4

The Constitution and National Defense

Yasuaki CHIJIWA

Introduction

Like Germany, Japan was occupied by Allied Forces following its defeat in World War II. One of the objectives of the Allied Occupation was to demilitarize the country. The Imperial Army and Navy were duly disbanded, and Japan was disarmed. Under this policy, and under instructions from Occupation forces, a new constitution was drawn up. This was promulgated on November 3, 1946 and came into force on May 3, 1947. Article 9 of the Constitution contained the following provisions:

> Article 9. 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.
>
> (Clause 2) 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.

In renouncing "war" as defined as wars of invasion, there is nothing particularly unusual about the first part of Article 9 in terms of international law. The distinctive aspect is the provisions in Clause 2, that is, the clear declaration that "land, sea, and air forces, as well as other war potential (*senryoku*), will never be maintained."

This clause led some people to make the extreme case that Japan was not allowed to exercise the right of self-defense and could not maintain defensive forces of any kind. But such extreme views were never realistic and by the middle of the 1950s—after some fierce debate—the position of the Japanese government was that even under Article 9, Japan was entitled to exercise the right of self-defense, and could also maintain defensive forces within certain limits. The present Self-Defense Forces (SDFs) were established on July 1, 1954.

The Russian invasion of Ukraine that started on February 24, 2022, as well as growing concerns in recent years about the risk of a Chinese invasion of Taiwan, have had a major impact on Japanese people's views of national security. In a poll of Japanese voters by the *Asahi Shimbun* in April 2022, more than 60% of respondents agreed for the first time that Japan should strengthen its defense capabilities. On December 16, 2022, the government carried out revisions to the "three national security documents" (the *National Security Strategy*, the *National Defense Strategy*, and the *Defense Buildup Program*). The headline points have been the aim to increase the size of the defense budget to around 2% of GDP (from a previous level of around 1%), and the decision to develop a "counter-strike capability" that will allow Japan to hit belligerent missile bases overseas

that might be used to launch missile attacks against Japan.

Meanwhile, the Constitution itself, including Article 9, has not been revised once since it was enacted shortly after World War II. The hurdles to constitutional amendment are high, requiring at least two-thirds approval of all the members of the House of Representatives and the House of Councillors as well as majority support in a national referendum. Balancing a realistic response to Japan's actual security environment with the restrictions of Article 9 will continue to be an unavoidable point of contention for anyone considering Japanese national security policy in the years to come.

From the establishment of the conventional constitutional interpretation on national security to the passing of the Peace and Security Legislation

In this section, I want to examine the subject of the Constitution and national defense by looking at the path that Japan's security policy has followed from the mid-1950s until Shinzo Abe's time in office in three periods. For reasons of space, I will omit the initial tortuous path that led from the drawing up of the Constitution to the establishment of the conventional interpretation of the Constitution on national security in the mid-1950s.

(1) The Cold War period

The first period ran from the establishment of the conventional constitutional interpretation on national defense to the end of the Cold War.

On December 22, 1954, the government at the time, led by Prime Minister Ichiro Hatoyama, issued an interpretation regarding Article 9. The government's position was that the Constitution did not renounce the right of self-defense, which was held as a matter of course by any independent sovereign state. Although the Constitution renounced war, it did not give up the right to fight in self-defense. The government's view was that Article 9 recognized Japan's right of self-defense as an independent sovereign state. Accordingly, "It is not a violation of the Constitution for Japan to maintain an organization for self-defense, and to establish a competent force with the necessary levels of armed capability to carry out this objective."

In fact, the National Police Reserve, which was the precursor to the SDF, had already been established before this, on August 10, 1950. When the Korean War broke out on June 25 that year, members of the United States Army Forces in the Far East stationed in Japan were sent to Korea as United Nations (UN) troops. Since this led to a shortage of personnel

to maintain public order within Japan, an armed organization was formed as a matter of urgency on instructions from the General Headquarters of the Supreme Commander for the Allied Powers (GHQ) to make up for this deficiency. At the same time, it was made clear that this new organization was not a military organization, but merely a police reserve that should be regarded as an extension of the existing police powers. With this interpretation, a third way was taken avoiding both the necessity of revising Article 9 and the extreme interpretation of Article 9 according to which Japan could maintain no armed forces whatsoever, and declaring explicitly that Japan would remilitarize. In effect, Japan pushed ahead with incremental de facto rearmament, while maintaining Article 9 of the Constitution.

