

The Constitution of Japan

By Nakano Kunimi

Problems in the enactment process

The creation of Japan's constitution is deeply tied to Japan's defeat in the Pacific War and the General Headquarters' (GHQ) leadership during the subsequent Occupation. Despite the Japanese government's surrender and acceptance of the Potsdam Declaration provision requiring complete democratization, revision of the constitution was not deemed necessary. Bowing to GHQ pressure to hasten democratization, the Japanese government reluctantly appointed Minister of State Matsumoto Joji to head revision efforts. When General Douglas MacArthur learned of the conservative nature of the Japanese revisions, he resolved that SCAP (Supreme Commander for the Allied Powers) would construct the draft. With a staff of roughly 20, the GHQ began work on February 3, 1946, and only days later (February 13) submitted a completed draft to the Japanese leaders.

GHQ apparently attempted to incorporate U.S. idealism in the text as well as provisions for the political aims of de-militarizing Japan and weakening the Japanese government.

Tokyo University's authority on constitutional law, Professor Minobe Tatsukichi made this statement in October 1945, following Japan's defeat: "It is clearly possible to create a democratic government under the current Meiji Constitution. If a revised constitution is necessary, this should be carefully considered once we return to a more stable, calm state of affairs."

In the constitutions of many other countries, certain procurements prohibit enactment or revision during a period of occupation, stipulating that such efforts should be made once conditions have stabilized. Also, international conventions require that the laws of the occupied nation are respected by the occupying nation. The Hague War Convention

states, "the authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country." The Potsdam Declaration provides that "A responsible government will be established that promotes peace and obeys the intention towards peace manifested by the Japanese people." And, Article Three of the Atlantic Charter states, "[they] respect the right of all peoples to choose the form of government under which they will live; and [they] wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them."

The only explanation is a "revolution"

The Meiji Constitution was cast by the Emperor and bestowed on the people. Since the current constitution places the sovereignty of the people above all else, it is much more than a simple "revision" of the Meiji Constitution. This forms the crux of the "August Revolution Theory" presented by constitutional law authority and Tokyo University Professor Miyazawa Toshiyoshi.

According to Professor Miyazawa, "The sovereignty principle of the people in the new Constitution is a fundamental departure from the Japanese government's focus on the doctrine of Divine Right that had been in place up to that time. Such reform would have been impossible for the Japanese government to achieve legally using the procedures laid out in the Meiji Constitution. Thus, one must consider this reform a constitutional "revolution," as this reform would not have been able to follow with the procedure provided within the parameters of the Meiji constitution. If this "revolution"

did in fact occur, it was at the hands of the U.S.

Following completion of the GHQ draft, the government's draft for a revised constitution was presented to the nation on March 6, 1946. While the draft was still only in outline form and the full text not yet public, the first post-war general election took place on April 10. In response to the impatient display by the MacArthur headquarters, the Far Eastern Commission (FEC), composed of Allied Powers other than the U.S., advocated postponing the general election since "The Japanese people do not have enough time to fully consider the constitution." General MacArthur ignored their recommendation.

Aside from his fear of interference from the FEC and the possibility that problems related to Imperial war crimes would surface, the growing national sentiment to pursue constitutional revision occurs only after the creation of a Constitution Enactment Assembly, sparking MacArthur's haste to enact the new constitution. He finally achieved public support on May Day with the slogan, "Food Before Constitution!"

According to one constitutional scholar, that Japan's constitution was created during occupation was the country's second resounding defeat. The concept of government, awareness of history, and the ideology of the constitution itself were irreparably damaged by its occurrence. At any rate, this question of a "forced constitution" became the driving force behind later sentiments to "Revise the constitution voluntarily and with Japanese hands!"

