

We, the Japanese People: Rethinking the Meaning of the Peace Constitution

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Abstract

From a political perspective, a constitution can be seen not only as a promulgation of basic law, but also as a political act: a seizure of power. Most modern constitutions in the tradition of the Magna Carta (though not those promulgated by dictators) aim to seize power from kings and/or aristocrats and place it under the limits of law. The Constitution of Japan was also such a power seizure, carried out by a short-lived alliance between The US Occupation forces and (a part of) the Japanese people. Thus it should not be surprising that the Japanese political class sees it as having been “forced on” them. That’s what good constitutions do. Almost from the time it was ratified, Japanese conservatives have been

trying to promote constitutional revision that would return the country to something closer to the authoritarian condition it was under during the reign of the Meiji Constitution. This is going on as this is being written, so one can only speculate how it will turn out...

Keywords

Japan; constitution; Article 9; Japan-US security treaty; Okinawa.

My first encounter with the post-war Constitution of Japan took place in 1961. Just out of the Marine Corps, and assiduously working to shift over to a different way of living, I was studying Japanese at the Osaka University of Foreign Languages. As I was at

that time the only male American in the program (and worse yet, an ex-Marine), the students had a lot to say to me. These were students with a variety of ways of thinking. Some were conservative, some democrats, some socialists, some supporters of the Japan Communist Party, and at least one who talked as though he belonged to one of the radical Trotskyist sects. I spent many hours in the coffee shop near the campus, listening as they explained to me their ways of thinking, and in particular their differences with America. But whatever label might be put on their various ideologies, there was one thing of which they were all anxious to persuade me: the value of Japan’s Peace Constitution.

And interestingly, they all used about the same manner of explaining this to me.

The explanation had three parts:

We know what war is. We have experienced it.

We are not going to go to war again, nor will we send our children.

And that is written into Article 9 of the Constitution.

Being a fairly typical Arrogant American, it took me time to realize that these Japanese young people (very slightly younger than I was) might know something that I did not. But they did. Only 16 years had passed since the fire-bombing of Osaka, which means that as children they would have experienced, if not the bombing, then life in the ruins. In my three

years in the Marines, we had talked about war, but we had not seen it.

Especially notable is the sequence in which they ordered their thoughts. First the resolution: We will not again go to war; then the Constitutional prohibition: And so it is written in Article 9. These students were members of what later came to be called the 1960 AMPO Generation. How many of them actually had taken to the streets the year before to oppose the extension of the Japan-US Security Treaty (AMPO), which they saw as violating Article 9, I do not know, but whether they had or not, this was the generation that embraced their Constitution as a good constitution should be embraced: first as a commitment, and second as written law.

In the 1970s when I began teaching college in Tokyo, I noticed a change. College students still mainly supported the Constitution, but the reasoning with which they explained this to me was different. They would say,

The Constitution forbids war.

Therefore, we cannot go to war.

Here the actor is no longer the citizens, but the Constitution; the citizens are the acted-upon. The renunciation of war is no longer a power (a commitment), but a power taken away. In retrospect one can see that, however subtly, the process leading to the Japan of today had already begun.

In 1982 a popular publishing house put out a book consisting of the text of the Constitution interspersed with color photographs, in travelogue style, of Beautiful Japan; somehow the combination made the book a big best seller.¹ The journal *Shisō no Kagaku* (*Science of Thought*, now defunct) asked me to write on this. At first I refused, explaining that I am not an expert on constitutional law, much less on the Japanese Constitution. The editor (cleverly) said not to worry, they did not want a scholarly

piece on constitutional law, but rather a book review of this particular book, whose contents happened to be the Constitution (plus photographs). For better or for worse, I was persuaded by this.

As I began to write, I found that, on the “for better” side, not being a legal expert enabled me to see a constitution in a different way. Having been trained in political theory, I found myself looking at the Constitution not so much as a set of legal principles but as a political action. From this standpoint I wrote an essay that was published in *Shisō no Kagaku* in January, 1983.² The following is based on that essay, much rewritten to include later insights and to reflect changing times.

The Japanese Constitution as a Seizure of Power

A constitution can be defined as the basic law of a country, the source of the legitimacy of all other laws. It can also be seen as a system of governance, a statement of the rules by which a country is to be governed. It is the charter that founds and authorizes the various governmental institutions. It is a declaration of the rights - or in the case of an authoritarian constitution, the absence of rights - of the people. More broadly, if it is a constitution democratically established, it will be an expression of the legal and political spirit of a nation.

