

Article

Global Constitutionalism and Japan's Constitutional Pacifism

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Abstract

The essence of constitutionalism is to regulate the exercise of power and in so doing to constitute liberty. The most critical of these powers to be regulated, and the focus of this article, is military power. The author traces the history of global constitutional thought throughout the nineteenth and the twentieth centuries including the aftermath of Hiroshima and Nagasaki. Also covered are successful practices of regulating and replacing military power by civil society in the 1990s and the 2000s. The article also discusses Article 9, the “pacifist” clause of the 1946 Constitution of Japan, as a notable example of the regulation of military power; its trajectory is full of contention, compromise, and undeveloped possibilities. Finally this article emphasizes that Article 9 has been—and will continue to be—quoted by the counter-hegemonic global civil society in its efforts to regulate military power.

INTRODUCTION¹⁾

It is noteworthy that discussions of global constitutionalism have become very active in recent years. The Japanese academia is no exception (Urata 2005; Mogami 2007; Kimijima 2009). Caution is required, however, because various authors use the term and concept differently. There are several different kinds of global constitutionalism. My own understanding will be discussed further later in this article, but perhaps it is helpful to mention some of its elements here.

I use the terms “constitution” and “constitutionalism” in a broader sense. Constitution is a set of fundamental principles for regulating power in a given political community, and constitutionalism is a project to regulate the exercise of power by rules, laws, and institutions. With an emergence of global political community, we can talk about global constitutionalism. I understand that global constitutionalism is a project in which counter-hegemonic global civil society regulates the exercise of hegemonic power relying on rules, laws, institutions, and other nonviolent means. Global constitutionalism also refers to global civil society's efforts to replace military options with civilian options in coping with the issues of human rights violations, conflicts, and humanitarian crises. In this sense we

have witnessed the increasingly active practice of global constitutionalism in recent years.

The *Heiwa Shugi*, or “pacifism,”²⁾ of Japan’s postwar constitution has been, and continues to be, an issue of intense debate and political contention. Article 9 is radical in its language of total rejection of war and militarism. It is a mixture of power politics and idealism. On one hand, it was a provision of complete disarmament of the Axis state by the Allied Powers, but immediately it came to be seen as an obstacle to the US-Japan military alliance that fought the Cold War. In spite of Article 9, Japan’s rearmament has steadily continued. On the other hand, the Japanese people embraced Article 9, and anti-militarism became a culture of postwar Japan. The Japanese people have resisted revising Article 9, and because of this the process of Japan’s comeback as a major military power has not yet been completed.

In this article, I elaborate global constitutionalism and the “pacifism” of the Japanese constitution and connect them. Both in Japan and in the United States there is an argument that Japan should revise Article 9 and send the Self-Defense Forces overseas more frequently, and, in doing so, Japan would contribute more to international peace and security. I disagree. I argue that Japan’s contribution to international peace is not the Japanese government’s dispatch of the Self-Defense Forces as a US ally but the Japanese people’s participation in global civil society’s efforts to create peace by nonviolent means with Article 9 preserved. I will explain this by linking the “pacifism” of Japan’s constitution with global civil society’s efforts in global constitutionalism.

GLOBAL CONSTITUTIONAL THINKING

Constitution is “the system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed,” according to the Oxford English Dictionary. Although the written constitutions framed and adopted by the peoples after the American and French Revolutions are the paradigms of modern constitutions, we can talk about constitutions in a broader sense. It is often said that wherever there is a political community there is a constitution. Now that we have overlapping political communities such as local, national, and international communities, we can argue that we have three levels of constitutions. When we explore these three levels of constitutions, the principal sources would be city ordinances, the sovereign states’ constitutions, and the United Nations Charter, respectively. It is not difficult to see the rudiments of a constitution of international society in the Charter of the United Nations (Fassbender 2009).

Constitutionalism is a project to regulate the exercise of political power by rules, laws, and institutions. In the modern sovereign state system, the major exercise of political power is the exercise of states’ power: police power and military power. As a result, a project to regulate the exercise of these powers through a state’s constitution and its laws is the typical form of modern constitutionalism. In the post-modern world, although constitutionalism of individual states continues to be most important, probably it is insufficient for regulating the exercise of power.

We have been witnessing a phenomenon of globalization of the exercise of political, military, corporate, and monetary powers beyond national borders. The worldwide

deployment of the US military forces using overseas bases and the worldwide activities of multinational corporations and investors are obvious examples. If the political, military and corporate powers are exercised globally, our project of constitutionalism will need to create the means and mechanisms to regulate globally exercised power. We need a project of global constitutionalism.

At this moment I think it is useful to trace the history of global constitutional thinking. We at once notice that there have been numerous world order proposals since the early 19th century. When examining the world order, people have often worked from an analogy of the domestic order. People thought of international society as an imperfect domestic society and perfecting international society by domestic analogy became their task. Hidemi Suganami has explored in detail how the world order proposals in the 19th and 20th centuries were based on thinking of domestic analogy (Suganami 1989). According to Suganami, many of the 19th-century world order proposals used their own states' constitutions as models.

