The Universal Spirit of the Japanese Constitution: Re-Reading Article 9

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Abstract

The theme of this paper is “the spirit of the Japanese constitution and its universalism,” and its subtitle is “re-reading Article 9.” The intent is limited to “reading” Article 9 of the Japanese constitution, and does not involve rewriting it. Therefore, it will not deal with the arguments themselves for amending the constitution, instead offering a discussion of Article 9 interpretation and a discussion of policy based on constitutional principles.

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Humanitarian Assistance: Public Stance and Reality

Let us begin with the current situation regarding the constitution.

The Antiterrorism Special Measures Law took effect on November 2, 2001 and expired on November 1, 2007. It was to be replaced by a successor law, the Supply Assistance Special Measures Law, whose bill was being debated in the Diet during November 2007. Three things can be said about the public stance of the lapsed Antiterrorism Special Measures Law.

First, the war in Afghanistan was prompted by the terrorist attacks that occurred on US soil on September 11, 2001, which led to the “war on terror.” There is a close connection here with the US-Japan alliance. Incidentally, the June 29, 2006 Koizumi-Bush meeting produced the “Joint Statement: The Japan-U.S. Alliance of the New Century.”

Second is that the activities of Japan’s government, especially Self-Defense Forces (SDF) activities, in support of this “war on terror” are geared to the activities of other countries, including NATO member countries, with the goal of realizing the purposes and principles of the UN Charter. In a broad sense, this is a component of activities for international cooperation. For example, if one reads the outcome document of the UN World Summit adopted in September 2005 to provide an interim summary of the September 2000 Millennium Declaration, it sets forth strategic objectives and solutions for world problems extending to poverty, the global environment, and arms reduction.

Third, if based on resolutions by the UN Security Council and other bodies, the perception is that implementing so-called humanitarian measures conforms to the peace principle of the Japanese constitution. For example, the Antiterrorism Special Measures Law was originally known as the “Law for Supporting the Activities of the US Military and Other Entities” or the “Law for Supporting the Activities of Other Countries’ Military Forces.” But subsequently “US military” vanished, and then “military forces” was deleted, and the authors started adding terms such as “UN Charter,” “UN resolutions,” and “humanitarian measures,” finally taking on an unusually long name of 112 characters. This was a feat achieved by techniques used to show that the Antiterrorism Special Measures Law conforms to the...
While the above three points give the public stance, what is actually being done? To be succinct, the public stance and reality are distorted.

On November 16, 2001 the Cabinet approved a basic plan based on the Antiterrorism Special Measures Law. This plan includes the provision of supplies. The Maritime Self-Defense Force, which carried out the plan, also supplied fuel to US supply ships, among which no distinction is made between those which engage in operations in Afghanistan, and those engaging in operations in Iraq. If the US supply ships fueled by Maritime SDF ships participated in the Iraq War, it would mean that Maritime SDF ships supplied war resources. This is sufficient to raise suspicions that Maritime SDF activities are perhaps not so-called humanitarian assistance.

In the event that the SDF participate in the war on terror, the Antiterrorism Special Measures Law would be applied, as in the Gulf War, but in the case of the Iraq War there is an Iraq Special Measures Law which involves activities to help ensure security in addition to humanitarian assistance activities. Officially, activities under the Antiterrorism Special Measures Law are limited to humanitarian assistance, but it is suspected that in reality the SDF performed war-participation acts that could be construed as cooperation in prosecuting the war.

After marine refueling was discontinued due to expiration of the law, a bill for a successor law, the Supply Assistance Special Measures Law, was debated in the Diet. Many UN Security Council resolutions are quoted at the start of the bill in a bid to justify supply activities. What is more, the humanitarian assistance activities conducted by Japan’s government are said to be fueling only. There is a question about the grounds for providing fuel, involving the following points of contention.

On the level of political discourse, two stances have emerged.

First is the argument advanced by the Liberal Democratic Party (LDP) and Komeito, which are the governing parties. They contend that Japan should continue the fueling operations at sea as an international commitment, based on the alliance with the US. This argument emphasizes the “special US-Japan relationship” and the demands of the military alliance, and could be characterized as appealing to “specialism.”