But in the context of the history of a country, a constitution can be seen as a political action: a seizure of power. More accurately, it is an attempt to institutionalize a seizure of power. This has been true ever since King John of England was forced by armed men to sign the Magna Carta in 1215.

When we evaluate a constitution, we ask many sorts of questions. Are its rules just? Does it provide for a good life for the people? Is it

workable? Does it accurately reflect the spirit of the nation? But viewing it as a political act allows us to ask an additional question: In this constitution, just who is wresting what power from whom? Read in this way a constitution will be seen to have a momentum, a pull, a tension built into its structure.

This can be illustrated by contrasting the Constitution of Japan with that of the United States. What the latter institutionalized, it should be remembered, was not the American Revolution, but the (mild but real) counterrevolution that followed it. The Revolution was institutionalized in the Articles of Confederation, which established the sovereign independence of the thirteen states, and joined them in a league whose power resembled that of today's United Nations. It was this system, not British colonial rule, that the Constitution of 1789 replaced. Its structure, therefore, embodies a seizure of power not from the British king, but from the American states.

This is made clear in James Madison's *Notes of Debates in the Federal Convention of 1787*, in which it is reported that the first days of this debate were devoted to the delegates' confirming among themselves that this is what they wanted to do. Elbridge Gerry put it succinctly: "The evils we experience flow from the excess of democracy," to which the solution, according to Edmund Randolph, would be to establish "a *national* Government . . . consisting of a *supreme* Legislature, Executive, and Judiciary" (Italics in original). When delegates asked that this be clarified, Gouverneur Morris "explained the distinction between a *federal* and *national, supreme, Govt*; the former being a mere compact resting on the good faith of the parties; the latter having a compleat and *compulsive* operation."³ (here too, italics in original)

And indeed, that is what the delegates wrote, a constitution whose principal theme is power,

detailing which branch of government is empowered to do what. Article I. Section 8 lists 18 powers of Congress, followed by Section 9, which lists 9 things Congress may not do. Article II grants executive power to the President; Article III grants judicial power to the courts. No powers are granted to the states; on the contrary Article I Section 10 lists the powers of which they are to be deprived. Thus the US Constitution contains a centripetal dynamic, which may partly explain the fairly steady growth in the power of the executive branch throughout American history.

In contrast to this, the Japanese Constitution embodies a seizure of power from the central government, and in particular from the Emperor. The momentum of this is tremendous: the first 40 articles, with only a few exceptions, are devoted to wresting power from the center. Power is taken from the Emperor and handed to the elected government; power is taken from the Cabinet and given to the Diet; power is taken from the government itself and given to the people. The articles from 10 to 40 (again with the above-mentioned exceptions) are a detailed list of basic human rights that, seen in the context of a document allotting powers, amount to a list of things the government may *not* do. No, you may not arrest people for things they have said or written, or for gathering to talk about public issues. No, you may not establish an aristocracy, or a system of slavery. No, you may not establish a state religion. No, you may not punish people except through due process of law. No, you may not discriminate, including against women. And so on.



Illustrative explanations of the new (1947) Japanese Constitution allude to the exercise of citizen rights (top) and the rising flag alluding to their patriotism, while detailing ten roles of the emperor in matters of state, the latter in ways evocative of the Meiji Constitution.

Of course, some Japanese criticize the Constitution for the one great compromise on which it is based: its failure to abolish the emperor system. This is a serious charge, and it may turn out that leaving that system partly intact admitted the virus that has been eating away at Japan’s democracy ever since. But still, the change in the Emperor’s status stipulated in this Constitution was not trivial. According to the earlier Meiji Constitution, the Emperor was outside the law; as the source of sovereignty, he was the lawgiver, and therefore prior to the law. The new Constitution placed him inside

the framework of the law, an entity created and legitimized (and limited) by the law. Of course, right-wing Emperor worshippers don’t believe this really happened, which is why the present prospect of imperial abdication may turn out to be of great importance. (If the Emperor can quit, that will mean that “emperor” was never his sacred being, but only his job.)

The power to make these changes was first seized from the Japanese Government by the Allied Military Forces. In this sense, the first section of the Constitution can be seen as an extension of the Allied war effort. The Allies fought the war to reduce the power of the Japanese Imperial Government, and institutionalized that reduction in the form of the Constitution. This is the view of Japan’s right wing, and it contains part of the truth. But it neglects the fact that the Occupation authorities considered the Japanese people as allies in this power seizure, at least during the crucial first few months after the war when the Constitution was written and enacted. It is this, more (I believe) than the inclusion of the war-renouncing Article 9, which made the Constitution a great document.