Post-Hiroshima-Nagasaki Moment

When we trace the history of global constitutional thinking, we also notice the research on global constitutionalism and the world-government movement in the post-WWII United States. Two research publications are important. One was the *Preliminary Draft of a World Constitution*, usually known as the Chicago Draft of a World Constitution, which was written in 1948 by the Committee To Frame a World Constitution, a group organized chiefly around scholars at the University of Chicago (Committee To Frame a World Constitution 1948). Another was Grenville Clark and Louis Sohn's magnum opus, *World Peace Through World Law* (Clark and Sohn 1966). This book, first published in 1958 as an outcome of two lawyers' collaborative research since October 1945, is a provision-by-provision proposal for revision of the United Nations Charter aiming to strengthen its functions for world peace.

It was the atomic bombings of Hiroshima and Nagasaki that propelled these scholars and lawyers toward global constitutional thinking. Robert M. Hutchins, Chancellor of the University of Chicago, who organized the Committee To Frame a World Constitution, told his radio audience as early as August 12, 1945, that the shock of Hiroshima made him realize the necessity of a world state (Boyer 1994:38). In addition to serving as President of the Committee To Frame a World Constitution, Hutchins was very active in promoting the cause of world government. The world-government movement had momentum for a couple of years in postwar America. For Clark and Sohn the United Nations Charter was inadequate and a strengthened United Nations was a prerequisite for world peace. It is important to be reminded that the United Nations Charter, signed in San Francisco on June 26, 1945, predated the advent of nuclear weapons. Unlike the Chicago Draft, the Clark and Sohn proposal was not an argument for a world government but for a combination of universal and complete disarmament of sovereign states, strengthening the UN's conflict resolving functions, and establishing the standing UN Peace Force. In any case the Clark-Sohn proposal was conceived as their expression of drastic, new thinking in the nuclear age, or, I would like to say, in the post-Hiroshima-Nagasaki age.

Kai Bird and Martin J. Sherwin wrote in the biography of J. Robert Oppenheimer that “[t]he scientists knew that the gadget was going to force a redefinition of the whole notion of national sovereignty” (Bird and Sherwin 2005:289). In 1946 Oppenheimer believed that without world government there would be no perpetual peace but that world government could not be realized soon. He argued that all states should agree to renounce their sovereignty in terms of nuclear energy (Bird and Sherwin 2005:341-342). Both the Chicago Draft and the Clark-Sohn proposal were examples of a redefinition of the notion of national sovereignty. They represented a tendency to limit state sovereignty and delegate some aspects of it to world institutions. These are forms of global constitutionalism. And as Suganami says, their global constitutional thinking was based on thinking of domestic analogy. It is true that they were too legalistic and static, lacking strategies of transition. However, their intention was to stimulate discussions on future world order, and both of them were aware of the impact of the Cold War. As the Cold War intensified, these ideas became marginalized. And after the end of the Cold War, discussions on global constitutionalism have been revitalized.

THEORY AND PRACTICE OF GLOBAL CONSTITUTIONALISM

World Order Models Project’s Conception

Among the theories of global constitutionalism after the Cold War, the most useful one for our purpose is that of the World Order Models Project (WOMP)(Falk, Johansen, and Kim 1993). Led by Saul Mendlovitz and Richard Falk, the WOMP began in the 1960s as a kind of successor to the Clark-Sohn proposal, and it became an international joint research project with participation by scholars of Europe, Japan, and the Global South.

According to Falk and others, global constitutionalism refers to a set of international norms, rules, procedures, and institutions for realizing peace, economic welfare, social justice, and ecological balance for global society. They think the world now comprises three systems. The first is the states system, which is made up of territorial states and the corporations, banks, military forces, and media that support them. The second is international governmental institutions including the United Nations system. And the third system is composed of the non-state actors and individuals who act through NGOs, various kinds of citizen groups, social movements, and other vehicles. Presently the world can be conceived as a three-layered structure comprising the states system, the UN system, and global civil society. A set of transnational norms, rules, procedures, and institutions for realizing peace and other values should permeate all three layers. While we must work to achieve democracy within the states system and the UN system, collaborations and partnerships among civil society organizations, states, and the UN are also important (Falk, Johansen, and Kim 1993:9).

One possible direction of global constitutionalism is an integration of sovereign states and the creation of world government. This could take the form of strengthening the United Nations’ powers and functions, which was the direction that the Chicago Draft and the Clark-Sohn proposal pursued. Besides the practical political difficulties of this course, there is the paradox of creating a greater power of world government in order to regulate

the powers of sovereign states. A world government would sit far away from the global citizenry and it would be an enormous challenge for them to control it. The problem of "deficits of democracy" would be serious, and it may be that demerits would outweigh merits. In contrast, WOMP's global constitutionalism does not seek a centralization of state power, but rather it emphasizes the global citizenry's effort to control state power from below.