50 years of constitutional debate

Over the past 50 years, a battle has raged between those for and those against constitutional revision. The debate is intimately related to bi-polar Cold War politics and further confused

by clashes between right and left ideologies. Along with GHQ intentions, sentiments of disgust for war and a deep seeded desire to make the ideal of an anti-war state a reality pervaded Japan when the new constitution was enacted. When Nosaka Sanzo of the Communist Party proposed, "It is absurd for an independent nation to surrender its military power," during the Diet debate on the constitution in June 1946, Prime Minister Yoshida Shigeru presented his stance as follows; "By surrendering military preparedness and our right to belligerency, Japan can lead the world's peace loving nations and contribute to the establishment of world peace."

Then, in January 1950, General MacArthur declared, "The Japanese constitution does not prohibit self defense," and when the Korean War broke out the following June, he directed Prime Minister Yoshida to establish the National Police Reserve. This signaled the beginning of an era in which revisions were made to interpretation rather than to the actual text. The constitution lost more and more meaning as revising interpretation became the norm.

Efforts to revise the constitution gained ground when Japan achieved independence in April 1952 with the San Francisco Peace Treaty and the U.S.-Japan Security Treaty. The Liberal Party created an in-house Research Commission on the Constitution. When the Liberals united with the Conservatives, the Liberal Democratic Party was born, and Prime Minister Hatoyama Ichiro announced constitutional revision as part of cabinet policy.

In response to the conservative stance symbolized by Prime Minister Hatoyama's statement, "It is the government's duty to correct the discrepancies between the

constitution and reality." Those advocating the protection of the constitution roared, "Young men, put down your guns!" (Suzuki Mosaburo, Chairman of the Social Democratic Party of Japan (SDPJ).)

The strong circle of influence towards defending the current constitution, centered in the SDPJ and the General Council of Trade Unions of Japan, developed efforts to protect the peace constitution and opposed Japan's re-militarization. In January 1954, the "National Union to Protect the Constitution" was formed.

In the following elections—House of Representatives (February 1955) and House of Councilors (July 1955)—advocates of change were once again unable to win more than two-thirds of the vote.



Late Prime Minister Yoshida Shigeru speaking in the Diet (June 1946).

Link to choice of political system

Unfortunately, the debate between pro- and anti-revisionists became tied to ideological and party confrontations and choice in political systems. The Conservatives advocated revision of the constitution through authoritarianism and reactionism, while the Socialists and other opposition parties limited their options with rigid "no changes whatsoever" policy. This stand-off stalemated the issue for almost half a century.

There was remarkable sympathy for Soviet Marxism among Japanese intellectuals following World War II. For many of them, demands to protect the constitution were merely one method for introducing Soviet Marxism into Japan. They essentially used the constitution to further other goals. If, in fact, they sought true Marxism, they would have opposed the current constitution since it recognizes the existence of the Emperor and private property.

Despite the existence of anti- and pro-revisionists, the absence of a third influence, one that could push for constitutional revision as necessary for developing a parliamentary democracy, was the real problem. Kyoto University's Professor Noda Nobuo points out that, "If one truly loves one's home, one fixes what is broken. The stance that one must never fix the constitution is like standing by as a cherished possession rusts into disrepair." That former West Germany's constitution was revised over 40 times is witness to that nation's determination to assure the longevity of the constitution.

A Diet without debate

Since its enactment, no honest, straightforward debate on the constitution has occurred in the Diet. Until recently, Diet deliberations broke down whenever a cabinet minister stated the need for consti-

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tutional revision. Opposition parties claim such statements are unconstitutional based on Article 99 which states; "... members of the Diet ... have the obligation to respect and uphold this constitution." Those calling for change have been pressured to either withdraw their remarks or resign. Also, demands are often made for the prime minister to "promise" not to revise the constitution. The only possible explanation for this is the concerted effort made by the opposition to place a strict taboo on constitutional debate.

While the Diet should have debated the issue, constitutional interpretation was used as a bargaining chip for bill or budget approval. But coaxing the opposition into compromise by twisting interpretations of the constitution was only possible during the Cold War since, safely tucked under the wing of U.S. protection, Japan could afford to avoid national security issues.

Whether cabinet minister or Diet member, speaking out on constitutional revision or stating personal opinions is by no means unconstitutional. If anything, the Diet is where active debate on the constitution should occur. It is the government's responsibility to debate how the current constitution could be improved. Forbidding free expression of opinion or suppressing debate is utterly self-destructive.