By contrast, the argument of the opposition parties, especially the Democratic Party of Japan (DPJ), can be described thus: The war in Afghanistan, which is the “war on terror” that the US initiated, was originally launched as a use of the US collective right of self-defense. As such, it is not permissible to deploy Japan’s SDF and perform fueling operations. They argue that there is no UN Security Council resolution and no grounds for sanctioning the use of armed force. Their position attempts to judge the justifiability of these operations in light of the charter of the UN, a universal organization, and resolutions by the Security Council, an authoritative agency. Therefore their position could, generally and abstractly, be described as “universalism.”

Here we have an evident clash between specialism and universalism.

Another issue is whether, from the stance of the Japanese constitution’s peace principle, the SDF’s foreign deployment and fueling operations can be allowed. I will consider this issue separately.

**Examining the Successor Law in View of Constitution Theory**

Let’s take a look at the problems in the successor law (Supply Assistance Special Measures Law or “New Antiterrorism Special Measures Law”) from the standpoint of Japanese constitution theory. As observed above, the Antiterrorism Special Measures Law and its successor law both suffer from contradictions between the public stance and reality. Here I shall consider the intrinsic reason for that. From that perspective, we can make the following four observations about the successor law’s bill, which passed the
House of Representatives and was sent to the House of Councilors last November.

First, none of the UN Security Council resolutions quoted at the start of the bill justifies military action.

Second, fueling operations by Japan’s Maritime SDF vessels do not have a justifiable basis in the US-Japan Security Treaty. If there are combined US-Japan actions, Article 5 of the Security Treaty would be applicable, but at this time there is no contingency in Japan to which Article 5 would apply. Additionally, the international commitment based on the US-Japan military alliance, which is cited by the government and governing parties, is the redefinition of the US-Japan Security System confirmed in 1996 by Clinton and Hashimoto, but the treaty itself has not been amended.

Third, what about Article 9 of Japan’s constitution? Paragraph 2 says in part that “land, sea, and air forces, as well as other war potential, will never be maintained,” thereby prohibiting the maintenance of war potential. This provision bans the overseas deployment of the SDF and their participation in war. Thus the successor law mistakes the interpretation of Article 9.2, as well as that of the pacifism and international cooperation principle of the Preamble.

Fourth and finally is the interpretation and implementation of the Self-Defense Forces Law. A look at the law shows that fueling operations do not constitute the use of self-defense capacity based on the right to defend Japan. There was a unified view of the Japanese government on the exercise of the right of self-defense and on the use of self-defense capacity, but there is the feeling that these constraints have been shattered. Additionally, the successor law does not have the provision for a basic plan that was in the Antiterrorism Special Measures Law, and the Diet is not asked to approve fueling operations. Concerning the manner of deliberations and decisions on the bill, there is the problem that the two houses of the Diet are controlled by different parties. Therefore there is the problem of procedure within the Diet. And there has been public criticism of the fueling of US ships by Maritime SDF vessels with respect to justifiability, legality, and constitutionality.

The foregoing is one point at issue in relation to constitution theory.

Desirable Form of International Cooperation Activities

A deeper look at this issue requires consideration in view of the desirable form of so-called international cooperation activities. If, in examining the constitution and the history of international cooperation activities, we go back to the period of time after the Cold War, and especially after 9/11, one notes the emergence of a new view using the term “spirit of the constitution.”

In December 1989 the Cold War was declared over, and after that the Soviet bloc collapsed. Then the 1990 Gulf crisis led to the Gulf War. That was followed by 9/11. During this time period the US government pressed Japan to deploy the SDF for the “war on terror.” In response, then LDP Chief Secretary Ichiro Ozawa used the term “spirit of the constitution” in an attempt to justify the deployment of SDF soldiers abroad. His rationale was not Article 9, but the phrase “We desire to occupy an honored place in an international society” in the constitution’s Preamble.

In other words, the government had presented a new interpretation of the constitution in which SDF participation in the “war on terror” was not the exercise of the collective right of self-defense, but rather the participation in UN group-security activities. Ozawa’s Blueprint for a New Japan, in which he set forth his position, was already published in 1993 after the Gulf War, and an English-language version appeared in 1994.

