

Japan's Pacifist Constitution: A Constitutional Perspective

Miho Aoi

Professor
Graduate School of Law
Gakushuin University

I. Introduction

People in Japan often label Japanese Constitution as the "Pacifist Constitution" as if Article 9, which renounces war, represented the whole document. Article 9 is, without a doubt, the most famous constitutional clause in Japan: even if the article about Freedom of Expression (Article 21) is not known, many people know about Art. 9.

Article 9 declares as follows.

- (1) *Aspiring sincerely to 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.*
- (2) *To accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as another war potential, will never be maintained. The right of belligerency of the State will not be recognized.*

It has been one of the focal points in post-WWII politics and the post-war culture of Japan. It has been a symbol of pacifism, beloved by many people for generations. But, at the same time, many people have accepted other facts that seemingly contradict the ideal of pacifism in Article 9: a vast military presence of US troops in Japan and the Self-Defense Forces (SDF) of Japan. To understand this contradictory state, we need to separate two aspects of Article 9: (a) its commitment to the values of pacifism and (b) its deprivation of military power from the State. The former aspect is often emphasized in general, but I would like to focus on the latter aspect as an expert of the Constitution.

From the perspective of constitutionalism, we can think of Article 9 as a power restraining clause that allocates "no power to military forces." The post-WWII practices regarding the national security policies of Japan can be understood as a struggle to achieve the above mandate. Overall, Article 9 has been contributing to the restraint of "military" power.

This article proceeds as follows.

First, I will sketch a brief history of military power in Japan. We will see how the relation between military and ordinary civic politics started and how the first Constitution—the Meiji Constitution—failed to control military power under civic politics.

Second, we focus on efforts to maintain logical coherence under the present Constitution. The government has reasoned that the SDF is not "military forces" because Article 9 forbids them. Certainly, the government's explanation is a tricky one; at least, it provides no easy understanding. Because of this, the SDF provoked vast political tensions among people in the past. And the constitutionality of the SDF was a significant political issue until around the mid-1990s. However, at the same time, this history can be understood as a struggle to realize the limitation of power of Article 9 in legal terms.

Finally, we consider the impact caused by the change in interpretation in 2014: permitting the use of collective self-defense rights that used to be deemed unconstitutional. Then, we think about the future of Article 9.

II. Brief History of the Military Institutions in Japan

Japan has had two Constitutions during modern times: the Meiji Constitution (The Constitution of the Empire of Japan: 1889-1947) and the present Japanese Constitution (1947). We can best understand the current government institutions against the background of the practices under the Meiji Constitution: some are utter denials of the past, and others are extensions of the past. Article 9 is a typical example of the former.

Therefore, to explain the somewhat peculiar legal status of the SDF in Japan, we should start with a brief background history, starting from around the Meiji Restoration — a word referring to the political event of "restoration" of practical imperial rule, the *Shogunate*.

A. The Independence of the Supreme Command of the Emperor

If we think of monarchs from feudal times to modern times, there is an interesting difference between Europe and Japan. Unlike European monarchs, Japanese Emperors did not have military power until the establishment of the Imperial Army in the Meiji period. The Meiji Restoration was completed without the Emperor's military forces: the Tokugawa Shogunate bloodlessly surrendered *Edo-jo* Castle in 1868. This was how Japan started its modern governmental system with no central military forces. Since then, it can be said that having and controlling military forces has been a massive issue in Japan, with slightly changing focuses.

After the *Meiji* Restoration, the Emperor and the government established military power to suppress strong militaristic ex-feudal clans.

The Emperor had established some military institutions before the promulgation of the Meiji Constitution. Most importantly, His Majesty adopted the Independence of the Supreme Command of the Emperor (*Tosuiken-no-dokuritu*), which explained the prerogative power of his majesty. Once an issue was classified as a matter of the Supreme Command, it could no longer be dealt with by parliamentary political processes.

The Independence of the Supreme Command is commonly regarded as a leading cause for the government's loss of control over the military. The Meiji Constitution took the Independence of the Supreme Command of the Emperor for granted. And people, including constitutional scholars, treated it as the "fact before the law." In hindsight, we can say the concept of the Independence of the Supreme Command made it possible for those in charge of military forces to act without "responsibility" to destabilize the constitutional system.