While Japanese memories of the disastrous experience of World War II caused by rampant military power remained raw, revision of Article 9 was impossible. At the same time, as the Cold War tensions continued to intensify, the US applied considerable pressure on Japan to remilitarize. Within Japan itself, conservative parties like the Kaishinto Party also pushed for Japan to reestablish armed forces. The government's interpretation of 1954 represented a balancing point. In the following year, 1955, West Germany joined the North Atlantic Treaty Organization (NATO) and the Bundeswehr (Federal Defence Forces of Germany) was formed at the same time as part of the same set of policy decisions.

The point for the government interpretation of 1954 was how to reconcile the wording of Article 9, which declared that "land, sea, and air forces, as well as other war potential, would never be maintained," with the existence of the SDF, which had already been founded as a force. To ensure consistency, the Japanese government incorporated *senryoku* as the concept of "minimum necessary force for self-defense." If the SDF was seen as *senryoku*, they would contravene the Constitution. But the SDF was not *senryoku* and only a "minimum necessary force for self-defense," so their existence would be brought in line with the stipulations of the Constitution. This interpretation helped to secure the constitutionality of the SDF.

But what does the "minimum necessary force for self-defense" really mean in practice? In effect, this was defined by contrasting it with examples that would exceed the "minimum necessary force for self-defense."

Let us look at some cases, following developments as outlined below. One example of exceeding the minimum necessary force was the use of force overseas for any purpose other than self-defense, such as the use of force in activities within the framework of the UN.

Another would be the exercise of the right of collective self-defense. This way

of thinking deliberately ties the concept of "minimum necessary force for self-defense" to the difference between individual and collective self-defense in international law, and holds that while the first of these falls within the extent of the minimum necessary for self-defense, the latter does not. This interpretation marks a major difference with Article 5 of the North Atlantic Treaty, which regards an attack on one or more of the parties as an attack against them all.

This insistence that Japan would not use force overseas for reasons other than self-defense, and would not exercise the right of collective defense even in self-defense, was seen as evidence that the SDF represented a "minimum necessary force for self-defense," and not the *senryoku* whose maintenance was forbidden by Article 9.

In fact, during the Cold War period, there were almost no circumstances in which it would have been necessary to deploy the SDF overseas or exercise the right of collective self-defense.

On September 8, 1951, Japan concluded a Treaty of Mutual Security and Cooperation with the US. This was revised on January 19, 1960, and continues in effect today. The framework of the Japan-US Security Treaty can be expressed as cooperation of material (*mono*) and personnel (*hito*). Japan gives material assistance to the US by providing the use of bases in Japan, while the US provides personnel: namely US troops who will fight for Japan if necessary. The basic framework of the Japan-US Security Treaty is an exchange, centered on the use of US bases in Japan. Japan allows the US to use bases in Japan, and in exchange the US agrees to defend Japan from enemy attack.

During the Cold War era, the provision of bases to the US under this treaty formed the core of Japan's contributions to the Western side. The foundation of Japan's security policy was to provide bases to the US, and at the same time gradually rebuild the defensive capability that had been reduced to zero as a result of Japan's disarmament after the war. Subsequently, Japan gradually put its defensive capabilities in place, under four Five-Year Defense Buildup Plans. In the 1970s, these Five-Year Plans were replaced by the *National Defense Program Guidelines* (*boei taiko*; now known as the *National Defense Strategy*).

Within Japan, there were deep differences of outlook and political sympathies during the Cold War that reflected the ideological divide between the eastern and western blocs. As the main opposition party for many years, the Japan Socialist Party campaigned for a position of demilitarized neutrality for Japan. Within Japanese society, there was a deep-rooted school of opinion that regarded the existence of the SDF as contravening the Constitution, and in this climate, it was easy to accuse any suggested change to national security policy of being tantamount to a "revival

of Japanese militarism." Deploying the SDF overseas or exercising the right of collective self-defense would have been out of the question. The defense policy continued to be subject to strict restrictions, including a cabinet decision (November 5, 1976) that set the size of the defense budget to no more than 1% of GNP (although this was later scrapped by a subsequent cabinet decision of December 30, 1986, in fact defense spending continued at around 1% of GNP) and the principle of an "Exclusively Defense-Oriented Policy (*senshu boei*)," which limited Japan's ability to develop a counter-strike capability. The Exclusively Defense-Oriented Policy dictated that Japan would use force only after coming under attack from another country, and even then would use only the minimum amount of force necessary to repel the attack. Answers given to the Diet on July 5, 1955 by Arata Sugihara, then Director-General of the Defense Agency, are generally taken as the first explicit mention of this policy.