The first argument this book made was that Japan should quit the defense strategy of defending only itself and switch to a peace-creation strategy that is built around the US-Japan security system. In this context he gives a new reading to the pacifism of the constitution’s Preamble, and says that there we find the “spirit of the constitution.” He then advocates the creation by Japan of a UN Standby Force in order to put UN-centrism into practice. These two features constitute the theory of the “spirit of the constitution” that
Ozawa advocates in his book. [9]

This was how the Peacekeeping Operations Law, under which the SDF participate in UN peacekeeping operations, was passed in 1992. But in the case of this law, five participation principles were established, and conditions were attached for accords, neutrality, withdrawal, and other matters, as measures to ensure that it would not conflict with exercising the collective right of self-defense. SDF activities were therefore restricted. In recent years we now hear the opinion that this runs counter to the “spirit of the constitution.” For example, Atsushi Kusano insists that the Peacekeeping Operations Law should be changed to widen the scope of permissible SDF activities.[10]

Taking the example of these two people, how should one respond critically? One recalls the case of Masao Maruyama, who maintained that instead of one-nation pacifism, Japan must actively make proposals and take action to bring about world peace. In his thinking, Japan’s pacifism was originally not one-nation pacifism but something that might be called positive pacifism.[11]

Since that time we constitutional researchers have developed constitutional policy theory in response to the court decision in the Naganuma case. In 1987 we published The Creative Implementation of the Peace Constitution (Gakuyo Shobo), which was during the Cold War. After the Cold War, in 1998, we published For Lasting World Peace: A Proposal for the Japanese Constitution (Keiso Shobo), which on the level of policy theory discusses positive pacifism that is non-military and civil.

**Japanese Constitution Guidelines for Solving Problems**

This section will consider what guidelines the Japanese constitution offers for solving the problems presented above.

First, we need a basic stance from which to comprehend those guidelines. Both paragraphs of Article 9 must be read in conjunction with the constitution’s Preamble, which sets forth a normative structure in which international peace and domestic democracy have an inseparable relationship. The Preamble’s normative meaning is given tangible form by the provisions for the renunciation of war and non-maintenance of war potential in Chapter 2 Article 9. Reading the constitution by combining pacifism with the constitution as a whole requires that one combine pacifism with constitutionalism. And doing so also combines pacifism and democracy. The pacifism of Japan’s constitution should be read as an amalgam of constitutionalism, democracy, and pacifism. [12]

From this basic stance, how should we conceive Japan’s activities for international cooperation?

According to the understanding of international relations theory, international cooperation consists in activities which transcend national boundaries and are conducted for the purpose of eliminating the fundamental causes of wars and confrontation between nations, and of conflicts in domestic relations. While in the broad sense it can include political activities, in general it often signifies economic, cultural, and humanitarian activities. These are in all cases non-military and civil activities.[13]

By contrast, the US-Japan alliance seeks to globalize the implementation of the US-Japan Security Treaty, and the military alliance is at the core of the US-Japan alliance. That is why Japan’s international cooperation activities were originally different from US-Japan alliance activities. What is more, they are by nature different from UN military operations, which are the polar opposites of non-military and civil activities. If Japan’s international cooperation activities are to strictly uphold the constitution’s pacifism, what does the spirit of the constitution mean? And how should we interpret and implement the text of Article 9?

**The Constitution and Universalism**

What is meant by the “universalism” of the constitution? I think there is still a need for in-depth research on the controversy over the ideas and philosophy concerning the common good which has been debated...
thus be interpreted as the sentence in the preamble that "laws of political morality are universal."

**Conditions for Universalism**

Next I would like to consider the matter of the conditions needed for the constitution’s universalism. This is advocated as policy theory based on constitutional principles.

In the world of “rule by force,” Japan was occupied by the US military in 1945, but the emperor system, bureaucracy, and Japanese capitalism were spared. The military occupation, and the continuance of the emperor system, bureaucracy, and Japanese capitalism, constituted the essence of the real world. But two levels were created in the scheme of postwar rule of law. One is the level of international law, where the UN Charter was created, and the Potsdam Declaration was issued and accepted. On the domestic law level, Japan’s constitution was enacted. In this way, postwar Japan came to have a dual structure of rule comprising “the real world” and “the world of law.”

