

Symposium: Constitutional Amendment and the Right of Collective Self-Defense: What is the Impact on Japan-United States Relations?

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[Note] :

The symposium chaired by Prof. Kawashima Masaki (Nanzan University) which was entitled “Constitutional Amendment and the Right of Collective Self-Defense: What is the Impact on Japan-United States Relations?” was held at Nanzan University on December 6, 2014.

Prof. Tsuji (University of Tsukuba) gave his lecture entitled “Amendment of the Japanese Constitution—A Comparative Law Approach” and Prof. Kan (Kyoto University of Foreign Studies) gave his lecture entitled “U.S. Global Strategy and Japan’s Right to Exercise Collective Self-Defense: A Historical Perspective.” And I made some comments and/or questions. Then other participants asked their questions and two lecturers replied.

This is the report of my comments and/or questions.

Firstly, I would like to express my warmest appreciation for the lectures presented by Prof. Tsuji Yuichiro and Prof. Kan Hideki. Both of the two lectures are very stimulating to consider the contemporary constitutional issues in Japan.

I would like to mention some comments and/or questions.

1. Most written constitutions (codified constitution) have an article for amendment and are designed to be difficult to amend.

Art. 96 of the Constitution of Japan (hereafter the Japanese Constitution) states:

Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify.

Amendments when so ratified shall immediately be promulgated by the Emperor in

* Professor, Law School, Nanzan University. This paper is a report of my comments and/or questions presented at the symposium held at Nanzan University on December 6, 2014. I would like to express my warmest appreciation for the stimulating lectures by Prof. Tsuji Yuichiro and Prof. Kan Hideki.

the name of the people, as an integral part of this Constitution.

Art. 5 of the Constitution of United States of America (hereafter the U.S. Constitution) states:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

According to Prof. Tsuji, “it has been argued that it is more difficult to amend the Japanese Constitution than the U.S. Constitution.” But he made a suggestion based on some grounds that “one might not say that the U.S. Constitution is more easily amended.”

It is said that the U.S. Constitution is the oldest written constitution in the world which remains in force. Once enacted in 1788, the U.S. Constitution was soon accepted as the fundamental law of the land. Since then, there have been twenty-seven amendments added to the U.S. Constitution while the U.S. Constitution itself has been accepted.

In Japan, we might say that the Japanese Constitution has been accepted by the ordinary people as a whole, but many conservative politicians and the Governments, mainly the Governments led by the Liberal Democratic Party have not necessary accepted the Japanese Constitution as the fundamental or “the supreme law of the nation.” On the contrary, many conservative politicians and the Liberal Democratic Party have maintained the position of fulfilling the constitutional amendments since the 1950’s. The target of debates on constitutional amendments has consistently been Art. 9.

2. Generally, it is said that the Constitution establishes the government, empowers it as well as constrains its power. In short, the Constitution is designed to constrain the power of government.

The Japanese Constitution follows this idea and makes clear that it “shall be the supreme law of the nation” (Art. 98-1) and that “[t]he 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” (Art. 99).

Prof. Tsuji also emphasized that “the Constitution binds an official’s exercise of power delegated by the people.”

It is important for us to remember that the Japanese Constitution does not require the people to “respect and uphold” the Constitution. Because “[w]e, the Japanese people …do claim that sovereign power resides with the people and do firmly establish this Constitution” (the Preamble to the Japanese Constitution).

3. It is said that the U.S. Constitution has developed since the 18th century in response to the social changes. In this context, it is the U.S. Supreme Court that has played an important part by way of constitutional interpretation.

Prof. Tsuji suggested that “[t]he supreme power to interpret the Constitution is not with the Cabinet, but with the Japanese Supreme Court.” And he also suggested “[t]he Japanese Supreme Court is expected to send messages through its decisions to gain the confidence of the people, bridging the gap between the judiciary and the general public.”

But, according to the Government, the constitutional interpretation can be changed by the cabinet decision alone. And the Japanese Supreme Court has consistently refused to face the question of the most controversial constitutional issue in Japan, that is, whether the Self-Defense Forces is constitutional.