The Author's Conception

When we observe a form of power and its exercise in present global society, we notice the following phenomenon: although there is no world government nor a single power center in the present world, various actors such as G8 governments, multinational corporations, the WTO, finance capitals, dominant mass media, and think tanks, interacting with one another, constitute a giant power complex, or informal global power (Gill 2008:183-205). This informal global power makes decisions that influence tens of millions of people in the world. A project to regulate the informal global power complex is what I call a project of global constitutionalism.

Among the exercises of informal global power, it is particularly important to regulate two of them---the military power of the US and its allies; and the power of actors of global capitalism.³⁾ They are the pillars of the informal global power complex. The exercises of these powers have brought direct and structural violence and threatened human lives and the global natural environment. Thus, to design and practice global constitutionalism that regulates these powers is an urgent task.

When we seek to regulate informal global power, constitutionalism of individual states---parliamentary democracy and judicial review---plays a certain important role, but in global society as a whole "deficits of constitutionalism" occur, so to speak. In addition to regulations based on individual states, transnational and global regulation of power is required. Here, multilateralism and international organizations are extremely important (Mogami 2007). So far, discussions on global constitutionalism have centered on these aspects. However, "deficits of constitutionalism" have also clearly been seen in the United Nations. On one hand, all member states are bound by the Security Council resolutions. On the other hand, when permanent members of the Security Council decide to go to war, the United Nations has no power to stop them. This is an example of "deficits of constitutionalism." And "deficits of democracy" have been a problem of the United Nations and, accordingly, democratizing the UN is also our task (Patomaki and Teivainen 2004). I believe that, finally, the actors who regulate informal global power will be global citizens and their associations---global civil society. By regulating informal global power, they protect their human lives, their human dignities, and their human rights. By doing so they will be empowered.

When we design and practice global constitutionalism, in order to regulate the exercise of informal global power, strategy is necessary, but it must not be a static, legalistic blueprint like the Chicago Draft. I understand that global constitutionalism is a process in which counter-hegemonic global civil society intervenes in the dynamic power relations of global society.⁴⁾

Accomplishments of the 1990s and Beyond

We witnessed global constitutionalism operating in the 1990s. On several occasions in the 1990s, global civil society succeeded in regulating military power. These instances included the World Court Project, which elicited from the International Court of Justice an advisory opinion on the illegality of the threat or use of nuclear weapons (Dewes 1998), and the International Campaign to Ban Landmines (ICBL), which worked with the Canadian government (the Ottawa Process) and achieved the Convention on the Prohibition of Landmines (Cameron, Lawson, and Tomlin, 1998). Both are cases in which NGOs took the initiative, created NGO networks, and worked in league with like-minded governments to regulate military power. It is characteristic that many governments that worked with NGOs were middle powers or small powers.

Recently ICBL has again succeeded in achieving a treaty to regulate military power. This time ICBL and other NGOs formed the Cluster Munition Coalition, an NGO network for achieving a cluster munition ban treaty, worked with the Norwegian government (this time the Oslo Process), and accomplished the cluster munition ban treaty. In addition, the International Coalition to Ban Uranium Weapons (ICBUW), an NGO network seeking a uranium weapons ban treaty, has been very active and its impact remains to be seen. All of these cases represent examples of the practice of global constitutionalism.

How to Regulate US's Military Power

Arguably, regulating the exercise of the US military power may be the most important task of global constitutionalism because the US military power is the primary pillar of the informal global power complex. The "mission" to regulate it is probably the most difficult.

The US President with the involvement of the US Congress exercises the US military power. Regulating the war-making powers of the President and Congress is, firstly, an issue of constitutionalism in the United States. Second, international law experts scrutinize the legality and legitimacy of a specific exercise of the US military power. These are important elements of global constitutionalism, but we need more than that.

The impact of the US military power---its presence and its exercise---is global (Calder 2007; Johnson 2000, 2004, 2006, 2010). Tens of millions of people all over the world have been influenced by the US military. As affected parties, these stakeholders think they should have a chance to express their opinions. In theory, citizens of other countries can convey their opinions to the US government by way of their own governments, but, in reality, there are alliances of government elites between the US and its allies and its client states, and government elites in, for example, Tokyo, Seoul, and Manila usually ignore their citizens' opinions. For both domestic and global constitutionalism, US citizens play pivotal roles. First, they elect the US President and the US Congress, and their votes may influence the exercise of the US military power. Second, citizens of other countries approach US citizens by way of international NGOs, and US citizens may help influence the US public opinion and lobby the US Congress, providing an avenue of domestic expression for these international NGOs.

The United States has 716 military bases in foreign countries⁵⁾. These bases support the exercise of the US military power and, thereby, cause direct and structural violence to

the people living in the vicinity. There are movements against the US military bases all over the world. These movements, on the occasion of the World Social Forum in Mumbai in 2004, formed the International Network for the Abolition of Foreign Military Bases, and they consolidated their network when they held their international conference in Ecuador in March 2007 (Yeo 2009). The Network includes US NGOs among its members, and it has a potential to develop a strategy for influencing the US public opinion.

Replacing Military Options with Civilian Options

For our task of regulating military power, it is important to notice that there have been worldwide efforts to replace military options with civilian options when dealing with conflicts and humanitarian crises. They are seen in the spheres of government, international organizations, and global civil society. People have increasingly realized that civilians can better perform many functions currently carried out by soldiers, such as peacekeeping. We can observe the trend that military options have been replaced by civilian options in many areas.

