

Constitutional Politics in Contemporary Japan

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The Japanese constitution is now at a turning point. Today, first I would like to explain the two major political attitudes toward the constitution. After making clear why and how these attitudes have been developed, I will point out that each of these attitudes has its own contradiction and dilemma within it. Then I will tell you something about my own way of thinking about the constitution. We should think about the constitution within a broader context of politics, rather than sticking to the constitution as a written national law.

1 The present constitution and its creation

The present Japanese constitution was made after World War II, under the occupation of the allied forces led by the US. In the formal legal context, it was regarded as a modification of the former Meiji constitution made at the end of the 19th century. However, seeing the huge difference between the two, nobody could be persuaded by the simple legal explanation.

The most important differences include, first, the declaration of popular sovereignty. While in the former constitution the Emperor was the sovereign, in the present one, his status has been changed to ‘the symbol of the State and the unity of the people’. Second, internationalism and pacifism are positive in the present constitution. In its preface, it declares that ‘no nation is responsible to itself alone’, and says that Japanese want 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. Furthermore, in its famous Ninth Clause, it renounces war as a means to settle international disputes, and states that the right of belligerency of the state is not recognized. Third, the scope of the protection of human rights is considerably enlarged from the previous constitution.

One of the most serious problems concerning the new constitution has been ‘who made it?’ If you look at the constitution, the Emperor appears in the first sentence and says that he is happy to see the modified constitution. However, just after this sentence, a subject called ‘we, the Japanese people’ comes up and starts the preface.

In addition to these two subjects, there is another one, a hidden subject invisible in the constitution, which is a group of Americans who actually drafted it. I do not want to go into the complicated background of the process here. At least we can say that one

of the characteristics of the Japanese constitution is that it was written by anonymous strangers, rather than by well-known founding fathers as in the case of the US constitution.

Another important characteristic is that this constitution does not stand alone. The constitution and the US–Japan Security Treaty seem to form an undividable set, though that connection is not mentioned anywhere. The treaty made it possible for the US to keep many bases in Japan, in exchange for its promise to militarily protect Japan when necessary. As everybody knows, Japan now has a considerable military force, notwithstanding the existence of the Ninth Clause. However, the military aspect of the sovereignty is still nonexistent in the constitution, and appears to be cared for in the treaty.

2 The Logic and Dilemma of the Protectionists

Because of the way this constitution was created, its legitimacy has always been controversial.

That does not mean that the constitution has been unpopular. On the contrary, it has been extremely popular among the people. Most Japanese people had anti-war feelings after the total war, and they were happy to see many clauses protecting human rights.

Most constitutional and political theorists have also relied on the constitution to establish a liberal democracy in the country. But at least for them, there was a problem to be solved. That is, how to legitimise the constitution.

One solution was to try to imagine that a revolution had taken place in August 1945, and that the revolutionary people had used their constitutive power. Of course, this was a matter of imagination. There was no visible revolution. There was something like a conquest, instead. However, to describe the creation of the constitutions as an institution by conquest (to use a Hobbesian term) looked too dangerous to the constitutional theorists. That kind of explanation might jeopardize the newly born constitution. So they decided to explain the creation in terms of social contract, rather than conquest or force.

The social contract theory was a favorite theme among the post-war Japanese social scientists, for two reasons. First was to criticize the Emperor system. Why were the Japanese people mobilized into a reckless war? According to the post-war theorists, one of the origins was the mystical way of thinking based on the existence of the Emperor as a god. In order to attack this way of thinking, the introduction of the idea of social contract seemed useful. Second was the criticism of Marxist theory. Political

theorists were not happy to think of politics as simply determined by economic factors. In that context, the social contract theory was regarded as a means to liberate politics from this structure.

However, the introduction of the social contract theory had side effects. First, we can point out that this contributed to the oblivion of the colonization period. When we say that we got together and used constitutive power, we are likely to forget how that 'we' unit was formed. In fact, the so-called Japanese nation was violently enlarged during colonization, and shrank in 1945. This kind of contingency could never be represented in the social contract theory.

Another side effect was to cause a dilemma for those who tried to protect the new constitution. What is most important in the social contract is a voluntary agreement of all the participants. But in the case of the Japanese constitution, we cannot be totally sure how voluntariness the agreement was, because the constitution was made under the occupation. So, when somebody argues that we should make another social contract in order to make sure that the agreement is perfectly voluntary, the constitutional theorists could not easily find a logic to resist it. But, on the other hand, seeing that those who were arguing that way actually were opposed to the content of the constitution, theorists who wanted to preserve the principles of the constitution could not join them. This was the dilemma of the protectionists.

3 The logic and the dilemma of the reformists.

On the other hand, the people who want to change the constitution are also in a dilemma. Before talking about that, let us briefly look back at the history of this issue.