As is well known, racism was a big part of US (and also Japanese) war propaganda, and in US popular consciousness the war was fought not so much against the Japanese political system as against the Japanese. But however Occupation authorities may have thought and behaved privately, they did not make this wartime racism the basis of their policy, at least during the first year. They made a distinction between the government and the people, and acted on the assumption (mainly correct) that the people would support their policy of breaking up the centralized power of the corporations, the military, the government and the emperor. In the Basic Initial Post-Surrender Directive, which was Washington’s mandate to the Supreme Commander Allied Forces (SCAP), were these sentences:

Changes in the form of government initiated by the Japanese people or government in the direction of modifying its feudal and authoritarian tendencies are to be permitted and favored. In the event that the effectuation of such changes involves the use of force by the Japanese people or government against persons opposed thereto, the Supreme Commander should intervene only where necessary to ensure the security of his forces and the attainment of all other objectives of the occupation.⁴

A movement by the Japanese people to overthrow their wartime regime by force was conceivable to the US authorities, and - at least in this original policy directive - something with which SCAP was not to interfere. This could be seen as growing out of the US democratic ideology and the revolutionary experience behind it, or it could be seen simply as an attempt to use any means available to weaken the enemy. But from the standpoint of evaluating the result, it doesn't matter. What matters is not the ethics of the motivation, but rather what, as a matter of fact, was actually done. The Occupation and the Japanese people by no means agreed on everything, but they did - for quite different reasons - agree on this: the Imperial Japanese Government had way too much power. The Constitution was constructed so as to reduce that power.

Japanese conservatives criticize the Constitution as having been enacted by force. Supporters of the Constitution look for ways to deny this, but I think a better response is, Of course. Accounts of what went on between SCAP officers and Japanese Government officials in the process of getting the thing written and approved leave no doubt about the force.⁵ As with King John the signing was done, as it were, with trembling hand. But so what? All good constitutions are enacted by force. What a good constitution does is to limit the powers of government: to transform arbitrary

rule (by monarch or dictator or aristocrats or technocrats) into rule of law. And it is rare to find a government that will reduce its own power voluntarily. From the time of King John, this is something that, on the whole, has been achieved by force. The issue is not force or no-force, but rather who is forcing what on whom. The Japanese conservatives want to frame it as "America forcing an American-style constitution on Japan", and therefore a national insult that should be opposed by patriots. But this distorts the historical record. The Constitution was not forced on "Japan" by "America", but rather on the Japanese *government* by a (temporary) alliance between SCAP and (most of) the Japanese people. What it does is to seize power *from the government* and hand it *to the people*.

Thus the Constitution is not simply a list of political principles. It is not the imposition of a particular way of thinking - whether universal or peculiarly American - on Japan. Rather it is a transfer of real political power. On the whole the Japanese government resisted this transfer, and the people supported it. But the transfer was made. It is not surprising that conservative government elites continue to complain about the "forced Constitution", because this forcing is not just something that happened 70 years ago. The Constitution has been continuously forced on them by a very active movement of people who want to preserve it and, though now a pretty damaged instrument, is being forced on them still today.

The historical window of opportunity for achieving this was narrow: the passionate first few months of the Occupation, the very moment the world entered the Age of Nuclear Warfare, in the very country where that happened. The surrender was on September 2, 1945; the Constitution was announced to the public on March 6, 1946. It may well be that the Occupation officials later regretted what they had done, as we know they regretted Article 9. As early as May, 1946, MacArthur

was issuing warnings against public demonstrations, and he banned the general strike planned for February, 1947, violating in letter and in spirit the paragraph of the Basic Initial Post-Surrender Directive quoted above, and indicating that the US policy of treating the Japanese people as allies in weakening the government was coming to a quick end. But by that time the Constitution had been written and announced to the world. They may have regretted what they had done, but it was too late.

But if it was too late to retract the Constitution, it was still possible to ignore it - or to try to ignore it. By 1947 Occupation General Headquarters (GHQ) had shifted its alliance from the people to the government, and begun working to restore centralized power. In the US view Japan was reconceived from an ex-enemy whose government was to be weakened, to a Cold War ally whose government and economy were to be strengthened. The breaking up of the Zaibatsu monopolies was abandoned. GHQ began de-purging war criminals and purging communists. In 1950 GHQ permitted the Japanese government to establish the paramilitary National Police Reserve, whose job was to ensure domestic security while the US military was busy in Korea. This organization soon metamorphosed into the Self Defense Forces (SDF) - which means that the SDF were originally founded not to defend Japan against foreign enemies, but to protect the government against domestic enemies. This collection of policies which, taken together, came to be called the Reverse Course, not only increased the coercive power of the government, but also created the political and economic conditions under which Japan's old ruling class, now firmly allied with the US, could remain in power. And to institutionalize and render this alliance permanent (as permanent as things get in international relations) the two governments made the Japan-US Security Treaty, which gives the US permission to keep military bases in Japan, a condition for the signing of the 1952

Peace Treaty. This treaty is, in effect, a major amendment to the Constitution, as it hands over to Washington the power to determine a big part of Japan's foreign policy. So long as US military bases are in Japan, whoever the US decides are enemies of America are automatically Japan's enemies as well, which is about as fundamental a foreign policy decision as there is.