But my argument here on the rule of law scheme is: It can be said that both international law and domestic law in principle take the position of universalism. Let’s consider what that means.

The United Nations was created to shape the postwar world order by the allied powers, including the Soviet Union, which fought in the Second World War. It was “we, the people,” the people of the allied powers, who enacted the UN Charter, which now occupies a place at the center of international law. Based on lessons learned during the days of the League of Nations, which was created after the First World War, the Potsdam Declaration stated that the postwar rule of Japan by the allied powers would not seek to expand territory to demand reparations. Thus the Potsdam Declaration was written on the assumption that it would be in accord with the spirit of the UN Charter. Influenced by this trend, Japan’s constitution likewise explicitly stated in its Preamble that the constitution is founded upon a universal principle.

But about 1948 it became apparent that the US policy on Japan occupation had changed. After that, in the real world as the Japanese archipelago was turning into an anti-Soviet military base, Japan was setting up a
balanced but unstable ruling system comprising the political community, the business community, and bureaucrats. This paved the way for the resurrection of Japanese capitalism. But what was going on in the legal community? The pacifist and democratic provisions of Japan’s constitution were being eviscerated, and some were advocating reactionary amendments to the constitution.

In 1952 the Treaty of Peace with Japan was signed, but this was one-sided reconciliation that excluded countries such as the Soviet Union, India, and China. At the same time, the US-Japan Security Treaty was enacted, and signed only by Shigeru Yoshida. During the Cold War years, the military alliance under the US-Japan Security Treaty gradually advanced, and the discourse on the US-Japan alliance was emphasized. This strengthened the “specialism” of the US-Japan linchpin.[17]

This specialism combines with the universalism of UN-centrism and Japanese constitutionalism in the capacity of a rationale and of the public stance. This is how the ideology of Japan’s rulers is characterized.[18]

Further, in December 1989, Mikhail Gorbachev and George H. W. Bush declared the Cold War officially over at a summit meeting in Malta, and then the Soviet Union was dismantled. Then along came the Gulf War, and Japan’s rulers started giving new readings to the UN Charter and UN Security Council resolutions with respect to Japan’s constitution. An example is cooperation with UN peacekeeping operations under the rationale described above. This is not what international cooperation activities are supposed to be.

But in the case of the war in Afghanistan, and also the war of aggression against Iraq, Japan’s rulers come up with a new reading, and justified the overseas deployment of SDF troops. As we already well know with respect to Iraq, the Bush administration manipulated information, rejecting even that from the CIA, and making up false reasons to justify the war, such as saying that Iraq was harboring terrorists. And there was the British claim that Iraq could even launch chemical or biological weapons on short notice. Washington leaders sought countries to assist with the new war against the threat of terrorism, which further promoted the military expansion of Japan and other countries that provided assistance. Here the term “international cooperation activities” served to lend a “non-military and civil” aura to SDF operations which deployed soldiers abroad.

But how does this look from the perspective of the world of law? Inside Japan, the brakes have been put on the militarization of public power exercised under the democracy/peace constitution. One could say that the legal defense offered these days by Japan’s rulers is to be found at the midpoint between the following two currents.

One of these currents is to rewrite the constitution and reinforce the US-Japan alliance under the new constitution, while the other is to rescind the US-Japan Security Treaty and totally implement the pacifism and democracy of Japan’s constitution. Japan’s rulers want to make their legal defense appear to be positioned somewhere between these two currents, and they are particular about how policy is shaped. Here is a contemporary cause for the emergence of the clash between universalism and specialism in the world of law as well.

At the heart of this contemporary cause is the existence of the US-Japan security system, which fundamentally contradicts Japan’s constitution. By interpreting the UN Charter around the US-Japan security system, Ichiro Ozawa says he will create a new UN peace-creation strategy. But for that reason the contradictions of his rationale become ever more convoluted and hard to understand.

**Giving Full Play to the Constitution’s Universalism**

Here I would like to consider the conditions for giving full play to the Japanese constitution’s universalism. For now, I shall put Japan’s role on three levels.