4. It is important for not only our ordinary people and the politicians but public officials to understand and accept the idea of so-called constitutionalism which contains the idea to constrain the government. Because the Japanese Constitution is our first Constitution based on such an idea derived from the U.S. Constitution.

Many constitutional lawyers think that the establishment of the Self-Defense Forces and the conclusion of the Japan-U.S. Security Treaty “through the action of government” are unconstitutional even for the purpose of self-defense. Also, it may undermine the constitutionalism that the Government by itself changes the constitutional interpretation to allow the exercise of the right of collective self-defense.

5. I would like to propose to read Art. 9 of the Japanese Constitution in connection with the Preamble to the Japanese Constitution.

The Preamble contains the following idea.

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.

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.

And Art. 9 in the Chapter II (Renunciation of War) states as follows in order to realise this ideal expressed in the preamble.

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

Nevertheless, the Government established the Self-Defense Forces (in 1954) and concluded the Japan-U.S. Security Treaty (in 1952 and revised in 1960). In consequence, the Government had to explain that they were not unconstitutional but constitutional.

I would like to confirm the following statements by the Government to explain that the Self-Defense Forces is not unconstitutional (I have cited these from “Report of the Advisory Panel on Reconstruction of the Legal Basis for Security” on May 15, 2014).

In the document submitted to the Committee on Audit of the House of Councillors in 1972, the Government stated as follows.

“……the Constitution cannot possibly be interpreted to prohibit Japan from taking measures of self-defense necessary to maintain its peace and security and to ensure its survival.”

“Nevertheless, that does not mean that the Constitution, which makes pacifism its fundamental principle, can be interpreted as permitting such measures for self-defense unlimitedly. These measures are permitted only when they are inevitable for dealing with imminent unlawful situations where the people’s right to life, liberty,

and the pursuit of happiness is fundamentally overturned due to an armed attack by a foreign country, and for safeguarding these rights of the people. Hence, these measures should be limited to the minimum extent necessary for repelling these situation.” and “[i]f so, the use of force under our Constitution is permitted only in cases dealing with imminent unlawful infringements against Japan. Accordingly, it follows that the exercise of the so-called right of collective self-defense, which entails repelling armed attacks against other countries, cannot be permitted under the Constitution.”

Again, the Government stated as follows in its written answer to a member of Diet in 1981.

“It is only natural for our country to hold the right of collective self-defense under international law as it is a sovereign nation. The Government nevertheless takes the view that the right of self-defense permitted under Article 9 of the Constitution is limited to the minimum extent necessary for the defense of the country. The Government believes that the exercise of the right of collective self-defense exceeds that extent and is not permitted under the Constitution.”

According to the Government, the right of collective self-defense is defined as “the right to use force to stop an armed attack on a foreign country with which the state has close relations, even if the state itself is not under direct attack.”

But, on July 1, 2014, as Prof. Kan said, “Abe and his cabinet approved the decision to allow Japan to exercise the right of collective self-defense under the existing Constitution.” As Prof. Tsuji pointed out, this was done by way of the change of the constitutional interpretation by the cabinet decision without having been debated in the Diet. That is, “no bill existed in time of the cabinet decision in 2014.”

In short, as Prof. Kan commented, “[t]his momentous decision not only marked a major turning point in the history of postwar Japan but was made by overturning the longstanding constitutional prohibition established by the successive Liberal Democratic Party administration with the advice of the Cabinet Legislation Bureau.”

6. My question is why the Government has changed the constitutional interpretation which had previously denied the exercise of the right of collective self-defense.

According to the Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan’s Survival and Protect its People on July 1, 2014, “[d]uring the 67 years since the Constitution of Japan came into effect, the

security environment surrounding Japan has fundamentally transformed and is continuing to evolve, and Japan is confronted by complex and significant national security challenge.” It also mentions “the policy of ‘Proactive Contribution to Peace’ based on the principle of international cooperation.”