The Constitution was adopted in 1946 according to the provisions for amendment set down in the Meiji Constitution, which means that it was approved by the Diet, and there was no popular referendum. There were public demonstrations in favor of it, the mass media supported it, and the Diet approved it, after a long debate, by a big majority, but as all this was under the domination of the Occupation forces, if you focus only on 1946 the conservative argument that the Constitution was never freely and spontaneously adopted looks strong. But if you look at the history of the country since then the picture changes. Under the protection of the human rights provisions of the Constitution, Japan developed a politically active civil society, and this civil society in turn made protection, or better, full realization of the Constitution its principal piece of business. The country's ruling elites made the amendment of Article 9 and the remilitarization of the country its first goal as far back as the 1950s; the civil society has so far prevented this. If the Constitution was not legitimized by the Diet vote in 1947, it surely was legitimized in the decades of struggle by the civil society to preserve it.

The Constitution and its Speaker

To say that a constitution is a political act is different from saying (what is obvious) that it is the result of political action. A constitution is itself a political act. A constitution is first of all an act of language - a speech act - and (if properly written) it will have a Speaker. In the

case of the Imperial Constitution of Greater Japan, the speaker was the Emperor Meiji. The first word in that Constitution is *chin*, a peculiar word in the Japanese language that means “I”, but only if spoken by the Emperor. Thus all that follows is spoken (not actually, but formally) in the Emperor’s voice; all its provisions are, taken together, declared by him to be “the Constitution”. This is a mode of speech called by language philosopher John Austin, “performative utterance”.⁶ A performative utterance does not state a fact; it creates a fact. It is not an observation but a speech act. Thus the words “I now pronounce you man and wife” (if spoken by a person with the authority to speak them) change the legal status of the two people referred to, as well as of any children they may parent, just as the words “You are under arrest” (again, if spoken by a person with the proper authority) also change the legal status of the person addressed. In the case of a constitution, the difference can be clarified by comparing the words, “This is the Japanese Constitution” as spoken in the preamble by a person or persons believed to have sovereign authority, and as spoken later by, say, a schoolteacher.

The Imperial Constitution was a command of the Emperor. For this to be possible, the Emperor had to be understood as prior to the law, which is one of the ways sovereignty is defined. Meiji Era legal scholars argued that the Emperor could not be held accountable to the law, as it is nonsense to say that a commander is obligated to obey his own commands. After all, the commander, who has the power to alter or rescind his commands, cannot also be bound by them. It all makes perfect sense.

In the English version of the Preamble to the present Japanese Constitution, *chin* is replaced by, “We, the Japanese people”. In the Japanese version, syntax requires that the “we” be postponed a bit, so the first words are, “The Japanese people”. But it is clear that this

Constitution begins with a 180-degree change from the Constitution it replaces: its Speaker, and therefore the sovereign, is “we, the Japanese people”.

Thus in this Constitution, as in the U.S. and many other constitutions, popular sovereignty is not a principle or an aspiration; it is structurally built into the law itself, as that which is prior to the law - that which makes the law, *law*. The people are the sovereign and the Constitution is their command. Their status as prior to the law is preserved in the fact that it is only with their consent that the Constitution can be amended.⁷

The clarity of the present Constitution on the question of sovereignty stands in sharp contrast to the muddle produced in 2011 by the Liberal Democratic Party’s Constitutional Revision Committee.⁸ In their draft, the first words in the Preamble are “The Japanese state” (“*nihonkoku*”). But the Japanese state cannot be a Speaker, as it cannot speak, let alone produce a performative utterance. Reading further, one discovers that much of this document is *about* the Japanese state, presented as a Shining Thing, unmatched in splendor and worth devoting one’s life to preserve, but it is not clear who is making these pronouncements. The second sentence begins with the words “Our country” (“*waga kuni*”) but it is again not clear to whom this “we” refers (After reading the whole document, one is left with the impression that it refers to the LDP leaders). In the third sentence we finally find the words “the Japanese people” (“*nihon kokumin*”) but as the sentence itself is a list of duties - that is, not a command by the people but a list of commands to the people - it is not the people as “we” but rather as “they”, or perhaps as “you”. The expression “popular sovereignty” does appear once in these sentences, but without a performative utterance with the people as Speaker, this is not persuasive. Finally, with the fifth sentence, we find what appears to be such an utterance:

“the Japanese people, in order to pass on our good traditions and our nation state to our descendants in perpetuity, hereby establish this Constitution.”

