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IMPLICATIONS OF REVISION OF ARTICLE 9 OF THE
CONSTITUTION OF JAPAN
ON THE DEFENSE POLICY OF JAPAN

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I. INTRODUCTION

On December 20, 2018, a P-1 patrol aircraft of Japan's Maritime Defense Force was flying within Japan's exclusive economic zone (EEZ) in the Sea of Japan as part of ordinary intelligence collection and warning and surveillance activities when it observed a destroyer, and a patrol and rescue vessel of the Republic of Korea (South Korea). While photographing the Korean vessels, the Japanese P-1 patrol aircraft was suddenly irradiated by a fire-control radar from the Korean destroyer.² A crew member of the P-1 aircraft tried to communicate with the Korean ship in English, saying, "This is Japan Navy. This is Japan Navy. FC antenna is directed to us. What is the purpose of this act?"³

There is nothing wrong for the crew to identify themselves as "Japan Navy" in this kind of communication. But this incident reminded the Japanese public witnessing the video, released by the Ministry of Defense at the end of 2018, that there existed a gap between the reality and the constitutional requirement.⁴ Japan has its armed forces while Article 9 of the Constitution prohibits "land, sea, and air forces, as well as other war potentials."

Since its creation, Japan's Maritime Defense Force has looked like a navy because, its role and mission is the defense of Japan at sea. That is exactly what a navy does. Today, it is more so than ever before. Similarly, the other two services also look like military forces. The Ground Defense Force looks like an army and the Air Defense Force

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² Ministry of Defense, *Regarding the incident of an ROK naval vessel directing its fire-control radar at an MSDF patrol aircraft*, http://www.mod.go.jp/j/approach/defense/radar/index_eng.html.

³ Ministry of Defense, *Regarding the incident of an ROK naval vessel directing its fire-control radar at an MSDF patrol aircraft*, (Dec. 28, 2018), <http://www.mod.go.jp/e/press/release/2018/12/28z.html>.

⁴ 「自衛隊の名、実態と合っていない? 無線では「日本海軍」」 [*Does the name of the Self-Defense Forces represent the reality? "Japan Navy" in the radio communication*], 『朝日新聞』 [ASAHI SHIMBUN] (Feb. 5, 2019), https://www.asahi.com/articles/ASM1C4QNPM1CUTIL01T.html?iref=pc_ss_date.

looks like an air force. To be precise, their official English names are not Defense Forces but Self-Defense Forces. On hearing the official name “Self-Defense Forces,” some may wonder if their mission is confined to defending themselves. Those who coined the English names must have tried to emphasize the Japanese forces allowed by the Japanese Constitution are different from ordinary armed forces in other countries. Article 9 of the Constitution explicitly prohibits “land, sea, and air forces,” and therefore they had to avoid the words such as army, navy and air force.

In the Cold War era, the confrontation between the right and the left in the Japanese politics reflected the global East-West bipolar confrontation. There was significant political controversy at that time over the constitutionality of the “Self-Defense” Forces. However, a series of events such as the end of the Cold War on the global arena, the establishment of a government under a socialist leader Murayama in Japan in the 1990s, and the enactment of legislation to deal with contingencies in 2003 with the approval by the large majority in the Japanese National Diet seem to have greatly contributed to constitutional legitimization of the Japanese military. There are two reasons for this. First, in the 1990s when the Socialists took power as part of a coalition with more conservative political parties, they could not abolish the military in accordance with their interpretation of the Constitution. Thus, they had to accept the constitutional legitimacy of the Japanese military. Second, one of the purposes of the legislation to deal with contingencies is to ensure smooth operations of the Japanese military when Japan is attacked, and therefore those who believe that the Japanese military is unconstitutional could not have approved the legislation.

