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The Case for Japanese Constitutional Revision Assessed

Koseki Shoichi

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By Koseki Shoichi

Translated by Richard H. Minear

Indonesian translation is available

There's been much discussion of constitutional revision in Japan. In November 2005, celebrating the 50th anniversary of its formation, the Liberal-Democratic Party published its "Draft of a New Constitution." In this rapidly changing world, it's quite risky for a developed country to make a constitution with an eye to the 21st century. Why? Because this is an age in which the nation-states that shape the modern era are changing dramatically, and because we still can't see what lies ahead.

The debate over constitutional revision originates in the incompatibility between the Japanese constitution's renunciation of armaments and the right to make war now asserted by the Abe administration, on the one hand, and the primacy of the US-Japan security system on the other. No matter how you look at it, it's risky to dream up a constitution for the 21st century without addressing—above and beyond US security demands—the changing character of the modern nation-state. In order to see the future, we must first examine the past. The current constitution of Japan has a history of nearly 60 years, and one might think it would be necessary to begin by assessing that history. But the constitutional research committees of the two houses of the Diet that might be expected to take that as their highest duty have failed to do so.

A Failure to Examine History

As an example, consider how lawmakers have failed to research the case law of the Supreme Court. One might think it necessary to assess whether the judgments in the numerous cases of the past sixty years are constitutional, and to ask whether it's necessary for the legislature to revise the constitution's provisions in light of the Court's judgments. But the Diet's constitutional research committee has merely listened to the argument of the chief of the Supreme Court's administrative office that decisions have been unconstitutional.

We can surmise that the LDP government has failed to exert the energy required to produce a new awareness by examining

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the facts. Indeed, how little intent there has been to assess history is all too clear in the LDP draft. In constitutional revision, preambles generally allude to the current document's relationship to the previous constitution. To give a classic example, the preface to the constitution of the 4th French Republic (1946) states that the French people "solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic." Its successor, the constitution of the 5th republic (1958), states: "The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution."

The preamble of the LDP draft for Japan contains no reference to the current constitution and no evaluation thereof. That too is to be expected. The organization that proposed this draft is called the "Main Office to Foster the Establishment (*seitei*) of a New Constitution," and the title of its proposal is "Draft of a New Constitution." *Seitei* differs from "revision"; it means that a revolution or complete break with the former constitution is to take place. The LDP likely would strongly prefer not to refer to the present constitution, to ignore it. But as the ruling party under the existing constitution, it can't make "revolution"; hence it has to rely on the process of revising the current constitution—how ironic.

A Failure to Address Globalization

The fact that the LDP didn't investigate and assess the current constitution means that it has neither responded to Japan's present situation nor addressed the issues that face countries with modern constitutions. The nation-states that are premised on modern constitutions now are experiencing great changes. Globalization exacerbates those changes.

Article 10 of the Constitution of Japan establishes the definition of a Japanese national and guarantees basic human rights to all Japanese nationals (*kokumin*). Foreigners living in Japan, however, are not guaranteed the same human rights as Japanese nationals. On this point, the current constitution is no different from the Meiji Constitution (Article 18). In advanced countries the nation-state is undergoing changes. Japan, too, continues to see lawsuits concerning the right of resident aliens to take part in local government and to hold public office. The Supreme Court has ruled that "the Constitution of Japan that establishes local self-government does not ban permanent-resident aliens" from participation in local government. Given Japan's status as an economic power, its 21st-century constitution must address the protection of the human rights of foreigners amid the onrush of the global economy. However, the constitutional research committee that takes "new

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human rights" as its motto has conducted no research on treatment of non-Japanese nationals, and no reference to the issue is to be found in the LDP draft.

In advanced countries the 21st century is an age in which increasing numbers of individuals act across national borders; the peaceful coexistence of diverse cultures and the prohibition of racial discrimination simply must be guaranteed. In the meantime, democracy advances in the form of participation in local government. Thus, the nation-state is called upon to seek a new identity through the extension of rights.

Against this backdrop, forces supporting the reinforcement of traditional ideas about the nation-state will inevitably push forward, appealing to concepts of nationalism rooted in traditional ideas of religion and culture as a basis for hierarchical rule.