A practical manifestation of this trend on the governmental level is the development of the civil peace service in European countries (Wallis and Junge 2002). This is a project that trains civilian peace workers to use nonviolent means to manage conflicts, sends them to conflict areas in other countries at government expense, and has them help with post-conflict peacebuilding. This project was proposed in Germany in the early 1990s and became a reality at the end of the 1990s. It is a government-NGO partnership for which Germany's Federal Ministry for Economic Cooperation and Development provides funding, and which is implemented by German NGOs. Currently in Germany, each year about 100 people undergo four months of training in nonviolent conflict resolution and other skills, and then are sent to Balkan countries, Latin America, Africa, and other places for two years. The project is an important part of Germany's development assistance policy. While Germany's civil peace service is the most advanced, Austria, France, the Netherlands, Switzerland, Sweden, and Italy have their versions of civil peace service projects. In some countries, conscientious objectors can join a civil peace service project as an alternative to military service.

An important instance of practice by an international organization is the Kosovo Verification Mission, which the Organization for Security and Cooperation in Europe (OSCE) sent to Kosovo during the conflict there. When the Kosovo conflict erupted, the OSCE sent over 1,000 civilian observers to the area in an attempt to deter the conflict from becoming violent. Researchers and the NGO activists often claim that sending thousands of foreign civilians into conflict areas can prevent conflicts from becoming violent, and the Kosovo Verification Mission can be seen as exactly that kind of attempt. Because the mission was forced to withdraw before its activities were fully implemented, it is difficult to assess its result, but Paul Rogers, professor of peace studies at the University of Bradford, thought highly of the mission and its activities in Kosovo and suggested the need for developing this kind of large-scale civilian observer forces (Rogers 2002:125).

It is global civil society that has made the most efforts to replace military options with civilian options in dealing with conflicts and humanitarian crises. There are many NGOs

engaging in unarmed civilian peacekeeping (Weber 1996; Moser-Puangsuwan and Weber 2000). These NGOs send peace teams comprised of multinational, trained, unarmed citizens into conflict areas, where they accompany local human rights activists and lawyers who might be targets of attack from military groups. The international civilian presence is an attempt to prevent killings and keep conflicts from turning violent. Having foreigners accompany local activists sends a message that international society is watching and, thereby, deters violence using the eyes of international society. Among the NGOs of this kind, probably Peace Brigades International (PBI) has been most visible, and PBI's activities in Guatemala in the 1980s established a paradigm (Mahony and Eguren 1997). Based on the accomplishments of these NGOs, Nonviolent Peaceforce, a new NGO that aims to send out more global and large-scale peace teams, was proposed at the Hague Appeal for Peace in 1999 amid the NATO's bombing of Yugoslavia. With the support and participation of numerous NGOs worldwide, Nonviolent Peaceforce was founded in 2002 and it began sending civilian peace workers to Sri Lanka in 2003 (Kimijima 2008).

The above-mentioned examples are cases where conflicts and humanitarian crises have been dealt with internationally. In defending one's own community against invasion, I think that Gene Sharp's theory of civilian-based defense (Sharp 1990, 2005) is relatively well known. It constitutes another area in which military options can be replaced with civilian options. I think these trends of the military being replaced by the civilian are also one aspect of global constitutionalism.

THE GENEALOGY OF THE JAPANESE CONSTITUTION

Now we turn to the Japanese Constitution. Before we begin the discussion on the "pacifism" of the Japanese Constitution, I think it is useful to trace the legislative history.⁶⁾ The making of the Constitution of Japan of 1946 was an important component and probably a climax of the Allied occupation. In October 1945 the Supreme Command for the Allied Powers (SCAP) suggested to the Japanese government the necessity of constitutional revision for demilitarization and democratization. In response, the Japanese government established the Constitutional Problem Investigation Committee. With members of distinguished constitutional scholars of the time, the Committee worked on the issue of whether or not constitutional revision was necessary and, if so, how to revise the 1889 Constitution. After preliminary deliberations, the Committee decided to prepare its draft revision of the 1889 Constitution and principal members of the Committee worked on a draft. Meanwhile, suddenly on February 1, 1946, the *Mainichi* newspaper published the Committee's draft as an exclusive story. The Japanese public opinion denounced it as too reactionary. SCAP realized that they could not rely on the Japanese government for the task of constitutional revision, and they decided to prepare a draft constitution by themselves. On February 8, the Japanese government submitted its draft revision to SCAP. SCAP, for their part, were preparing their draft constitution from February 3 to 12. On February 13, at the meeting of representatives of the Japanese government and SCAP, SCAP officials flatly rejected the Japanese government's draft as totally inadequate for demilitarization and democratization and presented, instead, the draft constitution they

had written (the so-called MacArthur Draft). The Japanese government resisted, but they had no choice but to accept the MacArthur Draft. The Japanese government's draft revision based on the MacArthur Draft was submitted to the Imperial Diet in June 1946. After several months of substantial debate, and with small changes to the Japanese government's draft, the Imperial Diet passed the Constitution of Japan and it was promulgated on November 3, 1946.