Nonetheless, Abe Cabinet’s decision to change the long-held interpretation of the Constitution with regard to use of force in 2014 and subsequent legislation to put the reinterpretation into effect helped resurgence of the old controversy on the constitutionality of the Japanese military. As the Abe Cabinet’s new interpretation made it constitutional to exercise the right of collective self-defense, departing from the previous interpretation, opposition parties criticized the decision by pointing out the inconsistency of the interpretation. In the process of such political debate, the opposition parties repeatedly tried to clarify the cabinet’s interpretation of the Constitution with regard to use of force and also the defense forces.

⁵ 武力攻撃事態対処法 [Legislation for Responses to Armed Attack Situations], https://www.cas.go.jp/jp/hourei/houritu/jitai_h.html.

The new project of the Maritime Defense Force to modify Izumo class destroyers to “aircraft carriers” in accordance with the new National Defense Program Guidelines (NDPG) and the new Medium-Term Defense Program (MTDP) of December 2018 seems to have fueled the controversy further. Although this modification project is not necessarily a highlight of the newly established defense force build-up program, it became a target of criticism by opposition parties because the Japanese Government had maintained for a long time that attack aircraft carrier is unconstitutional. A number of major newspapers in Japan focused on this project, whether they supported it or not, and most of them referred to the question of the constitutionality of the project. This coverage by the media has had an effect on the public opinion and the ongoing political debate in the National Diet.

This suggests that the constitutional debate on the assets and operations of Japan’s military will never end. The debate will divert the attention of the Japanese public, and even of the Japanese security experts, from the strategic reality they should squarely face in the world full of security challenges. The real challenge is not the constitutional issue but strategic issues, ranging from shifting balance of power to the trembling rules-based order, to non-traditional security challenges, and to expansion of operating spaces even to cyber and outer spaces.

Then, if the Japanese Constitution is reformed as the ruling Liberal Democratic Party wishes, how will it affect this political atmosphere in the Japanese politics and also the military security debate in Japan? In context of this question, I would like to discuss the following three points: first, possible impact of a revision of the Constitution, particularly revision of Article 9, the war renunciation clause, for the purpose of explicit legitimization of Japan’s military on the defense and security policy debate in Japan; second, the revision’s possible impact on the management of the Japan-US Alliance based on the Treaty of Mutual Cooperation and Security between Japan and the United States of America of 1960 (the Japan-US Security Treaty); third and finally, the revision’s impact on the civil-military relations in Japan.

While there are several amendments to the Japanese Constitution under consideration, I will focus only on the proposed amendment to Article 9 because this provision has continued to be a cause of concern to policy makers and military officers for many years because Article 9 denies “land, sea, and air forces, as well as other war potentials.” The revision of this article would be the most sensitive issue in the broader dispute on Japanese constitutional reform. There exists a variety of options for the amendment of Article 9, but the following

arguments are based on Prime Minister Abe's proposal to maintain paragraphs 1 and 2 of Article 9 and to add another paragraph to expressly legitimize the existence of the defense force.

II. REVISION OF THE CONSTITUTION AND JAPAN'S DEFENSE AND SECURITY POLICY⁶

Borrowing the expression of E.H. Carr, until 1914, "war was still regarded mainly as the business of soldiers," and "the war of 1914-18 made an end of the view that war is a matter which affects only professional soldiers."⁷ The fact behind his musing is presumably the total warfare of WWI. But even apart from such a historical background, I believe that national defense policy of any democracy has its real force only when it wins the understanding and support of its nationals. Therefore, winning the full understanding and support of the public is an indispensable element of national defense.

This point is particularly important for Japan, which is lacking in a consensus on its national defense, particularly on the constitutionality of its military. Military officers, civilian officials, politicians, and experts and intellectuals, both inside and outside the government of Japan, do not constitute a policy community. A common language and logic on defense necessary to establish a policy which deserves public understanding and support is not shared by them.

Some people try to push the security discussion into legal arguments on the constitutionality of specific weapon systems and operations. They are complacent with their legal logic, avoiding strategic questions about how to address the security environment Japan faces. If it is a utopian argument to try to address all the security issues with military solutions alone, focusing only on the necessity to prepare for the worst, the above-mentioned legalistic arguments are another type of utopian argument because the legalistic approach is not relevant to the strategic necessity to address the situations in front of Japan.

