korean, Okinawan and other people who bore the most terrible sufferings during Japan’s age of militarism.

*7. Hindering freedom of the press and critics of government by prohibiting the “wrongful acquisition, possession and use of*

*information relating to a person"*

The LDP proposes another set of duties through this provision: "No person shall improperly acquire, possess or use information concerning individuals" (proposed Article 19-2). This language does not create any rights at all. Instead, it imposes new constitutional duties -- and the potential application is extremely broad. "Information concerning individuals" is a virtually limitless category, including not only names, photographs, and vital data, but potentially any type of information describing any aspect of specific people. This duty could be applied to news organizations, bloggers and writers of all kinds, a vast range of businesses and voluntary organizations. All would face the risk that some government authority might interpret their activities as violations of the vague and subjective "improper" standard. Government authorities would enjoy broad latitude in selecting organizations for investigation.

Does this LDP proposal suggest a ban on "improper" surveillance and creation of databases by the police or other government agencies? It doesn't say anything about the government at all. The prohibition would apply to "any person."

The new Article 19-2 is reminiscent of the LDP proposal to create a "human rights commission" a little over a decade ago. This proposed body

would have been under the direct control of the Ministry of Justice and its primary charge would have been to monitor the acts of private parties, especially the news media, *not* the acts of government agencies. One provision of that bill would even have prohibited "excessive reporting."

The wording of this proposal and LDP history on the issue suggests that the true intent is to create a new basis for government regulation of the news media and other writers.

*8. Granting the prime minister new power to declare "states of emergency" when the government can suspend ordinary constitutional processes*

What should be the powers of government in a national emergency? Under the present constitution, the Diet is "the highest organ of state power" and the "sole law-making organ of the State" (Article 41). In the exercise of executive authority, the prime minister and other officers are responsible to the Diet (Article 66). The LDP proposes to grant power to the Cabinet to put this limitation aside.

Under the LDP's new Article 98, the Prime Minister would be empowered to declare a national emergency "In the event of armed attacks on the nation from abroad, disturbances



of the social order due to internal strife, etc., large-scale natural catastrophes due to earthquakes, etc., or other emergency situations as designated by law..." This is an extremely broad and undefined range of potential circumstances.

What would be the effect of such a declaration? According to LDP proposed Article 99(1), "the Cabinet may enact *Cabinet Orders having the same effect as laws ...*" (emphasis added) The constitution imposes various conditions on the lawmaking power of the Diet, including general requirements of public proceedings, recording of votes, and passage by majority vote in both Houses. (Chapter IV) Diet proceedings provide the most important venue for members of opposition parties to express opinion on all issues. There are televised broadcasts of Diet proceedings and news reporters inform the people on the issues and the arguments and counterarguments.

No such rules apply to Cabinet meetings. If a Cabinet Order had "the same effect as law," the nation could be ruled by secret government for as long as the declaration remained in effect. The LDP proposal does say that emergency declarations must subsequently be approved by the Diet, but Diet majorities are ordinarily composed of members of the Prime Minister's own party. Diet members who sought to overturn their leader's declarations would need the courage of mutineers.

The LDP plan was finalized with fresh experience of a devastating natural and nuclear disaster. Government actions related to those events have been criticized on many fronts, especially related to the government's failure to insist on adequate safety measures, its lack of advance preparations to manage and care for evacuees, and, above all, its failure to disclose critical information to affected persons in a timely manner. None of these problems would be solved by a new constitutional emergency power. To the contrary, if the Cabinet is operating in secret, these problems could be exacerbated.

What about protections for the right to free speech and other fundamental rights during a "state of emergency?" The next sentence in the LDP proposal appears to address this problem by mandating that constitutional provisions "relating to fundamental rights shall be respected to *the greatest extent.*" (emphasis added) These words may sound reassuring, but recall the LDP proposal for Article 12. As a general rule, individual rights would be respected only to the extent they do not conflict with "public interest and public order." Unquestionably, the need to maintain public order would be felt most strongly during a national emergency. Anyone with the temerity to speak out against government policy at such a time could expect harsh treatment. Given the lax attitude of Japan's Supreme Court in protecting individual rights under the existing constitution, which does not

subordinate individual rights to the “public interest and public order,” there is little reason to expect the courts to step in if emergency powers were abused.<sup>11</sup>

### 9. *Changes to Article Nine*

LDP leaders clearly believe that in order to secure a respected place in the community of nations, they must be free to employ the country’s military without the extraordinary restraints imposed by Article 9 of the present Constitution. Throughout the postwar era, debate over constitutional amendment has focused almost exclusively on Article 9.