B. The Meiji Constitution

The Emperor established the Meiji Constitution as a restraint on his majesty's sovereign power, and he granted it to his subjects in 1889. Many constitutions in the world had been translated and examined, such as those of the Dutch and the French, before the Meiji Constitution was finally modeled on the Prussian Constitution. The purpose of establishing a constitution was to proclaim the divine origin of the Imperial Family and the sovereignty of the Emperor. For Japan, the Prussian model was the most suitable one, especially considering it was a nation with strong monarchical power and weak civil power. The Meiji Constitution was drafted with the assistance of a German legal scholar, Hermann Roesler. He vigorously defended a more conservative constitutional system in the draft than the Prussian Constitution of 1850.

Under the Meiji constitutional system, many prerogative powers regarding military forces were maintained by the Emperor. Under the Constitution, there was a complicated system of military law, which affected every part of the legal system. There were also social systems related to military forces, which incorporated people's labor as capital to fight a "total war."

In the end, neither the Emperor nor anyone else could control the military powers: the Meiji Constitutional law system was simply not robust enough to maintain a proper balance between powers. The consequence of this failure was, of course, severe. So many people were killed, injured, or lost property. The death of 20 million people in the Asia-Pacific region because of the Japanese invasion will ensure the same fiasco never happens again.

That was our nation's start, and I understand it should remain a reference point so as to prescribe our future direction. It is absolutely correct for people to call this Constitution the "Pacifist Constitution." Even though people's memories are fading after approximately 75 years, the Meiji Constitution failed to control governmental powers that have been engraved in our present legal institutions.

III. The Self-Defense Law Under the Present Constitution

A. Article 9

Article 9 of the Japanese Constitution (a) renounces war, (b) declares non-retention of military forces, and (c) states non-recognition of the right of belligerency of the State. Historically speaking, (a) was not uncommon among world constitutions, but (b) and (c) were totally new ideas. From the perspective of constitutionalism, Article 9 deprived whole military institutions of their legitimacy. It became a reason to question the constitutionality of national security laws related to military forces. Also, because of the constitutional decision to remove powers, other related military institutions were abolished. And it gradually changed Japanese culture from a military one into a non-military one.

On the origin of the Constitution, it is well known that GHQ (General Headquarters; the standard way in Japan to refer to the Supreme Commander for the Allied Powers [SCAP]) made a draft of the present Constitution. As for Article 9, it is understood that General Douglas MacArthur shared the idea of pacifism with then Prime Minister Kijuro Shidehara, an old liberal.

B. Government's Logic for Exceptional Use of Military Forces

In 1947, after WWII, Japan re-started without its own military forces, relying on the Occupational Armed forces for

its security. But, international circumstances soon changed the policies of occupation: the Korean War started in 1950, and General MacArthur ordered the formation of the National Police Reserve (75,000 personnel). It was described as a police agency, and, in fact, interestingly, its legal framework was similar to that of the police.

The National Police Reserve transformed into the National Security Forces in 1952; then, they morphed into the Self-Defense Forces (SDF) in 1954. The government has used an intricate explanation of the SDF's constitutionality. It goes as follows:

Although the Constitution renounces war, Japan still has an international "natural right" to defend itself. A minimally sufficient force to achieve this purpose should not be interpreted as "military forces" as prohibited by the Constitution. So, the constitutionality of the SDF is based on this "exceptional" use of military forces.

The point is, the government interpreted that under the Constitution, the exceptional use of military forces was allowed. However, we can call it the exceptional use of military forces only the cases that are "exceptional" can be restricted, or if the constitutional prohibition means nothing.

Up to 2014, the government had made a clear boundary: it was based on whether there was a military attack from other countries. This was an obvious exception because it would be abundantly clear if there was a military attack on Japan. Also, because the above was the only possible explanation of the exceptionality of using a military force as a corollary, the right to collective self-defense was understood to be unconstitutional: Japan had it on an international law level but chose not to use it at a domestic level.

The government's interpretations as explained above had been maintained for a long time: from soon after establishing the SDF until 2014. And they held the understanding that if Japan needed to use collective self-defense rights in the future, that would require a constitutional amendment of Article 9.

C. The Self-Defense Law: Its General Structure

Specific legislation was always needed to authorize every move and step of the SDF. The constitutionality of almost all of these legislations was questioned, and it became very controversial, especially in the political arena. Because these were hot button issues, there were usually vigorous arguments in parliament; it was inevitable for the government to produce more and more elaborate explanations.