One of the major reasons the Japanese, not only public but also academics and politicians, are likely to associate their security

⁶ This part and the next part of this paper are based on Hideshi Tokuchi, *Reviewing the Fundamental Basis of Japan's Defense Policy – To Establish a Policy to be Honored in the Real World – (Tentative and Abridged Translation)*, ICHIGAYA HILL'S FORUM, (Dec. 21, 2018), <https://ichigayadairondan.org/2018/12/21/reviewing-the-fundamental-basis-of-japans-defense-policy-to-establish-a-policy-to-be-honored-in-the-real-world-tentative-and-abridged-translation-hideshi-tokuchi/>.

⁷ E.H. CARR, *THE TWENTY YEARS' CRISIS 1919-1939, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 3 (Palgrave Macmillan 2001).

discussion with legalism is their debate on the Constitution. The discussion often becomes ossified because of the rigid definition of some basic concepts. As I referred to earlier, the legalistic argument about the constitutionality of weapon systems and operations, which is not relevant to the strategic reality, is reemerging in Japan. If Japan revises its Constitution, I believe that it should do so in a way to wipe out the source of such a legalistic argument and to be able to establish a truly effective and convincing security policy for which no artificial argument is necessary. If the revision is made just to codify the present interpretation of the Constitution, there remains a fear of lingering “theology.”

Japan’s national interests are increasingly global. Accordingly, Japan has to think and act more proactively in the global context, even in military terms. If there remains a gap between the strategic reality surrounding Japan and the world anticipated in the Constitution as it is, the focus of the policy discussion will continue to be on the tactical question of how to slip past the constitutional restrictions.

The present interpretation of the Constitution with regard to use of force, which the Government of Japan established as a cabinet decision on July 1, 2014, permits Japan to exercise the right of collective self-defense, but only in very limited circumstances.⁸ The Japanese Government takes the position that this interpretation represents the maximum limit of interpretation of the Constitution. Measures by the defense forces which are beyond the scope of this interpretation, for example full exercise of the right of collective self-defense, would be made possible not by another reinterpretation but only by revision of the Constitution. If so, any revision of the Constitution just to codify the present interpretation would leave the gap intact.

Measures not allowed by the present interpretation are not limited to full exercise of the right of collective self-defense and full participation in international operations, such as peace-keeping. There is one more serious problem. Japan’s own national security is at stake in the face of certain gray zone situations which involves violation of

⁸ Exercise of the right of collective self-defense is permitted only when an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn people’s right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan’s survival and protect its people, and when Japan’s use of force is limited to the minimum extent necessary. These are the “three new conditions” established by the Japanese Government as the new interpretation of the Constitution. See Ministry of Defense, *2016 Defense of Japan*, 213 (2016).

national sovereignty but does not amount to an armed attack. For example, repeated intrusions of China Coast Guard ships into the Japanese territorial waters surrounding the Senkaku Islands are not considered to be the exercise of China's right of innocent passage because the Chinese intention is to demonstrate their claim of sovereignty over the islands. It is a violation of Japan's sovereignty, but it does not amount to be an armed attack against Japan, either. In this case, Japan cannot exercise the right of self-defense based on Article 51 of the UN Charter because even under the new interpretation of the Constitution, exercise of the right of self-defense is permitted only when an armed attack takes place.

Then, how about the right of self-defense in customary international law? According to the decision of the International Court of Justice of 1986 in *Nicaragua vs. United States*,⁹ self-defense is only available against use of force that amounts to an armed attack under customary international law as well as under the UN Charter. A use of force of a lesser degree can be justified as "proportionate counter-measures" on the part of the victim state, according to the decision.¹⁰ It is clear in the decision that collective counter-measures cannot involve use of force, but the decision is not clear on the question whether the victim state itself cannot use its force as a proportionate counter-measure.¹¹ Even if the Government of Japan takes the position that the victim state itself can do so, "armed attack" is a prerequisite for Japan's use of force according to the present interpretation of the Constitution, and thus, use of force as a proportionate counter-measure against sovereignty violation which does not amount to an armed attack is not constitutional.¹² If any measures considered legitimate "use of force" in international legal terms are necessary for the security of Japan, revision of the Constitution should be done to make proportionate counter-measures against sovereignty violation which does not amount to an armed attack possible.