First, in an interpretation of the constitution, Article 9’s second paragraph provides that all war is illegal,
and Japan should maintain this interpretation. It should also uphold the view of the Japanese government (Cabinet Legislation Bureau) that it will not use military force.

What about government policy? Japan should rectify the harmful implementation of the US-Japan military alliance, which aims to prosecute a “long war against terrorism,” and dissolve the military alliance. That dissolution should involve replacing the alliance with a treaty that aims to build a new relationship of war renunciation and friendship between Japan and the US. And Japan must change the orientation of its foreign policy to that of “omnidirectional foreign policy” and “foreign policy that emphasizes the UN,” which would respect UNGA resolutions and UN resolutions that elucidate a variety of world problems.

Concerning Article 9’s second paragraph, the government states that it might exercise the right of self-defense based on that right of the state, but this involves a number of problems which still need to be worked out, such as whether the three requirements for exercising the right of self-defense are fulfilled, or whether a distinction can be made between self-defense force and war potential. Especially now, when debate is focused on whether the exercise of the collective right of self-defense should be permitted, it is necessary to uphold the view that exercising that right violates the constitution.

In the area of policy, Japan must hold fast to the rule of keeping defense spending to within 1% of GNP; ban arms exports; observe Diet resolutions that ban the overseas deployment of soldiers, and reorganize the Ministry of Defense and the SDF into non-military peace organizations. Another task is to observe the three non-nuclear principles, and to legislate them.

The foregoing has been a discussion of Article 9, but Japan’s constitution also confirms that all the peoples of the world have the right to live in peace. Realizing the right to live in peace requires that the Japanese government implement its ODA policy on the basis of non-military principles. Doing so would also represent a positive commitment to the contemporary theory of “human security.” In this role, Japan should in a more concrete manner work to assure the conditions for people’s lives and living in peace.

Japan’s second role is in diplomacy. Foreign policy on the government level is fraught with the contradiction between universalism and specialization. Thus the government must make continuous efforts toward dissolving the US-Japan military alliance. For example, it should stop providing military bases, and cancel defense cost burden-sharing. At the same time, it is important that the government actively participate in the UNDP and other UN social and economic programs, and make international contributions in this way [19].

Third is the importance of activities not only on the government level, but also on the NGO level, including municipalities, and the private level. These are citizen activities aimed at solving global problems such as poverty, environmental problems, discrimination, and population. There are activities by developing countries and NGOs, especially in the areas of humanitarian assistance and peacebuilding. For example, there are Canada-style standby forces, in which each country sends a military force, and since the end of the Cold War there have been peacekeeping operations in which they send forces as allied forces of the US. But also conceived and pursued are individual operations, separate from those run by states, which are carried out on the private level in collaboration with UN operations. One example of this is the creation and deployment of civilian peace units. [20]

Conclusion

To conclude, I shall focus on the following three points.

First, because here I have concentrated on the job of reading Article 9, I did not touch on the work of rewriting Article 9, that is, making it more explicit. This matter will have to be explored in relation to the subject matter presented here, and while distinguishing it from constitutional interpretation and the preferable form of political policy. But it shall have to wait for another day.

Second, some of Japan’s rulers think that the “spirit of the constitution” justifies Japan’s participation in the
US military’s “long war against terrorism,” but this is not a justified interpretation. If one reads Article 9 once again, one must refuse and resist the “spirit of the constitution” theory of Japan’s rulers, including Kaoru Shigemitsu, Ichiro Ozawa and Jun-ichiro Koizumi. To do that, one must offer something to take its place, and it is here that the concept of the constitution’s universalism has important significance as a rationale. Global society currently has about 6.3 billion members. Forty percent of them, or about 2.6 billion people, are the populace of the Asia-Pacific region and ordinary people. And I would say that the image of ordinary people here is not necessarily similar to that of people who show us how the lives of ordinary individuals and families can come undone by events beyond their control as would happen in a novel. Ordinary people are those who keep striving for human dignity in their ordinary lives and who are forced to keep struggling against exploitation and suppression on a global scale by the contemporary ruling class. Protecting the security and livelihoods of the ordinary people on the Earth has universal significance for global society. The spirit of the constitution means taking the position of such universalism.