The appearance of “people” and “we” in the same sentence seems to establish the people as Speaker and therefore sovereign, but if so, what on earth were they doing in the previous sentences - and in the ones to follow - giving themselves all those commands? The present Constitution as well as the previous one make it clear that the sovereign, as an entity prior to the law, is the commander not to be commanded. This should not be misunderstood: under popular sovereignty of course the people as individuals are obligated to obey criminal and civil law; it is only as a collectivity that they are seen as sovereign. The present Constitution says almost nothing about duties - notable exceptions being the obligation to send your children to school (Article 26), the obligation to work (Article 27), and the obligation to pay taxes (Article 30) - not obligations to the state, but rather obligations of the people to each other. It says nothing about what is the main theme of the LDP draft proposal: the people’s obligation to devote themselves to the state.

The LDP draft does not, as might have been expected, reestablish the Emperor as the sovereign Speaker of the Constitution. Rather it leaves the question confused. While there is one sentence that seems to establish the people as sovereign, everything else in the draft contradicts that.

The LDP’s proposed revision of the very last Article of the Constitution may have been their attempt to clear up this ambiguity, but it only confuses the matter further. In the present Constitution Article 99 reads, “the Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution.”

This passage, more than any other, clearly

disqualifies the Emperor from being sovereign, by placing him squarely inside the framework of the law. At the same time, by not including “the people” on this list, the Constitution again acknowledges their position as sovereign. The LDP proposal reverses this. In their version (renumbered Article 102) the following sentence is added: “All the people [*kokumin*] must respect this Constitution.” If the people were the sovereign, and the Constitution their command, then this sentence would be nonsense. So it seems that they are not. This provision positively disqualifies them for that role.

There’s more. The text of Article 99 is reproduced, except that “the Emperor” and “the Regent” (the person authorized to exercise Imperial powers in case the Emperor for some reason cannot) have been stricken. Thus the Emperor, while not appearing as the Speaker and sovereign behind the Constitution, is still somehow returned to his Meiji Era position outside the law. Probably this ambiguity is a result of the LDP politicians’ desire to restore the Emperor system tempered by their fear that they may not be able to persuade the public to accept that. But I also suspect that another cause is the fact that, unlike the politicians of the Meiji Era, they don’t understand how to write a constitution.⁹

Article 9

Article 9 of the Japanese Constitution is a remarkable piece of writing. Among other things, it constitutes a kind of test of the ability to read. On the one hand it is written with admirable clarity. I believe that any 6th grader of average ability, reading it in English or Japanese, could understand its meaning without difficulty. On the other hand it seems that many people who have graduated from law school, in particular the Law Department of Tokyo University, have lost this ability. They read it, as it were, deductively. Judging from

what they have learned about law and politics, it could not possibly say what it says, therefore they conclude that it does not.

What it says is that the Government is not empowered to make war, threaten war, or make preparations for war. Government officials and their supporters tell us that it means the Government should not spend more than 1% of the GNP on war preparations, or that the Japanese Self Defense Forces may not engage in collective security, though neither the figure “1%” nor the words “collective security” are to be found in the text of the Article. Or they tell us that it says “except for self-defense”, though these words are also nowhere to be found. These people look at the words, and say what they wish were written there.

This is understandable, as the words of Article 9 violate the “common sense” of contemporary political science and international law. They violate the very definition of the state, as given us by German sociologist Max Weber: the social organization that “successfully claims” a monopoly of legitimate violence. To people educated in the context of a legal and political paradigm in which this is treated as an axiom, what article 9 says simply makes no sense – from which they conclude that it cannot and therefore does not say what it says.