Negligence by scholars and the media

The situation in constitutional research resembles the suppression of debate and the opposing views that occur in the Diet. Meetings are held among those with similar views, either for or against constitutional revision, and neither side moves to accept opposing ideas. It is an atmosphere void of logic, where logical counter-argument is unacceptable. Such resistance to rival theories or argument should never exist in the realms of academia since, without opposing ideas, no true progress can be made.

Concerning scope, constitutional study should be tied in with domestic issues, civics, history and social studies. To achieve a balanced relationship

between the protection of individual freedom, human rights and national security should be the foremost goal of constitutional studies.

On the contrary, following the war, study of the constitution without debate on the theory of nations or politics seemed to be the norm. This is closely tied with GHQ's "un-constitutional" goal of weakening Japan with the constitution. During the long period until Japan attained independence, GHQ censored the media, rejected criticism of the constitution and never revealed to the Japanese public that their constitution was U.S.-made. Also, the Tokyo War Crimes Tribunal, which passed sentences on war criminals, created a wave of popular opinion that Japan had committed a terrible crime in World War II, and that a similar offense should never be repeated. Deep anxiety was planted that criticizing the constitution would lead back to the pre-war mentality or re-ignite militarism.

In this sense, the media has been guilty of the same crime. On Constitution Day (May 3) each year since World War II, every newspaper has printed editorials blazing with headlines reading "Protect our Constitution" or "Peace is Precious." These editorials are nothing more than each newspaper's empty attempt to maintain the "pro-constitution" status quo.

However, about the time of the Soviet invasion of Afghanistan, this peace first policy began to dissipate. The media's tone became divided between whether to maintain the anti-Soviet line of the U.S. or to clarify Japan's position as an independent member of the Western world. This breaking with past conformity was the impetus for the wholly autonomous positions assumed by the media thereafter.

Revised text of the constitution?

The *Yomiuri Shimbun's* in-house project team, the "Yomiuri Shimbun Constitutional Studies Group," presented its proposal for a revised text of the constitution in November 1994. While the Diet and academia continue to avoid

any debate on the issue, it is epoch-making that a single newspaper has taken the initiative to face and work through the difficult issues within the constitution and present a proposal.

The *Yomiuri Shimbun* decided to create this proposal because of changes in the international situation, economic development, environmental concerns, and so on. These changes have rendered sections of the current constitution obsolete, thereby requiring both changes and new additions.

The *Yomiuri Shimbun's* proposal focuses on the following five points.

I
With the international situation changing and our national influence gaining strength, foreign expectations of Japan's role in fulfilling its international responsibilities are markedly increasing. Resource-poor Japan is very dependent on the free trade possible only in a safe, peaceful world; obviously, our nation's survival and prosperity would not be feasible under "one-country pacifism," which pursues only self-interest. Facing a new phase in the U.N.'s peace-keeping activities, Japan is being asked to contribute not only financial but also human resources. We believe that, in order to accomplish its mission more assertively in the international community, Japan should provide a part of its Self-Defense Forces to support both the activities for peace and the humanitarian efforts of international organizations.

In our proposal, the Self-Defense Forces is described as "an organization for self-defense." Our article reasserts that inhuman and indiscriminate weapons of mass destruction be banned, conscription is prohibited, and maintains that supreme command authority over the organization for self-defense rests with the civilian Prime Minister. We also clarify Japan's willingness to provide portions of its defensive power, (i.e. the Self-Defense Forces) to support peace-keeping and humanitarian efforts of international organizations.