When U.S. President George W. Bush ordered troops into Iraq in 2003, then-PM Koizumi Jun’ichiro swiftly declared his support for the action. In January 2004, he even ordered a Japanese military force onto Iraqi soil and provided Japanese military aircraft to support U.S. forces in the war zone. These acts incited various public displays of opposition in Japan. They included the acts of the “Tachikawa Three” described above which led to harsh police action. They also inspired a series of lawsuits seeking court declarations that the PM’s actions violated Article 9. On April 17, 2008, a panel of the Nagoya High Court (an intermediate appellate court) agreed with a group of these plaintiffs and issued a judgment in which it declared Japan Self-Defense Force activities in the Middle East

war zone in violation of Article 9. See Craig Martin’s commentary here (<http://craigmartin.com/2008/04/the-nagoya-high-court-decision-on-japanese-forces-in-iraq/>) and a U.S. Library of Congress report here ([http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l20540470\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l20540470_text)).

The decision had no legal effect because the court dismissed the case on procedural grounds (lack of standing). Nonetheless, the court’s declaration made the front page of every newspaper in the country and served as a rare judicial shot across the bow of nationalistic politicians eager to join military ventures abroad.

Japan’s “history, tradition and culture” certainly includes a military component and a willingness to dispatch military forces abroad on missions of conquest. Article 9 has been a powerful restraint on this element of Japanese tradition. The LDP seeks a major change. The next time a Prime Minister wishes to deploy troops abroad, they say, he should not be restrained by constitutional language.

The LDP Constitution would retain the present Constitution’s renunciation of war “as a sovereign right of the nation,” but would make several critical changes, including new language that would clearly declare that Japan could constitutionally maintain a modern military and that the government could deploy this force at home and abroad when it chose to do so.

The LDP's Article 9 would do away with the "self-defense force" euphemism currently applied to Japan's military and replace it with "national defense military" (*kokubōgun*) and would explicitly designate the Prime Minister as "supreme commander" (*saiō shikikan*). It would delete the current prohibition on maintaining "land, air and sea forces" and the renunciation of the "right to belligerency." In the space vacated by these deletions, the LDP would insert a declaration that nothing in this provision would "prevent the exercise of the right to self-defense."

The LDP's military would not be limited to a narrow interpretation of "national defense." A lengthy new provision defining the scope of military action expressly states that the military could participate in "internationally coordinated activities to secure the peace and safety of international society" and "activities to preserve the public order or to protect the lives or freedom of the people." Again, we confront the phrase "public order" (*oyake no chitsujo*). Thus, it appears the LDP military could be used as a domestic police force to put down internal threats to the established order.

As protection against any potential abuse of these powers, all actions of the new military force would be subject to law passed by the Diet. However, the LDP authors make no mention in their Article 9 of how it should mesh with their new Articles 98 and 99, which would grant the Cabinet extraordinary powers in "states of

emergency." Given the broad definition of this term, it is hard to imagine any circumstance in which the LDP military force might be deployed that would not qualify. Accordingly, in cases where the Prime Minister chose to declare a state of emergency, it appears that at least in the initial stages of a deployment, it would be the Cabinet, not the Diet, with actual authority to decide the scope of military operations.

Whatever one's position on Article 9, all must recognize that the Japanese people have avoided the suffering of war since it took effect.<sup>12</sup> The LDP's Article 9 would surely increase the risk of military conflict.

### *10. Lowering the Bar for Constitutional Amendments*

The Prime Minister and his allies have proposed that, before the Diet considers any substantive change to the constitution, it should first relax requirements governing amendment. Article 96 of the present Constitution requires that amendments be supported by a two-thirds vote of each House of the Diet. The LDP proposal would change this to require only a simple majority of each House. The present additional requirement of approval by a majority of the voters by referendum would remain unchanged.<sup>13</sup>

Approval by a supermajority vote of the national

legislature is a standard requirement in democratic constitutions around the world. The U.S. Constitution, for example, requires that amendments be approved by a two-thirds vote of each House of Congress and, in addition, by *three-fourths* of the states.

Advocates for such a high standard say that some individual rights – such as the rights to freedom of speech and freedom of religion – are so fundamental to the functioning of a free society and democratic government that they should not be subject to change by majority vote. They fear that public opinion may fluctuate sharply in times of stress and temporary majorities may threaten fundamental rights. In the words of U.S. constitutional scholar Cass Sunstein, “the goal is to ensure that the deliberative sense of the community will prevail over momentary passions.” Japanese voters recently displayed the potential for “momentary passions” by granting the DPJ a great victory in 2009 and then delivering an equally great victory to its adversary, the LDP, only three years later.