Accordingly, in the discussion of Japan's constitution, one can imagine repeated demands that the preamble stress "Japan's fine traditions," "the spirit of harmony," and "patriotism," and in fact, the preamble of the LDP draft states that "the Japanese people together have the responsibility to defend their country and society with love, responsibility, and courage." But there is no mention whatsoever of the kinds of ties to be constructed to international society, in particular to the countries and peoples of East Asia.

Post-World War II constitutions have anticipated recent changes in the nation-state to varying degrees. For example, the German constitution (1949, the basic law of West Germany) refers to the subjects of human rights as "all people" or "any person," in a departure from the Weimar Constitution, which used "Germans" and the "German people." And importantly, the 1949 German constitution has an article (Article 24) limiting sovereignty as follows: the state "may by law transfer sovereign powers to international organizations… [I]n doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world." Based on these limitations of sovereignty, Germany has pursued unity with Europe through the European Economic Community, the European Community, and finally the European Union.

By contrast, Japan's constitutional discussions—beginning with the assertion that the present constitution was imposed on Japan—have appealed repeatedly to nationalism. Far from envisaging the limitation of state sovereignty, the LDP draft emphasizes the "restoration of sovereignty" and "patriotism." "It is natural for an independent state to have a military," "a normal country"—these are its characteristic expressions.

Ambiguity about War

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The LDP draft changes the current constitution's "renunciation of war" in Chapter II to "guarantee of security." It leaves untouched Article 9 Paragraph 1, which renounces war, but excises completely the text of Article 9 Paragraph 2, which prohibits maintenance of the military and renounces the right to engage in belligerency. Article 9 Paragraph 2 of the LDP draft states, "To insure the peace and independence of our country, along with the safety of the country and of the nation, it [Japan] maintains a self-defense army with the prime minister as its supreme leader."

It certainly appears that the proposed constitution establishes state sovereignty as absolute—as the definition, in short, of a "normal country." But if you have a military and recognize the right of belligerency, it means that you prepare to go to war; so it would be appropriate that the right to declare war be established. For the Meiji Constitution, of course, that was the prerogative of the emperor. In the LDP draft, one might think it was the prerogative of the prime minister, but Article 73, which establishes the prerogatives of the cabinet [which the prime minister leads], leaves this unclear.

The Hague treaty on the declaration of war (1907) says, "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." This point is important for deciphering the nature of the LDP draft. We must keep in view that a joint US-Japan declaration after the end of the Cold War (1996) revised the guidelines of their security relationship, and on that basis, the law of armed attack (*buryoku kogeki jitaiho*, 2003) was subsequently established as a pillar of the Japanese legal system's crisis law (*yujihosei*).

In its Article 1, the law pertaining to regional incidents (*shuhen jitaiho*) defines a "regional incident" as "a situation having important influence on our country's peace and security in our region insofar as there is concern that left alone, it might develop into a direct military attack on our country." Notably, in consultations with the US, the government has emphasized that "regional" here is not a geographic concept, i.e. it is not limited to Japan's vicinity. Moreover, according to Article 3 of the law, if the US intervenes militarily, Japan will offer rear-echelon support (provide materiel for the US military, labor, and the like). Hence, as in the case of the Iraq war, Japan's support is not necessarily limited to its immediate vicinity. In addition it is certain that there will emerge "important influence on the peace and security" of Japan, which provides home ports for US aircraft carriers and has other important US bases. In such events, according to Article 3, Japan will provide rear-echelon support for the US military in the region.

The possibility of course exists that a

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country experiencing US military intervention will mount a retaliatory attack against Japan, which is co-operating with and supporting the US. So the law of armed attack (2003), which already exists as a pillar of the legal system in this era of crisis, can already kick in. The law of armed attack stipulates not merely the "event of military attack," a situation defined in the UN Constitution (Article 51) as conditions for invoking self-defense, but also the anticipation of military attack (Article 2 paragraph 4), "a condition that has not developed to military attack but where a military attack is anticipated."