While SCAP officials played a decisive role in making Japan's new constitution, as this legislative history shows, I must emphasize two things. First, many SCAP officials who wrote the MacArthur Draft were New Dealers, or American liberals. In a way they pursued their ideals in a project of constitution-making in Japan. Second, when these Americans wrote the draft constitution for Japan, they referred to the Constitutional Research Association's "Outline for Draft Constitution." The Constitutional Research Association was a non-governmental body of independent and critical Japanese intellectuals who were concerned about postwar constitutional reform. The SCAP officials thought highly of their "Outline for Draft Constitution" and they used it as one of the sources of their draft constitution. One could perhaps say that liberals of both the US and Japan worked together on this project.

Furthermore, when the Constitutional Research Association prepared the "Outline for Draft Constitution," they referred to the draft constitutions written by Japanese intellectuals and citizens in the Freedom and People's Rights Movement in the 1880s (Koseki 1998:32; Dower 1999:358). The Freedom and People's Rights Movement was a popular movement seeking constitutional democracy against the conservative, oppressive regime. Unlike the conservative 1889 Constitution the government enacted, draft constitutions written during the process of the movement showed liberal democratic nature with much emphasis on human rights protection. As a result, the genealogy of the 1946 Constitution is as follows: the draft constitutions in the Freedom and People's Rights Movement (1880s)---the Constitutional Research Association's Outline for Draft Constitution (December 1945)---the MacArthur Draft (February 1946)---the Constitution of Japan (November 1946). It is important to note that the constitutional thought of human rights and democracy in the 1880s in Japan has flowed into the 1946 Constitution.

THE "PACIFISM" OF THE JAPANESE CONSTITUTION: ORIGIN AND TRAJECTORY

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

(Second paragraph of the Preamble to the Constitution of Japan)

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

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

(Article 9 of the Constitution of Japan)

Textually based in the Preamble and Article 9, the *heiwa shugi*, or “pacifism,” is one of three fundamental principles of the Japanese constitution, in addition to popular sovereignty and protection of fundamental human rights. For the postwar Japanese people “pacifism” has been a national identity and the 1946 Constitution has often been called the “Peace Constitution.”

Article 9 came from General Douglas MacArthur and his staff. While it was a provision of complete disarmament of the Axis state by the Allied Powers, it contained an idealist nature as well. It has been argued that the “outlawry of war” movement and the 1928 Kellogg-Briand Pact influenced the idea and language of Article 9 (Fukase 1987:121-124; Dower 1999:369-370).⁷⁾ The “outlawry of war” movement was a very active peace movement during the 1920s in the United States, and it was one of the driving forces behind the Kellogg-Briand Pact (Cortright 2008:62-66). One could perhaps say that the US peace movement was behind Article 9. It is an irony of history that Japan, who had violated the Kellogg-Briand Pact and had begun the Asia-Pacific War, came to have Article 9, which can be seen as a reinforced Kellogg-Briand Pact. At the same time, the Kellogg-Briand Pact has been reinforced as Article 2 Clause 4 of the United Nations Charter.⁸⁾ Article 9 of the Japanese Constitution and Article 2 Clause 4 of the UN Charter share the spirit of the age.

Article 9 was conceived as providing *security against Japanese militarism*. Those who were offered security were the Allied states, the people of East Asia, Japan’s age-old emperor system, and the Japanese people themselves who suffered under the prior military regime. The *security of Japan* was not a major concern of Article 9. The Preamble suggested that Japan rely on the United Nations for its security. Theoretically speaking, Article 9’s self-restraint on military sovereignty and the UN’s collective security are compatible, but the UN’s collective security remained unrealized as a result of the Cold War. Historical records suggest that Douglas MacArthur envisaged that the US military presence in Okinawa would provide Japan with security (Koseki 1998:201). And the Japanese government chose to seek security through a military alliance with the US.

The atomic bombings of Hiroshima and Nagasaki and the adoption of Article 9 gave birth to Japan’s world government movement. Some people in Japan thought that, in addition to the necessity of international control over atomic bombs, Japan, disarmed by Article 9, required world government.

From the final years of occupation, when the Cold War intensified, the US government wanted Japan to rearm and to revise Article 9, and Japan began to rearm during the Korean War. In the 1950s conservative politicians made efforts to revise Article 9, but they failed due to opposition from the Japanese people. Nevertheless, Japan’s rearmament

continued and expanded steadily through numerous pieces of legislation based on the US-Japan Security Treaty and through subtle interpretations of Article 9. This phenomenon is sometimes called "interpretative constitutional revision." As a result, "Two Legal Systems" have existed in postwar Japan, one based on Article 9 and the other based on the US-Japan Security Treaty; needless to say, there have been tensions between the two.⁹⁾