What about the argument that the right of a people to defend itself is inalienable – so fundamental that it cannot be renounced no matter what the Constitution says? I think this argument is undeniable: the right to defend our lives is built into our nature as sentient beings. It is another way of saying that we have the right to life (a right which the state, being an artifice rather than a living being, does not have). Article 9 says nothing whatever about taking away the people’s right to self-defense. To say that it could is to misunderstand the Constitution’s basic principle: popular sovereignty. The Constitution was written to

limit the powers of the government, not of the people. To say that the Constitution takes away the people’s right of self-defense is to say that it is a higher power than the people, which it cannot be. The Constitution, to repeat, is a list of the powers that the people grant to the state, and makes clear that the right to make war is not among them. The key sentence is “. . . the Japanese *people* forever renounce war as a sovereign right of the *nation* . . .” (italics added) The Japanese text (which of course is the only text with legal effect) is written more clearly, substituting for the ambiguous “right of the nation” the term *kokken*, which means “the right of the state” as opposed to *minken*, “the right of the people”. The right of self-defense as *minken* (which in extreme cases can mean the people’s right of self-defense against the government) is not abrogated; rather, it is simply not delegated to the government. It is held in abeyance, and (despite the futile term “forever”) could again be granted to the government should the people choose to amend the Constitution.

If there is any part of Article 9 that the abovementioned 6th grader might have trouble understanding, it would be the final sentence: “The right of belligerency of the state will not be recognized.” “Belligerency” is not a word we use often in daily life, and many people, not only children, don’t quite understand it. Of course, it means “the right to make war”, but what, concretely, is that right? Its meaning is best understood when put bluntly: it is the right, delegated by the state to soldiers, so long as they follow the laws of war, to kill people without being guilty of murder, and to destroy property without being guilty of mayhem. Interestingly, while Japan’s conservative legislators and bureaucrats have willfully refused to believe that Article 9 presents any obstacle to their building up the SDF into one of the world’s major military organizations, they do seem to have accepted that the SDF does not, at least when sent abroad, have the right of belligerency. Beginning with the

Peacekeeping Law passed by the Diet on the occasion of the dispatch of SDF units for duty as peacekeepers in Cambodia in 1992, every law passed by the Diet allowing the SDF to operate abroad has included a clause titled, Use of Weapons. And this clause routinely contains the provision that weapons may not be used to harm anyone except in situations where Article 36 or 37 of the Criminal Code would apply. Article 36 stipulates the right of individual self-defense; Article 37, the right to defend another person under attack. These are rights that, under the Criminal Code, every person in Japan (and in most other countries) has, and they are very different from the right of belligerency. For example, in Japan, if it is possible to protect your safety by running away from an attacker, but you choose to stand and fight, your right of self-defense will probably not be recognized by a court of law. Certainly it will not be recognized if you shoot your attacker in the back while he or she is running away, or bomb your likely attacker while he or she is out taking a walk or eating dinner. But these are things that are allowed under the right of belligerency: if people are wearing the enemy uniform, you can kill them by gunfire or bombing even if they can't see you, and know nothing of your existence.



A protester holds up a sign, "Don't destroy Article 9!"

I had occasion, after the UN Cambodia peacekeeping operation was over, to talk to the Australian General who had been in command there. He told me that part of their job was to protect polling places against attack, but he could not assign SDF troops to this duty because, if an attack did come, they would be required to withdraw, whereas the job of the PKO troops was to repel the attack with gunfire. "I had", he said to me in a lowered voice, "to wrap them in cotton wool." From this concrete example it is clear that the United Nations does not have the right of belligerency, and that UN peacekeeping (or sometimes, as in the Korean War, war-making) troops act under the right of belligerency of the states of which they are citizens. And peacekeepers from Japan have no such right.¹⁰

The Constitution Today

Surely Japan has one of the oddest defense policies in the world. On the one hand there is the SDF: they dress like military, are organized and disciplined like military, train like military, wear military insignia, and (unlike, say, the Boy Scouts or the Salvation Army) are armed with real projectiles and explosives, with the firearms, rockets and aircraft to deliver them, but they do not have the right of belligerency, and are legally prohibited from taking military action. And while the Constitution prohibits a defense policy based on war and threat of war, the country hosts dozens of US military bases occupied by military forces treaty bound to defend Japan against attack, and which keep the country under the US "nuclear umbrella". Nobody planned it this way; rather than a contradiction, it is better described as a stalemate among people with different ideas of what the country should be. The Japanese Government elites built the SDF in the expectation that it would not take them long to persuade the public to approve the amendment of Article 9 so as to make the SDF into a

genuine military force, but so far they have failed to achieve that.

The US Government has failed in its efforts to pressure the Japanese government into amending Article 9 but, failing that, have used Japan's "failure" as a military ally to extort fabulous sums of money from Japan to support the US military bases there, and also to help pay for the US's various military adventures in the Middle East and elsewhere. (Interestingly, both Japan's government conservatives and its ultra-rightists, who as rightists ought to be extreme nationalists, find themselves in the awkward position of abjectly supporting whatever military adventure the US government comes up with and defending the partial occupation of their country by foreign military forces.) The Japanese anti-war civil society, for its part, has failed to prevent the establishment and growth of the SDF, but has succeeded in preventing the SDF from being granted the right of belligerency. Thus they have so far held what amounts to their last line of defense: in all the years since World War II, (so far as we know) no human being has been killed under the authority of the right of belligerency of the Japanese state. That is something that no one could have predicted in, say, 1939.