(2) Peacekeeping operations and the "War on Terror"

The second period started after the end of the Cold War. During this time, Japan started to participate more actively in international peacekeeping operations.

The event that prompted the shift from the position that had prevailed during the Cold War was the crisis in the Persian Gulf and the Gulf War that followed from 1990 to 1991 after the end of the Cold War. Following a UN resolution, an international military coalition moved to expel Iraqi troops from occupied Kuwait. Japan's contribution was mostly limited to financial support, and this led to stinging criticism from the international community. Inspired partly by the fact that Germany had sent minesweepers to the Persian Gulf, Japan decided to follow suit, and eventually managed to gain a certain amount of recognition for its contributions.

This prompted a debate on what Japan could do under the limitations enforced by Article 9 not in response to an invasion or in self-defense, but within the context of international peacekeeping operations. On June 19, 1992, the Act on Cooperation with United Nations Peacekeeping Operations and Other Operations (PKO Act) was ratified, allowing the SDF to participate in PKOs. And on September 17 that year, the SDF was duly dispatched to join PKO activities in Cambodia.

As evidence for the constitutionality of participation in PKO activities by the SDF, there was a debate, initially within the ruling Liberal Democratic Party (LDP), centered on the idea known as "Ozawa's theory." This was based on ideas expressed in a statement on the subject given on February 20, 1991, by a research committee headed by Ichiro Ozawa, former Secretary-General of the LDP. This defined the first clause of Article 9 as renouncing invasive wars

of aggression, and claimed that Article 9 did not renounce the "use of force within the framework of the UN," and argued that even if the SDF used force in the course of participation in international peacekeeping, this would not contravene the constitutional ban on maintaining *senryoku*.

Ultimately, however, the Japanese government looked for evidence that participation in PKOs by the SDF was constitutional not in the Ozawa's theory, but in the traditional thinking about the "minimum necessary force for self-defense." On April 28, 1992, Atsuo Kudo, Commissioner of the Cabinet Legislation Bureau, said in answer to a question in the Diet that the participation of SDF personnel in PKO missions overseas would not be regarded internationally as a use of force by Japan, and that this did not represent the dispatch of armed force overseas as banned by the Constitution. On the other hand, it could be argued that since participation in international peacekeeping was not self-defense, the use of force in this kind of operation would be unconstitutional.

This led to arguments about the "integration (*ittaika*)" of the SDF in actions that were tantamount to the use of force. If the SDF is engaged in operations overseas, for example participation in PKOs, they may assist armed forces from other countries engaged in the same activities, such as by replenishing supplies or transportation. These activities themselves do not represent the use of force. But, according to the "integration" argument, there might be cases in which Japan would be legally adjudged to have been engaged in the use of force as well, because of the closeness of its involvement in the exercise of force by others. The argument is that when another country's forces are engaged in the use of force, the activities of the SDF, through their close involvement with these forces, might become "integrated" in practice with the use of force by that country's forces—and that Article 9 does not allow the SDF to participate in activities of this kind.

Later, in the context of the "war on terrorism" in the aftermath of the attacks on the US on September 11, 2001, the SDF was dispatched to the Indian Ocean and Iraq. Unlike the German involvement in the International Security Assistance Force (ISAF), the SDF only engaged in activities that did not involve the use of force, such as refueling support to the "Coalition of the Willing" and humanitarian and reconstruction assistance and security assistance in Iraq. In this context, too, in addition to a strict prohibition on activities by the SDF itself, the areas within which the SDF was allowed to operate were limited to "non-combat zones (*hi sento chiiki*; specifically, the SDF was dispatched to Samawah)". This was driven by the need to be able to demonstrate that the SDF was operating in non-combat zones set apart from the "combat zones" within which the troops of other countries were engaged in the use of force, to avoid any possibility of

"integration" with the use of force by other countries' troops.

(3) Limited recognition of the exercise of the right of collective self-defense

The third period covered the years up to the passage of the recent package of security-related legislation in 2015.

In the years that followed the Gulf War, Japan successfully sent the SDF to participate in PKOs and to help in the "war against terrorism," while managing to balance this against the provisions in Article 9.