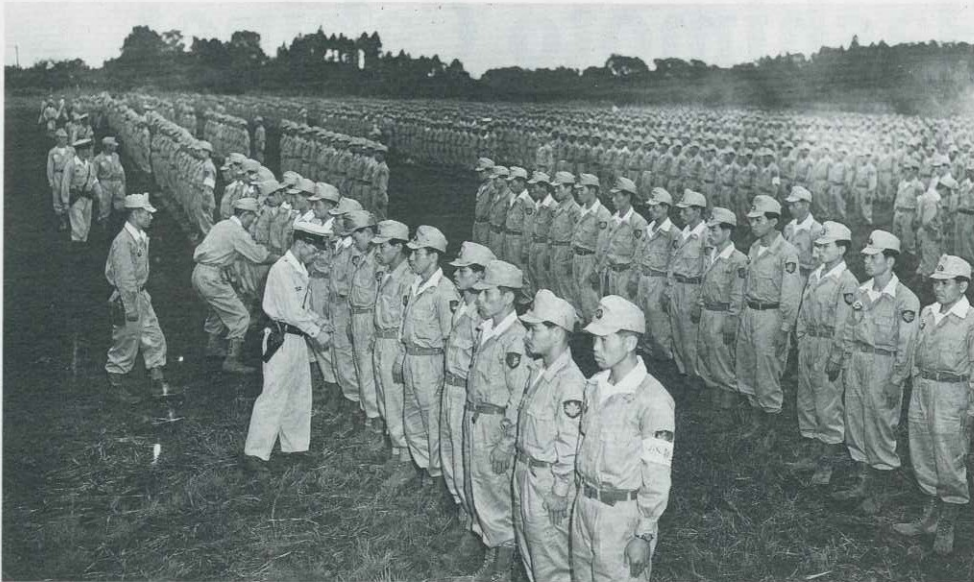


Photo: Kyodo News Service

Scene of the then National Police Reserves in training.

II

To continue as a peaceful and safe nation, Japan is being questioned time and again as to its stance on defense and security. Yet, the interpretation of the provisions of the current constitution relating to the Self-Defense Forces, so fundamental to our national security, has been utterly confused, resulting in a stream of sterile debate. This situation must not be disregarded.

To this end, we have deleted the second paragraph of Article Nine which declares that Japan will never maintain armed forces and renounces the right of belligerency and replaced it with a statement recognizing Japan's right to both independent and collective self-defense.

III

The relationships between state and individual and among individuals themselves are changing and becoming more complex, thus broadening and heightening our awareness of human rights. However, in our view, the current constitution is not coping well with such matters. Guarantees of basic human rights related to the global environment, protection of privacy

and other issues should be more explicitly stated in the constitution.

Therefore, our proposal includes a viewpoint based on the "right to privacy," and stipulates an article for the protection thereof. Also included is a newly created article on the environment.

IV

The parliamentary democratic system has to be further developed. It is particularly urgent for us to restore people's confidence in politics and to bring into effect policies capable of dealing more efficiently and more promptly with foreign and domestic situations. To attain these objectives, inevitably the Diet will require reform and the cabinet should be reinforced.

Our proposal includes an article to heighten the independence of the House of Councilors by granting it precedence in treaties and personal affairs. We have also strengthened the leadership of the prime minister.

V

Circumstances surrounding our judicial system are also changing. We are being asked how best to deal

assertively with constitution-related litigation, the fundamental law of the state. The courts have tended to shy away from making constitutional decisions. Therefore, we feel that a Constitutional Court, independent of the Supreme Court, the sole function of which would be to judge constitutional suits and thus expedite non-constitutional trials, should be established.

Future constitutional debate

Following submission of the proposal for the revised text of the constitution, the *Yomiuri Shimbun* presented a proposal regarding government policy on general security. This proposal did away with the legal imper-

fections in current national security policy and now includes systems to deal with national emergencies including invasions, large-scale disasters and terrorist acts. We are also preparing future proposals on Cabinet and Diet policy and continue consideration on the constitution in order to present improved second and third proposals for constitutional revision.

The progress in constitutional reform in the Diet and academia remains slow, but publicizing the secret notes of the Constitution Enactment Assembly after 49 years has incited the gradual dissolution of the taboo shrouding constitutional debate.

When the current re-organization of government is over, we expect the emergence of an environment conducive to debate on problems including re-consideration of the constitution in the Diet and whether to include military force in international cooperation. We sincerely hope effective discussion on the constitution can occur in the political world. ■

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