The Japanese people have embraced the 1946 Constitution and Article 9. Whenever the Japanese government has taken military action, Japanese citizens have opposed it and brought the issue to court. Consequently, there have been numerous lawsuits challenging the constitutionality of governmental action under the US-Japan military alliance. As a result, large parts of the peace movement in postwar Japan have taken the form of constitutional lawsuits (Yamauchi 2001). This situation has had both positive and negative impacts. It has been positive because citizens have taken the initiative in challenging governmental military actions by relying on the constitution. At the same time, it has been negative because the issue of peace and security has been narrowed to a legalistic debate on constitutional interpretation, and, as a result, efforts to form pacifist, alternative policies to military commitment have been insufficient. It is ironic that, although an idea like civilian-based defense is most suitable for postwar Japan under Article 9, it has not interested the Japanese people.¹⁰⁾ In any case, the issues addressed by constitutional lawsuits have included the US troops stationed in Japan (Sunagawa case in 1959), Japan's Self-Defense Forces (Eniwa and Naganuma cases in the 1960s and 1970s), Japan's financial contribution to the Gulf War in 1991, and the Self-Defense Forces' actions in Iraq since 2003, among other things. In most of these cases the courts have avoided making any judgment on the constitutionality of these governmental actions, and Japan's Supreme Court has avoided making a decision on the constitutionality of the Self-Defense Forces. However, there have been some lower court decisions that have found the US troops stationed in Japan and the Self-Defense Forces as being in violation of Article 9. Constitutional scholars have played important roles as well. They have placed Article 9 in a comparative and historical perspective, brought out its potential, and provided plaintiffs in lawsuits with strong constitutional interpretations. Since the 1960s, in constitutional lawsuits, the plaintiffs and constitutional scholars have used "the right to live in peace" clause in the Preamble as one of their arguments. This was far earlier than the United Nations General Assembly resolutions confirming peoples' right to peace (1978, 1984) (Roche 2003; Urata 2005:143-167, 203-223).

When we look back at the 60-year history of Article 9, it looks as if Japan's peace movement had little success in resisting the expansion and reinforcement of the US-Japan military alliance. But had it not been for Japan's peace movement, the posture of the US-Japan military alliance would have been very different from the present one. I think that Japanese citizens and constitutional scholars, by dint of 60 years of practice, have elevated pacifism from a marginal, obscure idea to a respectable, alternative principle of political order.¹¹⁾ Global civil society has noticed these efforts, and it has referred to Article 9 in its documents in the past 10 years.

One of the features of the Japanese constitution is its perception about the actors who

create peace. Judging from the Preamble and Article 9, we can say that it assumes that the actors who create peace are not the government, but rather the people. And although it does not explicitly mention NGOs or civil society organizations, I understand that it assumes NGOs and civil society organizations to be the actors creating peace. Here the Japanese constitution's emphasis on the people as principal actors for peace resonates with the practice of global constitutionalism. Tadakazu Fukase sums it up most exactly:

The problems of war and arms, and of peace and disarmament, are no longer problems of the government's exclusive power or final say; they are under the direct and indirect direction and control of the sovereign people. Not only in domestic society, but also in international (world) society, the people, as individuals and as voluntary groups (NGOs and other groups which lobby the UN), and by means of their partial and total public opinion, are guaranteed the status and rights to exercise their initiative in solving problems relating to war and peace and to arms and disarmament, or to influence or apply pressure regarding them. (Fukase 1987:194-195)

“Pacifism of Inaction” and “Pacifism of Action”

So far, people have tended to understand Japan's “pacifism” solely as a “pacifism of inaction,” that is, pacifism as a prohibition against governmental military action. That is one of the reasons for Japan's peace movement's inability to effectively rebut the realist argument in the 1990s. The realists argued that in order to contribute to international peace and security Japan should revise Article 9 and send the Self-Defense Forces overseas. Restraining Japanese military power is an important responsibility of the Japanese people, but it is only half of the “pacifism” of the Japanese constitution. An integrated reading of Article 9 and the Preamble suggests the other half of Japan's “pacifism,” that is, a “pacifism of action.”

It should be noted that Article 9 and the Preamble are complementary and need to be read concurrently. While Article 9 rejects war and militarism (direct violence); that is, it aims at negative peace, the Preamble states that the Japanese people are determined to make every effort to overcome "tyranny and slavery, oppression and intolerance" and "fear and want" (structural violence) throughout the world and create a just world order; that is, they are engaged in a search for positive peace. Read this way, the Japanese constitution requires a “pacifism of action.” In other words, the Japanese people's engagement with peace activities in the world is a necessary component of the “pacifism” of the Japanese constitution. Given this, there are many possibilities for the Japanese people to make contributions to international peace and security.

As I have discussed above, global civil society's efforts to regulate military power and replace military options with civilian options are noteworthy. Ideas and practices of civilian-based defense or unarmed civilian peacekeeping are just a few examples of the vast possibilities. There are numerous NGO activities for peace in which the Japanese people can participate. Supporting and participating in these activities are a practice of a “pacifism of action” that flows from the Japanese constitution (Kimijima 2010).