The LDP proposal would empower temporary majorities to sponsor fundamental change. It would expedite any and all constitutional amendments, including the LDP proposals to weaken protection for fundamental human rights.

### Final Comments

Prime Minister Abe traveled to Washington for a

meeting with President Obama held on February 22. This was the first meeting of the two leaders after Japan’s December elections. The White House transcripts of their statements are cold and brief. The two leaders expressed only two ideas: the importance of their military alliance in preserving regional security and the need to increase economic growth. There were no statements of shared visions, philosophies or broader dreams for their people.<sup>14</sup>

It’s hard to imagine that a former community organizer and president of the Harvard Law Review<sup>15</sup> and a man who has built his career on a campaign to rewrite his nation’s wartime history<sup>16</sup> share common views about the role of government. If there is any doubt on this score, the LDP revision proposals show that the political leaders of Japan and of the United States and other nations in the western political tradition do *not* share the same belief in free society and the role of government. Japan’s dominant political party is on a very different track from its Western allies.

The LDP constitutional program includes significant proposals additional to those discussed above. A revision to Article 20, for example, would open the door to direct government participation in Shinto rituals, to the extent that they “do not exceed the boundaries of social rituals or customary acts.” Article 24 would include a new provision declaring that the family (*not* the individual) is the “natural and

basic unit of society” and creating a constitutional duty for family members to support each other. A revision to Article 63 would weaken the role of the Diet as a check on the executive branch and as a means to inform the people on matters of national interest by relaxing the requirement that Cabinet ministers appear at the Diet to respond to inquiries. These and other proposals require additional study. In this article I selected ten that could have an especially big impact on human rights protection.

It remains to be seen whether the LDP will be able to push through any or all of their constitutional revision proposals, but there should be no misunderstanding of the Party’s intentions.

### Appendix

The text of the present Preamble to Japan’s Constitution and the text proposed by the Liberal Democratic in 2012.

The Present Preamble:

LDP Proposed Preamble (Translation by Lawrence Repeta):

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith. We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want. We believe that no nation is responsible to itself alone, but that laws of political morality are universal; and that obedience to such laws is incumbent upon all nations who would sustain their own sovereignty and justify their sovereign relationship with other nations. We, the Japanese people, pledge our national honor to accomplish these high ideals and purposes with all our resources.

Japan is a nation with a long history and unique culture, under a *tenno* who is a symbol of the unity of the people and which is controlled under a system of separation of the legislative, administrative and judicial powers subject to the sovereignty of the people. Japan has overcome the ravages of great war and many disasters and has taken an important place in international society. Japan pursues friendly relations with all nations under a philosophy of peace and contributes to world peace and prosperity. The Japanese people take pride in their country and land and protect it tenaciously. While respecting fundamental human rights, they also respect harmony and form a nation where families and the whole society mutually support each other. We hold freedom and discipline in high esteem. While protecting our beautiful national territory and natural environment, we promote education, science and technology and promote the growth of our country through vigorous economic activities. In order to pass on the good traditions of our nation to many future generations, the Japanese people hereby establish this Constitution.

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- Craig Martin, *The Case Against “Revising Interpretations” of the Japanese Constitution* (<http://apjff.org/-Craig-Martin/2434>)

- Koseki Shoichi, *The Case for Japanese Constitutional Revision Assessed* (<http://apjff.org/-Koseki-Shoichi/2289>)

- John Junkerman, Gavan McCormack, and David McNeill, *Japan's Political and Constitutional Crossroads* (<http://apjff.org/-John-Junkerman/2175>)

### Notes

<sup>1</sup> The story of the drafting of the “MacArthur Constitution” and its subsequent modifications is available in many sources. For example, see Eiji Takemae, *The Allied Occupation of Japan* (Continuum, 2002), especially pp. 274-292.

<sup>2</sup> See “*Draft Reform to Japan’s Constitution, Q & A*,” (*nihon koku kenpō kaisei san Q&A*), p.2, available at [this address](http://www.jimin.jp/activity/colum/116667.htm) (<http://www.jimin.jp/activity/colum/116667.htm>)

ml). This pamphlet was published by the LDP in October 2012. It includes a complete text of the LDP revision proposals together with brief commentaries in Q & A format. (Hereinafter, "LDP Q&A") All translations of texts of LDP constitutional proposals and of excerpts from the LDP Q&A pamphlet that appear in this article were made by the author, who has sole responsibility for accuracy.