⁹ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J.14.

¹⁰ *Id.*

¹¹ *Id.* at ¶¶ 211, 249.

¹² The "three new conditions" as shown in note 8 are premised on the existence of an armed attack.

III. REVISION OF THE CONSTITUTION AND THE MANAGEMENT OF THE ALLIANCE

The Japan-US Alliance has been one of the pillars of Japan's national security policy since the Cold War days. One of the bases of this alliance has been the sharing of values.¹³ But because of the collapse of the Soviet Union and the end of the Cold War, this aspect of the alliance has become less significant. In addition, President Trump's departure from long held views of previous US administrations to support the liberal internationalism is undermining the very basis of shared values. His words and deeds seriously hurt America's soft power. If it in due course leads to the decline of America's hard power, it will affect the resilience of the Japan-US Alliance. It might easily lead to an illusion that Japan should tilt toward China, breaking away from the US. Or, it might easily lead to a prospect of a new order without the US.

However, the Japan-US Alliance and the US-centered alliance network in the Asia-Pacific region with the Japan-US Alliance as its integral part have been institutionalized through decades of history and have become the firm bedrock of the regional order.¹⁴ This alliance network will not be shaken by the change of the leadership of one country, even the US, but the adjustment of the system is inevitable because of the power shift, particularly because of the rise of China and its maritime expansion. As far as Japan is concerned, it should ensure its own security by assuming much greater roles for the regional security. That is the way for Japan to adjust the alliance relationship.

While the Japan-US Alliance is the pillar of Japan's national security policy, it is wrong to say that Japan's security depends on the US. Article 5 of the Japan-US Security Treaty is not an article for the US to defend Japan. It simply states: "Each party ... would act to meet the common danger" In other words, it is Japan-US mutual

¹³ The first paragraph of the Japan-US Security Treaty says, "Japan and the United States of America, desiring to strengthen the bonds of peace and friendship traditionally existing between them, and to uphold the principles of democracy, individual liberty, and the rule of law." Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1652. In addition, Japan-US Joint Declaration on Security on April 17, 1996 says in its paragraph 2, "The Prime Minister and the President reaffirmed their commitment to the profound common values that guide our national policies: the maintenance of freedom, the pursuit of democracy, and respect of human rights." Japan-U.S. Joint Declaration on Security – Alliance for the 21st Century, Japan-U.S., Apr. 17, 1996, <https://www.mofa.go.jp/region/n-america/us/security/security.html>

¹⁴ This is based on the realist view that the alliance network is the main tool of power-balancing in the Asia-Pacific region.

cooperation that defends Japan. It is because of the asymmetrical nature of the security treaty¹⁵ that the mutuality is not clearly recognized.¹⁶ Although there is no denying that Japan's hosting US bases on its own soil enhances Japan's strategic value to the US, it will be increasingly important to make the alliance cooperation truly symmetrical by enhancing Japan's roles for regional security in order for both American and Japanese nationals to fully recognize the mutuality.

Japan has enhanced its roles for regional security through a number of steps including the renewals of the bilateral document called "The Guidelines for Japan-US Defense Cooperation." But all these efforts are based on the present Japan-US Security Treaty. Thus, this approach is limited by the asymmetrical nature of the Japan-US Security Treaty.

If Japan cannot fully exercise its right of collective self-defense even after revising the Constitution, the asymmetrical nature of the alliance cannot not be changed.¹⁷ This issue is relevant to the resilience of the US alliance network in the Asia-Pacific, too. Japan, as a staunch ally of the US, should be aware of its responsibility to strengthen the alliance network.