JAPAN'S CONTRIBUTION TO GLOBAL CONSTITUTIONALISM

The Japanese People's Engagement with Global Peace Efforts

Indeed the Japanese people have engaged with global peace efforts in the past 60 years. Naturally the experiences of the atomic bombings of Hiroshima and Nagasaki have had an enormous impact on the Japanese people. *Hibakusha*, or "survivors of atomic bombings," have constituted a core of the Japanese people's movement for nuclear weapons abolition. In the 1990s this movement participated in the World Court Project and played a very important role.

Under the US-Japan Security Treaty, there are numerous US military bases in Japan, particularly in the island of Okinawa. Okinawans have been victims of militarism during the Asia-Pacific War (1931-1945) and the US military occupation (1945-1972), and even after Okinawa returned to Japan as well. Their suffering due to military forces---both Japanese and American---have made them strong anti-militarists.¹²⁾ Because the US military bases in Okinawa have been playing significant roles in the global projection of US military power, Okinawa's peace movement is important as an actor to watch global operations of US military power and as a member of the International Network for the Abolition of Foreign Military Bases.

Among the recent trends of replacing military options with civilian options, Nonviolent Peaceforce (NP), an international NGO that practices unarmed civilian peacekeeping, has drawn support from the Japanese people. Nonviolent Peaceforce Japan was established as an affiliate in Japan, and it has been instrumental in NP's project in Sri Lanka. The important point is that Nonviolent Peaceforce Japan consciously links the "pacifism" of the Japanese constitution and global civil society's efforts to replace military options with civilian options (Kimijima 2008).

Global Civil Society and Article 9

In the 1990s, following the end of the Cold War, when activities of various social movements, NGOs, and civil society organizations became very active and influential, people realized that global civil society had developed into an important actor in world politics. The World Court Project and the International Campaign to Ban Landmines are only a few examples of this phenomenon.

In May 1999, nearly 10,000 peace activists from all over the world---including about 400 Japanese people---participated in the Hague Appeal for Peace Civil Society Conference. It was one of the largest citizen peace conferences in history. Global civil society has clearly emerged out of this conference as a principal actor to regulate power and create peace. "The Hague Agenda for Peace and Justice for the 21st Century," global civil society's strategic plan for creating peace, is still one of the best available conceptual maps for peace studies. On the last day of the conference, the secretariat of the Hague Appeal for Peace released "Ten Fundamental Principles for a Just World Order" which summed up the conference discussions (Kimijima 2001). The first principle is the following:

Every Parliament should adopt a resolution prohibiting their government from going to war, like the Japanese article number nine.

Since the Hague Appeal for Peace in 1999, the Japanese people's engagement with global civil society's peace efforts has become strengthened and deepened. As a result, NGO conferences often make reference to Article 9 of the Japanese constitution. Article 9 is quoted because it resonates with global civil society's efforts to regulate military power and replace military options with civilian ones.

One of the recent examples is the Global Action Agenda (2005) of the Global Partnership for the Prevention of Armed Conflict (GPPAC). It contains the following reference:

In some regions of the world, normative-legal commitments play an important role in promoting regional stability and increasing confidence. For example, Article 9 of the Japanese Constitution renounces war as a means of settling disputes and of maintaining forces for those purposes. It has been a foundation for collective security throughout the Asia Pacific region.

The Global Partnership for the Prevention of Armed Conflict (GPPAC) is a global civil society project to emphasize the primary importance of prevention of armed conflict rather than military intervention. GPPAC began as a response to UN Secretary-General Kofi Annan's 2001 report on preventing armed conflict (S/2001/574), and one of its aims has been to make the voice of global civil society heard in the UN Security Council. It partially succeeded when representatives of GPPAC spoke at the debate of the UN Security Council in September 2005. The Global Action Agenda is a product of global civil society's intense discussions on strategies and priorities for preventing armed conflicts. It was presented to Kofi Annan at the GPPAC Global Conference held at the UN in New York in July 2005 (Global Partnership for the Prevention of Armed Conflict 2005). Article 9 is quoted in this document as well. GPPAC is another example of the practice of global constitutionalism.

Lastly, it is important to emphasize that global civil society is not a flat, harmonious space but a field where various actors interact and fight each other for hegemony or counter-hegemony (Cox 1999). Probably we can distinguish two types of global civil society (Santos 2005). One is the liberal global civil society that does not challenge the prevailing ideologies such as liberal democracy and neoliberal capitalism. The other is the counter-hegemonic global civil society that seeks more participatory democracy and alternative economies. For our purpose, as a principal actor to regulate the exercise of informal global power, we will rely more on the counter-hegemonic global civil society than on the liberal global civil society.¹³⁾

CONCLUSION

In closing the article, I think it is fitting to refer to the outcome of the GPPAC process in Northeast Asia. At GPPAC, in preparation for the Global Conference and the Global Action

Agenda, civil society organizations met region-by-region and adopted regional action agendas. Civil society organizations in Northeast Asia—China, Taiwan, South Korea, Mongolia, Far Eastern Russia, and Japan---met twice in Tokyo and adopted the Northeast Asia Regional Action Agenda (Tokyo Agenda) in February 2005. The discussions at the meetings and the contents of the Tokyo Agenda are most relevant to this article.