The Liberal Democratic Party, which has been almost always in power since the 1955, has held the policy of the constitutional reform in their platform. But opinion within the party regarding that point was not integrated, to say nothing of the opinion of their supporters. From the 1950s to 1960s, a research committee was active within cabinets, scrutinizing the creation process of the constitution. After a relative silence, new research committees were established, this time within parliaments, in 1999. They have interviewed constitutional and political theorists, and are trying to make reports within a couple of years, though they are not entitled to submit proposals to make another constitution.

Two points have been made by the reformists. First, they insisted that the constitution was forced upon Japan by the Allies. When they talk about forcing, they are not only talking about the creation, but also about the content. They say that the constitution doesn't fit the Japanese very well. The constitution is full of human rights,

though the very idea of human rights has been foreign to us. The emphasis on individualism in the constitution has caused a moral disaster, ruining traditional values such as family ties and communal cooperation.

Second, they criticized the Ninth Clause. As I have already mentioned, that clause renounced the war and right to wage war, though Japan actually has military forces. In order to solve the contradiction between the law and the fact, the law rather than the fact should be changed, they said.

When it comes to the opinion of the general public, they do not seem to be much impressed with the criticism of human rights. But, arguments about the Allies forcing the constitution and war are gradually taking roots among the public as well.

First, some people who are not necessarily right-wing in the traditional sense are now coming to support the idea of making another constitution. They insist that only when the Japanese make their own political framework by themselves, they can become purely independent. This kind of argument, which we may call the civic republican way of thinking, may not be dismissed at once. Habermas says in his theory about Constitutional Patriotism, that we can distinguish between the unit of nation, which is based on some sort of homogeneity like ethnicity, and the unit of demos, which is based on some kind of abstract principle. According to Habermas and his followers, while nationalism based on the unit of nation can be dangerous, constitutional democracy based on the unit of demos is safe. However, I think that those two units quite easily synchronize with each other, if the extensions of the units are almost the same. They can make a harmony even if they seem to be playing different melodies.

Second, the pacifistic way of thinking has been losing support, especially since the Gulf War. At that time, the Japanese government decided not to send forces and concentrated on the fiscal support. However, some US elites allegedly criticized this approach. And, when the Kuwait government put an advertisement in leading newspapers saying thank you, there was no mention of Japan. This was a sort of traumatic event for some Japanese. From that time, more and more people have come to believe that sending forces to areas of conflict is a contribution rather than an invasion. They say that if we reject that kind of contribution because of the existence of the constitution, we will be internationally underestimated. It is difficult to say whether the idea of so-called humanitarian intervention is right or wrong. I am not prepared to speak about that here. However, I believe that if the interventions are motivated by national interests or by a sort of nostalgia for sovereign statehood, they cannot be called humanitarian. If somebody desired constitutional reform simply to show off the might of the state, they are trapped in a serious anachronism.

I think that the reformist attitude, which is now gaining force, is also in a dilemma. Reformism is based on an idea that we can show the power of the nation by using constitutive power. However, as I said, the constitution is indivisible from the US-Japan Security Treaty. It is impossible to say what should become of the Ninth Clause without discussing the treaty. However, most of the reformists believe that the alliance is too important to be touched. So they cannot think about Japanese defense policy independently, even if they are talking of their own constitutional reform. Of course they will be able to touch the treaty, if Americans ask them to do so. But, in that case, obviously, their reform will look like another version of forced constitutions. This is the dilemma of their side.

4 Redefinition of constitutional politics

As I have shown, I am not satisfied with the protectionist attitude in some respects. The greatest problem is that protectionists have been too much preoccupied with the written constitution. Though there is no doubt about the importance of the written constitutional law and many important things have been achieved because of its existence, if the constitution is regarded as the fixed final instance, that might cause trouble. The constitution is not almighty. It cannot take care of issues which extend beyond the national unit. For example, in order to solve the regional environmental problem, the constitution is not enough. The constitution should be placed in negotiations with other levels of rules, such as local laws and international rules.

With regard to the Ninth Clause, I must say that protectionists have been too passive in promoting and realizing the spirit of the clause. If the Japanese are not hiding away from conflicts, but are trying to create peace in the world through pacifist strategy, then we should have shown more concrete programs and frameworks. Of course, it was best for Japan simply not to send forces abroad just after the notorious war. However, now we must say something about what to do about conflicts in the world. If we say nothing in particular and simply talk about the existence of the constitution, that does not sound plausible.

On the other hand, I am not happy with the reformists either. They talk about the creation of the constitution all the time. But why is this creation process itself so important? They are actually sharing a belief in the social contract theory with the protectionists. All of them believe that social order is made in one instance. On the contrary, I think that social order is made as accumulation of practices, as the result of struggles between different political visions. What is important is what kind of concrete laws and rules are made, and how they are interpreted and executed. Even if a certain

written constitution had been forced at first, as far as that is accepted by the people, and many important practices crystallized around it, then there is no need to abolish it. Reformists say that protectionism is a fetish of the constitution. But I think that reformists themselves are fetishist, because they emphasize the importance of changing the written constitution too much.