Today, decades after its establishment, the Self-Defense Law — not the "Military" Law— has evolved into a vastly complicated system. Although the government changed its interpretation in 2014, it is worth noting that the government tried to show that the change was in line with the basic structure of the long-held understanding of Article 9.

D. Some Essential Traits

As we have seen, the Japanese government has understood the basic logic of Article 9 as a "denial of the military." Therefore, it has been essential to distinguish the SDF from military forces that the Constitution prohibits. People in charge have paid meticulous attention to differentiate the SDF from armies.

It is apparent from the structure of the Self-Defense law that this logic is working. For example, because Article 9 constitutionally negated military forces, the SDF must be explained as ordinary administrative organs: the SDF are integrated into the Ministry of Defense. The head of the uniformed personnel (CJCS in the USA) is positioned within the Ministry of Defense, with no legal power to directly support the Prime Minister (PM), the commander in chief.

Also, the effect of Article 9 extends to areas other than the Self-Defense Law. There are many examples, but only the following three will be discussed below.

First, the Expropriation of Land Act under the Meiji Constitution used a clause for special expropriations for military use. Under the present Constitution, this clause was eliminated because there was no more "military use."

Second, no law penalized a leak of "military" secrets in general until 2013. The Secret Information Protection Act of 2013 designates and punishes the leak of "defense-related" secrets.

Third, while ports management used to belong to the national administration under the Meiji Constitutional system, the management power was delegated to local governments under the present Constitution. Again, although ports have crucial importance when an island country like Japan takes action, it was assumed there would be no such further cases in Japan.

E. Who has Maintained the Coherency?

Generally speaking, it is not easy for the judiciary to judge the constitutionality of acts relating to national security policies.

There are several reasons for this.

First of all, it is not easy to bring these issues to court. The judicial review power bestowed on the judiciary by Article 81 has been understood as the US-type incidental review; therefore, if threshold requirements such as a "case or controversy" are not met, the courts basically cannot address the issue of constitutionality. Also, even if the threshold problems are solved, the judiciary tends to avoid highly political topics such as these. Lack of democratic legitimacy has been one of the main reasons for their reluctance.

Therefore, constitutionality regarding Article 9 has been mainly scrutinized within the political branches of government. The organ that primarily plays this critical function is the Cabinet Legislation Bureau (CLB). The CLB is a part of the executive branch, directly assisting the Cabinet on legal matters.

Since the early Meiji period, the CLB has had a long tradition of assisting administration. Its establishment dates back to before the promulgation of the Meiji Constitution. Although it is a part of the executive branch, the CLB is relatively independent in personnel administration and can make its appointments. For example, a person who serves as the Deputy Director will typically become the next Director-General. Though, there is one exceptional example that will appear in the next section.

The CLB has been regarded as playing an essential role in maintaining the legal coherence of Japan; it checks all

legislative bills submitted by the Cabinet for constitutionality, legality, and their "fit" into the existing legal system. Therefore, it can be said there is an unspoken rule that the statute laws checked by the CLB are crystal-clear constitutionally. It is sometimes argued that this is one of the reasons why the judiciary rarely strikes down on statute laws.

The change of governmental interpretation in 2014 demolished the long-maintained logic within national security policies. Therefore, although the CLB had played the leading role in maintaining constitutionality and coherence, it now seems to be playing a less essential role.

IV. The Year 2014 — Its Aftermath and the Future

A. Interpretational Change in 2014

2013–15 were decisive years for the Japanese way of pacifism. In 2013, the then Abe administration abruptly sacked the Director-General of the CLB and appointed the Japanese ambassador to France, who used to work as a bureaucrat constitutionalizing collective self-defense rights during the first Abe administration.

Because the CLB stood in opposition to successive administrations' requests to change the interpretation of Article 9 to permit the use of collective self-defense rights, it had been proposed to several PMs, unofficially, of course, to replace the Director-General —note that the PM has the legal power of appointment. But no administration had tried to dismiss the Director-General until Mr Abe did. Therefore, when Mr Abe did dismiss the Director-General, it was very apparent that his administration was forcing the CLB to concede its interpretation of Article 9.