In postwar Northeast Asia, the US-Japan military alliance succeeded the Japanese Empire. As a result, regulating US-Japan military power is a large task for this region, and for that purpose preserving Article 9 is extremely important. In addition, creating a multilateral, common security mechanism in the region is the direction we should pursue. At the same time, it is necessary for civil society organizations in Northeast Asia to engage nonviolently in conflicts and humanitarian crises in, and out of, the region. Ultimately it is civil society, not state armed forces, that should take the initiative to create peace. All of these issues are what civil society organizations discussed, and these are the contents of the Tokyo Agenda. They resonate with my argument.

I believe it is the Japanese people's efforts to preserve Article 9 and engage in global civil society's peace activities that constitute Japan's contribution to global constitutionalism. And as the references to Article 9 in NGO documents show, I think global civil society is ready to share Article 9 and draw on its potential.¹⁴⁾

Notes

- 1) This article, based on a paper I submitted to the International Peace Research Association Conference held at the University of Sydney on July 6-10, 2010, was prepared with the benefit of feedback from Stephen Gill, James H. Mittelman and Heikki Patomaki, for which I am grateful. I would also like to thank the students and administration at the School of International Service at American University who gave me the chance to teach a graduate course on global constitutionalism in spring 2008. Of course it is I alone who is responsible for any and all errors.
- 2) It is extremely difficult to translate the Japanese term *heiwa shugi* into English, but I use the English term "pacifism" because in the context of this article I think "pacifism" is closest to *heiwa shugi*. See also Cortright (2008:11).
- 3) It is appropriate to refer to Gill's new constitutionalism here. I understand that new constitutionalism is global capitalism's project to restrain popular power or democratic control in order to secure private property rights and accumulation of capital (Gill 1998, 2002, 2008). My conception of global constitutionalism is the opposite. However, I regret that I have not elaborated the aspect of global constitutionalism that regulates the power of actors of global capitalism in this article. I wait for another chance.
- 4) The author's conception of global constitutionalism resonates with what Mittelman calls civil society and organic intellectuals' project for alterglobalization (Mittelman 2004:94-95). This project pursues autonomy from below against globalizing forces. And I would like to mention here that Teubner's conception of "societal constitutionalism" and WOMP's and the author's conceptions of global constitutionalism have similarities in that all of them emphasize the principal roles of civil society (Teubner 2004).
- 5) The number of US military bases in foreign countries, 716, is based on the US Department of Defense's 2009 *Base Structure Report*.
- 6) On the legislative history of the 1946 Constitution, I rely on Koseki (1998) and Dower (1999).

- 7) Article 1 of the Kellogg-Briand Pact provides as follows: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another."
- 8) Article 2 Clause 4 of the United Nations Charter provides as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
- 9) On Japan's rearmament and the tensions between Article 9 and the US-Japan Security Treaty, see Dower (1993). On political contention over the 1946 Constitution, see Hook and McCormack (2001).
- 10) Notable exceptions are Miyata (1971) and Terajima (2004).
- 11) On some aspects of Japan's pacifism, see Yamamoto (2004) and Kimijima (2006).
- 12) On Okinawa, see Johnson (2000:34-64; 2006:171-207); Urata (2005:71-142).
- 13) As a space for counter-hegemonic global civil society, the World Social Forum is important. See Blau and Karides (2008).
- 14) Peace NGOs in Japan launched the Global Article 9 Campaign and they successfully organized and held the Global Article 9 Conference to Abolish War in May 2008 in Japan.

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グローバルな立憲主義と日本の立憲平和主義

立憲主義とは、パワーの行使をルール、法、制度等で規制することによって、われわれの生存、尊厳、権利を保障しようとするプロジェクトである。主権国家の成文憲法によるパワー行使の規制は重要なプロジェクトであるが、それだけでは足りない。現在の国際社会においては、国家を超えるパワー行使、とりわけ米軍および同盟軍のパワー行使とグローバル資本主義のアクターのパワー行使が国際社会に大きな影響を与えており、これらのパワー行使を規制するプロジェクト、つまりグローバルな立憲主義が必要となっている。

グローバルな立憲主義は多義的であるが、本稿は、ソール・メンドロヴィッツ、リチャード・フォークらの世界秩序モデル・プロジェクトを参考にしつつ、パワー行使を規制する主体として、グローバルな市民社会の役割を重視する。1990年代2000年代には、グローバルな市民社会がミリタリーのパワー行使を規制したり、ミリタリーに取って代わる平和活動をしたりする事例が見られた。

本稿はまた、ミリタリーを規制する顕著な事例としての日本国憲法9条について検討する。憲法9条は連合国による枢軸国の武装解除であるが、戦後の日本国民と憲法研究者はそれを自分たちのもの——ミリタリー依存を極小化して平和をめざす規定——につくり変えたといえる。近年、グローバルな市民社会がしばしば日本国憲法9条に言及するようになった。それは、できるだけミリタリーによらずに平和をめざす点で、グローバルな市民社会の努力と日本国憲法9条が共鳴するからである。

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