What this means, according to the response in the Diet by Director Ishiba of the Defense Agency during deliberations on the law, is that "should the enemy begin to shift missiles to launch sites, we will attack the enemy." This is none other than President Bush's "preemptive attack," codified into Japan's crisis legal system. At such a time, according to the same law, the government draws up the "basic policy in response to military attack, and the prime minister orders the Self-Defense Forces to take defensive action." It is *de facto* war.

But there is still no provision for a declaration of war. That is, Japan has created a system for use in case of US military intervention, and the LDP draft envisages Japan's participation in wars of precisely this kind. In this sense, indeed, it is a post-Cold War constitution.

A Failure to Limit State Sovereignty, Uphold Rights

One can't help feeling that this approach to the constitution fails to recognize the character of the era in which we live—especially since it establishes a "Self-Defense Force with the prime minister as supreme leader." This is an age in which the maintenance of peace requires limiting state sovereignty. It is an age in which it is essential to restrict through treaty the right to go to war against neighboring states, a right that is the highest exercise of absolute state sovereignty, and to work for the maturation of trust. The LDP failure to envisage common action with neighboring states is indicative of the failure of this draft to qualify as a 21st-century constitution.

Is there any nation that can deploy its army regardless of the views of other nations? Only the US. According to current guidelines, the Self-Defense Forces are in fact under the command of the US. At the time of the Iraq war, the former chief of the Self-Defense Agency stated, "Japan is the 51st state." Given the fact that his statement precipitated no political controversy, it has become common sense that Japan's prime minister does not control the Self-Defense Forces. This is another example of the LDP's twisted sense of nationalism that sits uneasily with its subservience to the US.

In order to become a "country that can

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make war," it is necessary to have national emergency authority—that is, the right in time of "war or national crisis" to issue extraordinary proclamations. But the article of the LDP draft that addresses the cabinet (Article 73) specifies no such right. Actually, it appears only where one would least expect to find it: among the general provisions on human rights. This is the shocking text:

> Article 12. The freedom and rights which this constitution guarantees the people must be maintained by constant effort of the people. The people must not misuse them, and, aware that duties and obligations accompany freedom and rights, they have a duty to enjoy liberty and exercise rights always so as not to infringe upon the public good and public order.

In other words, liberty and rights must be exercised insofar as "the public good and public order" are not infringed upon. Even in times of peace it becomes possible to restrict human rights for the sake of "public good and public order."

The LDP draft not only opens the way to remilitarization but sports a blatantly nationalistic character. To seek identity in *minzoku* (the Japanese people, emperor), patriotism (the flag, *kimigayo*), and religion (Yasukuni) has long been advocated by the ruling party. The final goal is *minzoku* purity, equating the rights of citizenship with a conception of a pure Japanese race.

A Lack of Ideals

According to opinion polls since 1995, the 50th anniversary of the end of World War II, over half of the Japanese people have supported the revision of the present Constitution. This LDP draft, however, is supported by only 17%, according to the *Mainichi Shimbun* newspaper of March 5, 2006. Despite such a miserable public response, the LDP has shown no sign of abandoning its policy. Prime Minister Abe Shinzo, in his inaugural address in September, stated that he plans to complete revision of the Constitution within six years.

What is demanded now from the constitution is political ideals. This is an age that calls for projecting new political ideals. The grim reality is that this hasn't happened; hence it is necessary to chant "Defend the Constitution!" in the face of regressive challenges to it.

Statist and vertical constitutional ideas show up also in the LDP draft's excision of the special legal provisions for local self-government, which appear in Article 95 of the present constitution. Since ours is an age calling for local self-government, sovereignty can't function effectively unless constitutional principles are horizontal. The same is true of the need to restrict state sovereignty in the interest of achieving regional ideals. Shouldn't 21st-century

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constitutions be designed on these premises?

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Koseki Shoichi is Professor in the law faculty of Dokkyo University and the author, with Ray Moore, of The Birth of Japan's Postwar Constitution*. Richard Minear is Professor of History at University of Massachusetts (Amherst) and a Japan Focus associate. His book,* The Scars of War: The Japanese Home Front in World War II*, will be published in 2007. He translated this article for Japan Focus. Posted on December 12, 2006.*

Please see also "Japan's Political and Constitutional Crossroads," a Japan Focus roundtable on constitutional revision.

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