There is another necessary condition for the constitution’s universalism to be attained: Continue fighting the constitutional struggle on the level of various problems both in Japan and abroad, and make those in power engage in politics which observes the constitution. In this struggle the populace’s power of democracy combines with the rightness of constitutionalism which restricts those in power.

What about in relation to other countries? To begin with, it is important for Japan’s government and citizens to have an awareness for abiding by the constitution, which is an international pledge. This awareness is vital for the “peace-loving peoples of the world” who are mentioned in Japan’s constitution and who take a stance of abiding by the spirit of the UN Charter among nations, to carry out “actions which foster mutual trust,” by which the people seek fairness and justice. It is especially important that Japan have an awareness of its wartime and postwar responsibility toward the Asia-Pacific region —especially the peoples of China and the Korean peninsula and other countries, and that it discharge its postwar responsibility to the hibakusha and “comfort women,” whom it has neglected. For example, having developed and implemented a strategy and policy for the “East Asia Community,” Japan could carry out the intent of Article 9’s second paragraph, i.e., disarmament and total demilitarization, and renouncing the state’s right of belligerency. In global society the widening gap between rich and poor is making nominal freedom meaningless, and the majority of people in society suffer discrimination and deepening poverty. The universalism of Article 9 has growing importance in global society as a fundamental guide to show the direction for solving livelihood problems of people around the world.

Footnotes


[3] In relation to this issue see also the December 18, 1956 speech in the UN by then Minister of Foreign Affairs Kaoru Shigemitsu. In this speech he stated that the intent of the Preamble of Japan’s constitution is in accord with the purposes and principles of the UN Charter, and he used expressions which hinted that there were limits to the extent
that Japan could discharge its obligation by itself. Specifically, the declaration that Japan submitted to the UN in June 1952 when applying for membership included this passage: “The Government of Japan is eager to apply for membership in the United Nations therefore and will undertake to fulfill the obligations of membership in the Organization by all means at its disposal.” The phrase “by all means at its disposal” meant that Japan would be limited to non-military means due to the restrictions imposed by Article 9 of the constitution.


[7] The bill was approved by the Cabinet on October 17, 2007 and given the short title “New Antiterrorism Special Measures Law.”


[14] As a work which expounds upon the natural law thought represented in Catholicism, see, for example: Messner, Johannes. Das Naturrecht, Handbuch der Gesellschaftsethik, Statsethik und Wirthshaftsethik, 6. Aufl. Tyrolia Verlag, 1966.


[16] The US monopoly over nuclear weapons was the actual foundation of the allies’ rule of law system that was based on the UN Charter. The “real world” is the framework for perceiving this rule system ontologically.

[17] Specialism here is assumed to be counterposed against universalism, but the logical provisions are still uncertain. However, it is supposed that this has nothing to do with the concept of specialization as a reverse operation for generalization (Generalisierung). See: Husserl, Edmund G. A. Ideen zu einer reinen Phanomenologie und phanomenologischen Philosophie. Halle a.d.S.: M. Niemeyer, 1928. 3. unveranderter Abdr.

[18] One can see an example of this combination in the Basic Policy for National Defense (approved by the Cabinet on May 20, 1957). While the second and third paragraphs set forth the normative meaning of the Japanese constitution, the fourth paragraph states, “Until the future time that the United Nations becomes able to effectively stop invasions from outside, the basis for dealing with invasions shall be the security system with the United States.”

[19] One thing to note carefully here is the work being done in the UN for a new “Peacebuilding Commission.” From that, with regard to war and conflict in the post-Cold War world, one can see how the SDF might be used in global projects from preventing conflicts to postwar reconstruction. Report of the Peacebuilding Commission on its first session (June 2006–June 2007), A/62/137–S/2007/458 [PDF, 117 KB].

Here I will not go into the matter of actors, specifically, how we conceive “the people” and what is these days called the “multitude.” See: Hardt, Michael and Antonio Negri. *Empire*. Cambridge, Mass.: Harvard University Press, 2000.

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