Rightists and Japan-bashers in the US Congress accuse Japan of taking a "free ride": adopting a hypocritical pacifism while hiding behind the US military. Given that this accusation is used to extort money from the Japanese Government, the word "free" is hardly appropriate, but still the accusation contains some truth. When I wrote my first essay on the Japanese Constitution back in 1983, I wrote,

Insofar as there are some people in Japan who positively support both the Constitution and the Japan-US Security Treaty, it must be admitted that their position is not the renunciation of military force but preference for an arrangement in

which the fighting will be done by someone else. From the standpoint of *Realpolitik* this is shrewd enough, but from the standpoint of pacifism it is hypocritical.

"Yet", I continued, "while hypocritical pacifism can be found, it is not a characteristic of Japan's peace movement as a whole," as in those days just about every peace organization had "Smash the Security Treaty" as its principal slogan.¹¹ But times have changed since 1983. The stalemate is still a stalemate, but its fault lines have shifted. Today while polls still show a majority of the public - as much as 60% - supporting keeping Article 9 as is, they also show over 80% supporting keeping the Security Treaty as is.⁽¹²⁾ This means that the majority of the people who say they support Article 9 also support AMPO, which means they support US military bases in their country. The various Save Article 9 movement leaders know this, and have responded by avoiding the AMPO issue as much as possible. In rescuing Article 9, their trump card is that constitutional amendment requires a majority vote in a national referendum. They fear, reasonably, that if they adopt the slogans No AMPO; No US Bases, the movement will be divided and they will not be able to get a majority in that referendum. So with the anti-AMPO movement reduced to a small minority, the "free ride" criticism is harder to deny.

The great puzzle is, how is it possible for one person both to profess a passion to preserve the Peace Constitution (and claim the accompanying self-image as a pacifist) and also to accept foreign military bases in his or her country? Of course the human mind knows any number of tricks to achieve self-deception, but in this case one of the most important of these is provided by Okinawa. For to most mainland Japanese, while legally Okinawa is part of Japan, culturally and spiritually it is not. Put in Japanese terms, it is not Yamato, but Ryūkyū. Ryūkyū was an independent kingdom until

1879, when it was annexed as the first step in Japan's attempt to build an empire. The discrimination towards Okinawa developed through the many years of colonial rule remains in Japanese society today, though largely unconsciously. And as any Okinawan will tell you, while Okinawa comprises only 0.6% of Japanese territory, over 70% of the US military bases "in Japan", are in fact in Okinawa. This blatant structural discrimination enables Japanese to reframe the base problem as "the Okinawa problem", an occasion not to reexamine one's own position, but rather to feel sympathy for the "poor Okinawans".

Thus Article 9, as splendid as it is as a document and as a contribution to constitutional and international law, has taken on a different meaning in the context of contemporary Japanese politics, though it is difficult to say what that meaning is. The complexity can be seen in the recent efforts to nominate it for the Nobel Peace Prize. Actually, as the Peace Prize cannot be awarded to constitutional clauses but only to living human beings, it was "the people who support Article 9" who were nominated, which meant that the nominators were nominating themselves. Given that these are people who, on the whole, are avoiding the issue of US military bases in Japan (mainly Okinawa), it is not surprising that their self-praise project has not been successful.

From the perspective of Okinawa, where I live, it is difficult to say what the Peace Constitution

means. Support for Article 9 is high, but at the same time many people will say, "the Peace Constitution has never reached Okinawa". While Okinawa has not been the scene of actual combat since 1945, during the Korean and Vietnam Wars, and to a lesser extent during America's various Middle East wars, Okinawa has been "at war" in a very real sense. Particularly galling is the fact that, despite their determination never again to be involved in a war, with the US bases here Okinawans are forced to be complicit in wars in which they have no interest, about which they have not been consulted, against people with whom they have no quarrel. It is easy to understand why they do not see the Peace Constitution as the law of the land in Okinawa.

The Abe Shinzō government has announced following its electoral victory in October 2017 that it means to begin the constitutional amendment process soon, and assuming it survives the scandals in which it is bogged down at the time of this writing, it is quite likely it will do so. If so, the result will be a historical showdown between the Government and its supporters, and the anti-war civil society. During such a struggle, it is possible that some of the political entanglements described above will begin to come untangled, and the people's various political positions will become clearer. But until that happens, any attempt at a definitive conclusion to this essay would be premature. All we can do is to wait and see.