Meanwhile, the international security environment surrounding Japan has become increasingly challenging in recent years. China has been behaving increasingly like a regional hegemon, while North Korea has worked to develop its nuclear and missile capabilities. In this challenging environment, a problem for Japan was that for many years, Japan had taken the view that the collective self-defense exceeded the "minimum necessary force for self-defense." According to this view, even if US forces active near Japan and contributing to Japan's security came under attack from a third country, the SDF would not be able to launch a counterattack unless they were attacked themselves. Likewise, if a third country launched missiles at the US, Japan would not be able to intercept the missiles, despite having the capability to do so.

For many years, invoking the right of self-defense had always come with the proviso that it meant "in the event of an armed attack against Japan." In other words, it was only the exercise of the right of individual self-defense that was recognized. This changed on July 1, 2014, when a cabinet decision under Prime Minister Shinzo Abe added a new set of conditions that allowed Japan to use force "also 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." This opened the way to legislation to allow Japan to exercise the right of collective self-defense.

Even so, for the exercise of the right of collective self-defense to be recognized, it was not sufficient for an attack to have taken place against a country that is in a close relationship with Japan—it was also limited to a situation that "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" (a so-called "Survival-Threatening Situation"). This imposition of such strict limits on the exercise of the right of collective self-defense was felt to be necessary because the constitutional interpretation of the "minimum necessary force for self-defense" was still maintained. The decision to impose limits on the exercise of the

right of collective self-defense can be seen as having created a framework for defending the "minimum necessary" line.

Based on the 2014 cabinet decision, on September 19, 2015, Japan passed the new package of Legislation for Peace and Security. This recognized that Japan could exercise the right of collective self-defense in Survival-Threatening Situation. The same legislation also allowed an expansion of participation by the SDF in PKOs and similar activities. Following this new legislation, the geographical limits that restricted the SDF to participation in PKOs only within non-combat zones were scrapped, and revised to allow them to operate in zones other than those in which actual combat is taking place.

In spite of these changes, however, the previous constitutional interpretations—that Japan can maintain only the "minimum necessary force for self-defense," and that contributions to PKOs must not be integrated with the use of force—have not changed. The limited recognition of the exercise of the right of collective self-defense, precisely by limiting the conditions within which Japan can exercise this right, serves to underline that Japan's recourse to the right of collective self-defense remains within the boundaries of the "minimum necessary force for self-defense." Although the new definition of the areas within which the SDF can participate in PKOs as "zones in which other countries are not actively engaged in combat operations" is more lenient than the previous restrictions, which limited the SDF to "non-combat zones," it nevertheless still attempts to guarantee that SDF activities in these areas will not become "integrated with the use of force" by other nations. In this respect, the restrictions remain unchanged.

The present situation and agendas of the Constitution and national defense

Despite the changes outlined above, there is still a tendency in some sectors of Japanese society to regard the very existence of the SDF as contravening the Constitution. And even if people do recognize the constitutionality of the SDF, it is necessary to follow the rather tangled logic that we have seen in the previous section. Given this, there is a school of opinion, heard chiefly from conservatives, that argues in favor of revising the Constitution to insert a clear reference to the existence of the SDF.

Under Prime Minister Fumio Kishida, the ruling LDP was victorious in the elections for the House of Councillors held in July 2022, having made an election pledge to amend the Constitution. However, the concept of "constitutional revision" is not as straightforward as it might appear at first glance, and numerous possible approaches exist. The proposal for constitutional revision put together

by the LDP on March 26, 2018, says that it will maintain both clauses of Article 9 as it currently stands as well as the existing constitutional interpretations. The proposal says adding a new clause in addition to these, making clear and explicit reference to the maintenance of the SDF.

It is true that the Legislation for Peace and Security does not resolve all the issues with regard to the Constitution and defense. For as long as Japan holds to the constitutional interpretation that says the country can maintain SDF only to the "minimum necessary for self-defense," it will continue to be necessary to draw a line somewhere that defines what that "minimum necessary" means in practical terms.

On collective self-defense, the Peace and Security Legislation marks a limited acknowledgment of this right. For example, Ken Jimbo, a specialist on security affairs, has argued that the current legal interpretation does not make it clear whether Japan can intercept missiles fired by a third country at a target outside Japan itself (for example on US territory or US troops operating at sea). Likewise, the argument that PKOs must not be "integrated" with the use of force is still maintained as before. This means that even in international peacekeeping and similar operations, the SDF is still limited to operating in zones where other countries are not currently engaged in actual combat. Opinions are likely to differ on whether this delineation will be effective in actual operations.