<sup>3</sup> LDP Q&A, p. 14.

<sup>4</sup> Drafting and negotiation of the terms of Japan's Constitution and the Universal Declaration are contemporary events. The UN Commission on Human Rights, which drafted the Universal Declaration, was formed in June 1946. For an engaging portrait of the creation of the Universal Declaration, see Mary Ann Glendon, *A World Made New – Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001).

<sup>5</sup> LDP Q&A, p. 14.

<sup>6</sup> For descriptions of recent Supreme Court decisions involving fundamental human rights, see Lawrence Repeta, "Limiting Fundamental Rights Protection in Japan – the Role of the Supreme Court," in Jeff Kingston (ed.) *Critical Issues in Contemporary Japan* (Routledge, 2013) (forthcoming).

<sup>7</sup> The Kyūen Renraku Center (救援連絡センター (http://qc.sanpal.co.jp/)) maintains a continuous

report of arrests and other police actions related to public demonstrations. See **here** (<http://qc.sanpal.co.jp/center/english/>). Police officials know they can employ the kind of heavy-handed tactics used in the Tachikawa case whenever it suits them. In a recent example, in December 2012 Osaka protesters were subject to extended detention for harmless speech activities. As in the 2004 Tachikawa Three Case, the police took the opportunity to search homes and offices and seize computers, files and other materials. Also like the Tachikawa case, the police did not make the arrests and seizures until many weeks after the incidents they cited as crimes. For details concerning the Osaka case, see **here**

(<http://fukushimavoices-eng.blogspot.com.au/2012/12/12/third-letter-from-jailed-professor.html>).

The Osaka case is cited in Tessa Morris-Suzuki, "Freedom of Hate Speech; Abe Shinzō and Japan's Public Sphere," *The Asia-Pacific Journal*, Volume 11, Issue 8, No. 1, February 25, 2013. [http://www.japanfocus.org/-Tessa-Morris\\_Suzuki/3902](http://www.japanfocus.org/-Tessa-Morris_Suzuki/3902) The courts have also endorsed broad government authority to set restrictive conditions on public demonstrations. In another 2012 example, Tokyo metropolitan government simply denied a permit for a demonstration in Hibiya Park against nuclear power on the grounds that it would obstruct management of the park. This denial was upheld in court. "Anti-Nuclear Activists Denied Use of Park" (<http://www.japantimes.co.jp/news/2012/11/0>

7/national/antinuclear-activists-denied-use-of-park/#.UdUaJfkjySo).

<sup>8</sup> LDP Q&A, p. 14

<sup>9</sup> Stanford Encyclopedia Entry: Constitutionalism (<http://plato.stanford.edu/entries/constitutionalism/>)

<sup>10</sup> Kazuyuki Takahashi, “Why Do We Study Constitutional Law of Foreign Countries, and How?” in Vicki C. Jackson and Mark Tushnet, *Defining the Field of Comparative Law* (Praeger, 2002), p. 45.

<sup>11</sup> The Supreme Court’s strong support for the police when they confront political activists is the legacy of a restructuring of the Court executed by LDP governments during the early 1970s. This was an era of frequent clashes between masses of demonstrators and riot police that sometimes turned violent. For a description of the response by LDP leaders and the resulting shift in the Supreme Court, see Lawrence Repeta, “Reserved Seats on Japan’s Supreme Court,” Vol 88 No 6, *Washington University Law Review* 1713 (2011), especially 1724—1744, available at this location (<http://lawreview.wustl.edu/in-print/reserved-seats-on-japans-supreme-court/>).

<sup>12</sup> For an authoritative study of the successful role of Article 9 in restraining the Japanese government from war, see Craig Martin, “Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum,” available at this address. ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1296667](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1296667))

<sup>13</sup> A group of scholars formed in May 2013 to oppose this move, led by University of Tokyo emeritus constitutional law professor Higuchi Yoichi. See here. (<http://blog.livedoor.jp/gataroclone/archives/27376713.html>)

<sup>14</sup> The White House report on the meeting is available at this address. (<http://www.whitehouse.gov/the-press-office/2013/02/22/remarks-president-obama-and-prime-minister-abe-japan-after-bilateral-mee>)

<sup>15</sup> First Black Elected to Head Harvard Law Review (<http://www.nytimes.com/1990/02/06/us/first-black-elected-to-head-harvard-s-law-review.html>)

<sup>16</sup> See, e.g., here (<http://apjjf.org/-Narusawa-Muneo/3879>)