Japanese politics have been misguided by the alleged conflict between protectionists and reformists. Both sides are too much concerned with the constitution as a written national law. The constitution is not only a written law, but also the framework of the political society. It means the act of constituting an order and the constituted order at the same time. I think that the most important thing is to make clear what kind of order we would like to have. The actual order will be formed as *modi vivendi* through all the negotiations with people inside and outside the country. Though the word ‘constitutional politics’ is usually thought to mean the creation or modification of a constitution as a written law, I would like to propose a redefinition of the word as a process of realizing political visions in gradual negotiations.

5 Negotiations toward a new framework

However, when we talk about gradual process, we should be careful about one thing. Something like a ‘hollowing out’ approach, which transforms the characteristics of the constitution without changing the façade, has already been under way. Our approach should not be confused with that. In 1997, the so-called New Guidelines for US-Japan defense cooperation was added to the alliance treaty. Those guidelines made a wider cooperation between the two forces possible, when a security alert is found in so-called ‘situations in areas surrounding Japan’. Though what this ‘areas surrounding Japan’ meant was not clear from the beginning, the Japanese government at first explained that it did not go far from eastern Asia. But, after 11 September, they have changed the interpretation considerably. Now, Pakistan is regarded as within the areas surrounding Japan! Meanwhile, in Japanese society, security is being tightened. Under a new law, the national government can ask local governments to cooperate with the logistics of US forces in Japan, when necessary. In addition to this, other emergency legislations are being made. Limitations of civil rights seem to be imminent.

Seeing all this, protectionists say that we should stick to the constitutional law further, in order to resist those attacks. They believe that they can fight the government by depending on the authority of the constitution, by blaming the new policies as unconstitutional.

Of course, we should resist the ‘hollowing out’ approach. And I believe that it is

most important for us to fight back against those attacks on civil liberties in the name of the security measures. But I think that in order to persuade the general public, the protectionist approach is not enough, because they do not think now that the constitution has priority over everything though they still pay respect to the constitution. We have to show them an alternative view with respect to matters like wars, terrorism, and security. If we simply carry on saying that we cannot do certain things because of the constitution, then people will be more and more mobilized by the constitutional reformism.

What is needed is a new approach to the constitution, which is neither protectionist, nor reformist. The new approach should be one which takes political theory and diplomacy more seriously. We start with political debates, especially with the people 'in the areas surrounding Japan', about what kind of order we want to establish. If it turns out that some kind of changing the words is necessary, we will do that. But we do not jump to conclusions. This approach is completely different from the 'hollowing out' being made by the government, in that this approach does not presuppose any conclusions.

Some would argue that especially after 11 September, the superiority of a traditional military approach was proved. But I do not think so. It is true that a feeling of insecurity seems to be permeating the people, and that is not merely a fear of being involved in violent incidents. The fear comes from somewhere deeper. I would say that people are anticipating the transformation of the idea of politics itself.

Politics has been regarded as an activity based on a bordered territory. The sovereignty as the final deciding instance, and the national interest as the benefits of a certain enclosed bunch of people have been presupposed. To protect those within the border was what politics was all about.

However, we can no longer be sure about the border. We cannot protect ourselves at national borders in the first place, when violent attacks can take place deep within the territory.

And people are becoming more and more aware of the existence of differences within the border. The presupposed and forcefully constructed homogeneity of the nation are not plausible anymore. Some people are trying to attribute the origin of crimes and other bad things to the existence of others, 'them'.

In these circumstances, something like a 'politics of security' can easily emerge. As the US, Britain, and other governments including Japan are now trying to do, some will try to create a façade, which allegedly sorts out the chaos. They will try to exclude 'others' from within the border, and will try to create homogeneity inside it.

But these approaches will never be successful. The politics of security is self-destructive, because you cannot stop excluding people until the last person is taken out. To try to eradicate terrorism is another terrorism.

When the border between the internal and external is becoming ambiguous, we have two options. We might be able to call that situation pathetic, and may try to get out of it as soon as possible. But as I said, if we try to be free from insecurity completely, we can end up in a quite horrendous situation.

Another approach is to try to accept the new predicament. If the border is not as reliable as it was, that is not necessarily bad news. Of course, there is a possibility that the borderless globalisation of the economy can impoverish the poor further. But on the other hand, if we can create a new regional or global system of mutual cooperation and reallocation of wealth, then we can do things the former nation-state systems have never done.

When we think about politics in this kind of new perspective, the internationalist and pacifist elements within the Japanese constitution seem to have a new meaning. I am not saying that the traditional protectionism is to be preserved. Only that when we can make new practices, the old content will be reactivated. Rather than relying on the very old nation-state framework of the reformists, I think we had better find a way in that direction.