Amendment of the asymmetry of the alliance to establish a mutual defense relationship by revising Article 5 of the Japan-US Security Treaty would be very challenging. It might end up with simply inviting an easy criticism of subordination to the US. It would be more difficult than revising the Constitution, but revision of any substance of Article 9 might raise an expectation on the part of the US on the dissolution of the asymmetry,¹⁸ and if so, how to manage such an expectation would be a challenging job for the Japanese side.

¹⁵ The US has the obligation to defend Japan when an armed attack occurs against Japan in accordance with Article 5 of the Japan-US Treaty, but this obligation is not reciprocated Japan. Japan-U.S. Security Treaty, *supra* note 13, at art. 5. Instead, Japan has the obligation to provide military bases to the US in accordance with Article 6 of the Treaty. *Id.* at art. 6.

¹⁶ Kazuya Sakamoto, 『日米同盟の難問 還暦をむかえた安保条約』 [*Difficult Questions of the Japan-US Alliance: The Security Treaty Reaching Its Sixtieth Birthday*], PHP INSTITUTE INC., 275 (2012).

¹⁷ The US cooperation to defend Japan in accordance with Article 5 of the Japan-US Security Treaty is based on the premise that the US may fully exercise the right of collective self-defense.

¹⁸ Amendment of Article 9 of the Constitution might give an impression to the Americans that Japan will be able to fully exercise the right of collective self-defense because the interpretation of article even after the amendment will not be clear enough if you just read the amendment if the current idea by the ruling Liberal Democratic Party.

IV. REVISION OF THE CONSTITUTION AND JAPAN'S CIVIL-MILITARY RELATIONS

Management of the military is one of the fundamental tasks of politics of modern democracies. Civilian control of the military is critically important particularly in democracies, because of the special character of the military organization in comparison with democratic civil societies. The commander's authority is absolute in the battlefield. You cannot afford to argue with your superior officer in combat. The beauty of democracy is decision making by discussion and persuasion, but there is no such thing as persuasion in combat. You just order, "Shoot!" You do not try to persuade your troops to shoot on the field in war. In the civil society everyone is equal, but in the military, you will be put into the hierarchical structure, and seniority is clear in the structure. In this sense, military culture is different from democratic culture. This distinction is one of the main reasons civilian control of the military is important particularly in democracies.¹⁹

There is no provision about the command relationship or the jurisdiction of the legislative and administrative branches of the government on the military in the Japanese Constitution now. There is no concept of civilian control of the military within the Constitution, except for Paragraph 2, Article 66, which stipulates that, "The prime minister and other ministers of state must be civilians." If Japan having any military capability were unconstitutional as a matter of interpretation, then there would be no reason for the Constitution to have a clause to control the military. There should not exist what should be controlled, if you took this interpretation. If no armed forces are allowed in the Japanese Government and no armed forces exist in the government structure in fact, it means that Japan does not have an object of civilian control.

In order to establish a robust institutional basis of civilian control of the military in the Japanese politics it is recommended that there be a clear reference to Japan's military forces, no matter how the forces are called, in the Constitution, that the organization be appropriately situated within the executive branch of the government, and that the basic command structure be defined there. In addition, if such clear reference to the military forces in the language of the

¹⁹ Katsuya Tsukamoto, 「政軍関係とシヴィリアン・コントロール」 [*Civil-Military Relations and Civilian Control*], Nihon Keizai Hyoronsha 『アクセス 安全保障論』 [ACCESS SECURITY STUDIES], 108, (Yoshinobu Yamamoto & Masaru Kono eds., 2005).

Constitution is provided it will enhance the sense of ownership of the Constitution by the service members, mitigate their feeling of being alienated by the Constitution, and strengthen their trust on the general principle of rule of law.

Thus, the efforts to make clear reference to the military forces in the Constitution will be beneficial to the civilian control of the military, but it all depends on how it will be achieved in the political process. If the process simply portrays the split of views among the politicians and their constituents, it will end up with a large disappointment in the psyche of the military. Mature discussion and careful management of the political process will be critically important.