SPECIAL ISSUE

A New Constitution for Japan?

Edited by Tessa Morris-Suzuki and Takahashi Shinnosuke

Tessa Morris-Suzuki, *The Constitution, Human Rights and Pluralism in Japan: Alternative*

Visions of Constitutions Past and Future (<https://apjif.org/2018/5/Morris-Suzuki.html>)

Okano Yayo, Prime Minister Abe's Constitutional Campaign and the Assault on Individual Rights (<https://apjif.org/2018/5/Okano.html>)

Noah McCormack, Affirmative Action Policies Under the Postwar Japanese Constitution: On the Effects of the Dōwa Special Measures Policy (<https://apjif.org/2018/5/McCormack.html>)

Uemura Hideaki and Jeffry Gayman, Rethinking Japan's Constitution from the Perspective of the Ainu and Ryūkyū Peoples (<https://apjif.org/2018/5/Uemura.html>)

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Notes

¹ *Nihonkoku Kenpō*, [The Constitution of Japan], Tokyo: Shōgakukan Sharaku Books, 1982. [日本国憲法] 小学館: 写楽ブックス、1982.

² Douglas Lummis (trans. Kaji Etsuko), "Radikaru Nihonkoku Kenpō", *Shisō no Kagaku*, January, 1983. ダグラス ラミス、「ラディカル日本国憲法」『思想の科学』1983年一月。加地悦子訳 [English Original in *Nihonkoku Kenpō o Yomu*, (*Reading the Constitution of Japan*), Tokyo: Kashiwa Shobō, 1993. [日本国憲法を読む] 柏書房。

³ James Madison, *Notes of Debates in the Federal Convention of 1787*, (Adrienne Koch, intro.) Norton: Ohio University, 1966, pp. 39, 34 and 35.

⁴ "Basic Initial Post-Surrender Directive", in Jon Livingston, Joe Moore, and Felicia Oldfather, eds., *The Japan Reader 2: Postwar Japan, 1945 to the Present*, p. 9.

⁵ For a vivid (and painful) account, see Kyoko Inoue, *MacArthur's Japanese Constitution: a Linguistic and Cultural Study of its Making*, Chicago, University of Chicago, 1991.

⁶ J. L. Austin (eds. J.O. Urmson and Marina Sbisa), *How To Do Things with Words*, Cambridge Mass.: Harvard University, 1962.

⁷ In the Magna Carta (1215) the first word, and (grammatically) the Speaker, is "John." Some other examples: English Bill of Rights (1689): "Representatives of all estates of the people." Virginia Declaration of Rights (1776): "Representatives of the people of Virginia". US Declaration of Independence (1776): "Representatives of the thirteen states." U.S. Constitution (1789): "We the People of the United States". U.N. Charter (1945): "We the Peoples of the United Nations". Republic of Korea (1948): "We, the People of Korea". Iraq (2005): "We the People". Cuba (1976/2002): "We, Cuban Citizens". Vietnam (1986): We, the

Vietnamese People, vow . . .TM Republic of South Africa (1996): “We, the people of South Africa”. Then there are some exceptions. In the Constitutions of China (1982), the Democratic People’s Republic of Korea, and Iran, there is no speaker. In the case of the first two, perhaps Historical Materialism persuaded them that History is the speaker. In the Constitution of Thailand (2007) the speaker is the King, though he declares that the people are sovereign. Saudi Arabia has no constitution. At the command of the King, it is governed by the Basic Law found in the Koran.

⁸ 自民党憲法改正推進本部、起草委員会、『日本国憲法改正法案』平成二十四年四月二十七日（決定）Drafting Committee, Liberal Democratic Party Constitutional Revision Headquarters, *Proposed Revision of Japanese Constitution* 2012.

⁹ The LDP draft contains many more oddities. For a more extensive discussion, see Douglas Lummis, *Zōho: Kenpō wa Seifu ni taisuru Meirei de aru*. Tokyo: Heibonsha Library, 2013. ダグラス ラミス『増補：憲法は政府に対する命令である』平凡社ライブラリー 2013年。

¹⁰ For a complete (as complete as can be done from memory) account of this conversation, see Douglas Lummis, *Waiting for Owls*, Tokyo, Shōbunsha, 1992. ダグラス ラミス、『フクロウを待つ』晶文社、1992。

¹¹ Lummis, “Radikaru Nihonkoku Kenpō”, p. 184.