Then, as expected, on July 1 of 2014, the Abe administration passed a Cabinet decision that changed the governmental interpretation of Article 9 of the Constitution.

Later, some civil rights groups and news media outlets, under the Information Disclosure Act, asked the CLB to disclose this interpretive change. The CLB answered that neither Cabinet minutes nor records existed in the department, which strongly suggested it was a political decision rather than a matter of logic.

In the post-2014, the government rationalized that the SDF can be used not only for self-defense but also as part of collective self-defense. This shift in the interpretation of the role of SDF is said to be "a partial exercise of the right to collective self-defense from the perspective of international law."

As mentioned earlier, under Article 9 and within the Self-Defense Law, the decisive issue for the government's interpretation has been whether it can explain the use of force as an exception to the constitutional prohibition against "military forces."

The problem with the 2014 Cabinet decision, and its embodiment in law in 2015 (2015 laws), is that it was unclear in what cases the SDF could claim collective self-defense rights. During the parliamentary discussion of the 2015 bills, explanations provided by the *Abe* administration often changed, and it was never clear precisely what the government was thinking.

Overall, the reasons and justifications for the interpretation change were not enough to persuade many legal professionals, including some former CLB Director-Generals, most constitutional academics, and many lawyers. It can be said that the system of Self-Defense Law has become unstable, legally speaking. It will require some drastic institutional changes in the future if the interpretation is to be stabilized.

B. The Future

So far, this article has dealt with the legal system of Japanese Self-Defense Law under Article 9 of the Constitution. In this final part, I want to explore the external erosion of Article 9. That is, the legal system that governs the area of the US military presence in Japan is, as it were, something above the law—in my understanding, no reasonable explanation for legality and constitutionality is possible.

This is because it was a de facto extension of the mainly American post-war occupation of Japan. Therefore, it is understandable that even though the logic of the "denial of the military" obviously rejects a military alliance, constitutional experts have regarded the US military presence as an "exceptional situation."

Techniques that avert parliamentary controls have been usually used in connection with the US military presence. For example, while treaties need to be approved by Parliament (Article 73 (3)), guidelines, such as Guidelines for Japan-U.S. Defense Cooperation, do not need any such approval. It is well known that each of the Guidelines has presented a "favorable future" for Japanese national security policies, and actually, these were embodied in statutory laws afterward. It may have been mutually advantageous for both US and Japanese sides to skip troublesome parliamentary scrutiny.

So, although modifications and changes required by the US-Japan security relationship often triggered changes in Japanese security policies, most of these happened without serious parliamentary deliberation; this has been a shortcut in responsible politics, so to speak. As a constitutional academic, it is sad to admit that Article 9 does not hold normative power over this area. And I cannot deny that it seems like we are, again, possibly failing to control military power.

To make matters worse, regarding constitutionalism, the Japanese government has been actively expanding the "exceptional area"—which was previously only related to the US—to include other countries, such as the UK and Australia. These issues have escaped the public's attention so far. Still, as this article shows, this trend could create tension in existing legal systems.

We can predict two possible courses for the future.

First, we may see the Self-Defense Law in Japan change more dramatically to expand to its logical limits, which would lead to a constitutional amendment.

The other possibility is that the issue of the constitutionality of national security policies will become ambiguous over time and, finally, become forgotten. People in the future might look back at this period (around 75 years after WWII) and say, "Article 9 was just a blossom without a fruit."

Either way, currently in 2021, one thing is clear: Article 9 remains a perennial favorite of citizens wanting "peace without resorting to military power." Ultimately, it is up to the Japanese people whether to hold on to this notion or not. Whatever their choice, this is and will remain to be, one of the most emotional issues for many people in Japan.

Miho Aoi

Professor at Graduate School of Law, Gakushuin University. Her research interest is Constitutional Law. Graduated from the Graduate School of Law and Political Science of the University of Tokyo (Law) and holds a Masters degree in law from the same university. After working as Associate Professor at the Faculty of Economics, Shinshu University and the Faculty of Law, Seijo University, she assumed her current position in 2011. From April 2020, she was a Visiting Fellow at the Australian National University (ANU) for one year, working on the Australian Capital Territory (ACT) Human Rights Act. She has published numerous papers on constitutional law and authored and co-authored several books including *Constitution and Politics* and *Who Will Defend the Constitution?*