Meanwhile, if the plan for constitutional revision is merely to add a clause explicitly making clear the existence of the SDF, then ultimately the question whether the SDF represent *senryoku* renounced in the second clause of Article 9 will continue to be a point of contention for as long as the second clause remains in place. In this sense, the main purpose of the new clause may be to elevate existing government interpretations to the level of formal inclusion in the text of the Constitution. Of course, this would not be without significance in itself—but nevertheless, issues remain, in particular the need to weigh the significance of a limited amendment of this kind against the possibility of widespread unrest accompanied by an organized opposition movement and the risk that a proposal to amend the Constitution might be defeated in a referendum (a defeat that would damage the legitimacy of the SDF and would make the prospect of meaningful constitutional change unthinkable for the foreseeable future).

Conclusion

As we have seen in this article, the main events from the 1950s (when the government's interpretation of the Constitution affecting national security became established) until the present can be thought of in three separate stages.

First was the period up to the end of the Cold War. During the Cold War era, Japan's provision of bases to US forces under the terms of the Japan-US Security Treaty was highly significant in itself, and simply by pursuing an incremental defensive capability under the constitutional interpretation that it was allowed to maintain the minimum necessary for self-defense, Japan was recognized as playing a role within the Western alliance. By contrast, any response that went beyond this in national security policy was made impossible by fierce ideological disagreements within the country.

Second was the period after the Gulf War, when Japan started to contribute to international peacekeeping. However, evidence for the constitutionality of the SDF participation in PKOs and the "war on terrorism" continued to be based on the concept of the "minimum necessary for self-defense."

Third was the period that lasted until the enactment of the Peace and Security Legislation, in the context of an increasingly challenging security environment in East Asia. The enactment of this legislation made possible the exercise of the right of collective self-defense and an expansion in the scope of participation in PKOs. Even so, the constitutional interpretation that SDF should be limited to the "minimum necessary force for self-defense" continues to be maintained.

Because of the complications and limits of the constitutional interpretations on national security, there is a certain amount of support for the idea of constitutional revision. However, as I explained at the outset, the Constitution itself sets the hurdles to revision quite high, and it is difficult to see any meaningful constitutional reform becoming a reality in the near future.

Some people believe that Japan should simply change the traditional "minimum necessary force for self-defense" interpretation of the Constitution, without necessarily amending the Constitution itself. This view argues that Article 9 prohibits only wars of invasion, and does not restrict the exercise of the right of self-defense as recognized by international law or the use of force as part of measures for collective security based on the UN Charter. However, constitutional scholar Masanari Sakamoto has raised doubts about whether this interpretation reflects an appropriate understanding of the Japanese text of the first clause of Article 9.

The concept of "minimum necessary force for self-defense" has been the biggest point in the relationship between the Constitution and national defense in postwar Japan. It is fair to say that how Japan interprets and organizes this concept in light of the regional security environment will be the focus in the years to come.

Reference material

Jitsuo Tsuchiyama (2007), "War Renunciation, Article Nine, and Security Policy," in Thomas U. Berger, Mike M. Mochizuki, and Jitsuo Tsuchiyama, eds, *Japan in International Politics: Foreign Policies of an Adaptive State,* Boulder, CO: Lynne Rienner Publishers

Yasuaki CHIJIWA

Yasuaki Chijiwa is Senior Fellow, National Institute for Defense Studies, Ministry of Defense.

He studied international politics at Hiroshima University (B.A.) and Osaka University (M.A. and Ph.D.). He was Visiting Research Associate at George Washington University, COE Research Fellow and JSPS Research Fellow (PD) at Kyoto University, Assistant Councilor at Cabinet Secretariat (National Security and Crisis Management), and Visiting Scholar at Columbia University. His research interests include a postwar history of Japan's defense policy and war termination study.

His publications in English include "Insights into Japan-U.S. Relations on the Eve of the Iraq War: Dilemmas over 'Showing the Flag'," *Asian Survey* Vol. 45, No. 6 (November-December 2005) and "Unfinished 'Beyond-the-Threat Theory': Japan's 'Basic Defense Force Concept' Revisited," *NIDS Journal of Defense and Security* Vol. 17 (December 2016). He won several awards such as the 7th INOKI Masamichi Award of Japan Society for Defense Studies and the 43rd ISHIBASHI Tanzan Award.