But it is not so clear what “the changes in the security environment surrounding Japan” means. The idea of “Proactive Contribution to Peace” is also not only unclear but contradictory to the pacifism declared in the Japanese Constitution.

Prof. Kan suggested us to pay attention to the so-called Armitage reports and pointed out that “[t]he 2012 report’s message is that Washington desires the Japanese government to change its interpretation of the constitutional prohibition so that Japan can exercise the right to collective self-defense. To put it in the postwar perspective here, Washington officials have come to entertain such a view at least since 1958.”

That is, as Prof. Kan discussed, we are now at “the final phase of redefining the Japan-U.S. Security Treaty: during the tenure of the Obama administration” through “the first phase of redefining the Japan-U.S. Security Treaty: from the Nixon Doctrine to the end of Cold War” and through “the second phase of redefining the Japan-U.S. Security Treaty: from the end of the Cold War to the Obama administration.”

In a word, the Government has been required to change the constitutional interpretation in order to admit the exercise of the right of the collective self-defense in the process of redefining the Japan-U.S. Security Arrangements led by U.S. As a result, “Japanese-American defense cooperation not only advanced substantially but was further integrated into America’s global security strategy,” as Prof. Kan pointed out.

7. My question is what the significance of the Guidelines for Japan-U.S. Defense Cooperation (hereafter Guidelines) is.

As Prof. Kan discussed, the new Guidelines of 1997 based on the Japan-U.S. Joint Declaration on Security of 1996 “reconfirmed the ‘strong Alliance’ between Japan and U.S. marked a new era in Japan-U.S. security treaty relations because it provided the basis for more effective bilateral cooperation during a regional crisis” (Article Six situation).

Then, the Government enacted the Law concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan (1999) and the Ship Inspection Operations Law (2000) to enforce the new Guidelines.

But the Guidelines are only an agreement approved and issued by the Security Consultative Committee (hereafter SCC) composed of Secretary of State and Secretary of Defense from U.S. and Minister of Foreign Affairs and Minister of Defense from Japan. The SCC has issued many Joint Statements to promote the process of “the deeper and broader Japan-U.S. Alliance.”

It is said that “the Japan-U.S. Alliance has expanded in terms of the scope of defense cooperation in response to the changing environment” from the “Cold War era” (focused on the defense of Japan), to the “post-Cold War era” (focused on the response to situations in areas surrounding Japan), and to the “post-9.11 era” (focused on the improvement in international security environment). These process of “the deeper and broader Japan-U.S. Alliance” has been promoted through the consultative forum between Japan and U.S. Government officials concerning Japan-U.S. security issues. The SCC is one of such forums.

It is necessary for us to remember that the Guidelines have been used to redefine the Japan-U.S. Security Arrangement and promote the process of “the deeper and broader Japan-U.S. Alliance” without revising the Japan-U.S. Security Treaty.

8. As Prof. Kan suggested, it may be important for us to pay attention to “Abe’s revisionist view of past history” and his “wrapping up the exercise of collective self-defense in the package of nationalism.”

This revisionist view of past history might be the cause of anxiety for U.S. Government and the cause of strife for the neighboring countries in Asia.

As Prof. Kan suggested, “Abe’s doctrine that advocates ending of the ‘post-war regime’ and reflects his new concept of a ‘proactive contribution to peace’ (sekkyoku heiwashugi) contains elements that challenge the San Francisco Peace Treaty system in the maintenance of which the United States has huge stakes.” This is the paradox for U.S..

9. My last question is where Japan is going.

The SCC has been considering the revision of the new Guidelines of 1997. According to Prof. Kan, the revised Guidelines would allow Japan “to expand the scope of cooperation on a global scale or without geographical restrictions” (The SCC agreed on the revision of the Guidelines on April 27, 2015). And Abe has wished to amend the Japanese Constitution itself in near future.

I would like to propose to reread the Preamble to the Japanese Constitution to consider where we should go. The Preamble to the Japanese Constitution states:

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, the Japanese people, pledge our national honor to accomplish these high ideals and purpose with all our resources.