



# Do Not Forget About National Security by Clinging to the Constitution

## — Significance of a report submitted by the Advisory Panel on Reconstruction of the legal basis for security

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### Introduction

The first cabinet headed by Prime Minister Abe Shinzo set up the Advisory Panel on Reconstruction of the Legal Basis for Security (hereinafter the “Advisory Panel”) in 2007 with Yanai Shunji, former administrative vice foreign minister and former ambassador to the United States, as its chairman. The Advisory Panel submitted a report to then Prime Minister Fukuda Yasuo in 2008 because his predecessor, Abe, had stepped down from the post during his term of office. Fukuda did not give consideration to the report and chose to shelve it.

Returning to administrative power in December 2012, Abe set up the Advisory Panel again in February 2013. The reestablished panel consisted of its original members.<sup>1</sup> I have advanced discussions by the panel as its acting chairman because Chairman Yanai was abroad due to his position as president of the International Tribunal for the Law of the Sea.

Those who are interested can find details of the discussions in a report the panel submitted to Abe in May, 2014. In this article I would like to state points I consider the most important in a way that is somewhat free, with a dash of my personal views, because it will be a lengthy report that covers many points at issue.



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### Basic Issues

To start, I would like to emphasize that the objectives of the Advisory Panel are to investigate whether there are deficiencies in the existing legal system on security and to recommend ways for improving them if and when they are found. The panel does not limit itself to discussions on the right of collective self-defense. In addition to this right, the panel has discussed issues such as legal deficiencies within the scope of the right of individual self-defense and relationships under a collective security arrangement.

To cite an example, the Japanese prime minister can mobilize the Japan Self-Defense Forces (JSDF) when his country faces an armed attack, which is defined as an organized and planned invasion by foreign countries. But there are no further definitions except for this case. Whether an attack is an obvious invasion of this type is often unknown today, as Russia’s actions in Ukraine clearly demonstrate. Chances are higher that an attack amounts to what we call a low-intensity conflict.

<sup>1</sup> Professor Hosoya Yuichi of Keio University joined the Advisory Panel in the summer of 2013.



However, the Self-Defense Forces Act has no stipulation about the right of self-defense in such conflicts. The Advisory Panel is proposing to correct this legal deficiency as soon as possible.

The JSDF can be dispatched to transport rescued Japanese citizens only in cases where they experience danger abroad. The Self-Defense Forces Act has no stipulation about rescue itself.

Regarding collective security, under the present arrangement, Japan cannot offer backup logistic support, engage in transportation or sweep mines when a United Nations force is organized or a multinational force is assembled on the basis of a United Nations Security Council resolution supported by nations including Russia and China, as in the case of Iraq's invasion of Kuwait in 1990, even though such a force is rarely established. The Advisory Panel's proposal includes a recommendation for arrangements that enable Japan to at least perform those duties.

However, in many cases, flaws in the current Japanese legal system on security boil down to the interpretation that the exercise of the right of collective self-defense is not allowed under the Constitution of Japan and the Cabinet Legislation Bureau's expansion of the scope of such prohibition. Discussions by the panel have focused on the issue of the right of collective self-defense for that reason. Panel members were led to discuss collective self-defense rather than having demanded taking up it as an issue.

Nonetheless, Japanese people have been showing an extremely high level of interest in the Advisory Panel's discussions, particularly those on the right of collective defense. This is a surprising situation. Belief in the Constitution that could be labeled excessive seems to lie in the background of this situation. This belief includes the view that changing the interpretation of the Constitution is a serious problem and the opinion that Japanese security will be all right as long as it maintains the Constitution the way it is now. In this article I would like to bring to light the fallacy of such a belief by discussing the relationship between the Constitution and the right of collective defense.

## The Right of Collective Self-Defense and Conditions for Its Exercise

At this point we should again go over the right of collective defense. All countries have the right to conduct armed counterattack when they are attacked. This is the right of individual self-defense. But small and medium-sized countries cannot defend themselves alone when they are attacked by a great power. For that reason, to defend each other they must cooperate with countries that share their interests and ways of thinking. A country is permitted to cooperate with the use of forces with another country, assuming that an attack was made on it and if leaving the matter as is would produce serious security effects on the country. This is the right of collective self-defense.

Both the right of individual self-defense and collective self-defense are for protecting a country. They are not obligations; thus, these rights are exercised in some cases and not in others.

I have cited the following six criteria with regard to their exercise: (1) an unwarranted attack on a country that has close relations with Japan, (2) an express request from the country that experienced the attack, (3) the outlook for serious effects on Japan's own security to arise when the attack is left as is, (4) prior or ex post facto approval by the Diet, (5) comprehensive judgment by the prime minister regarding the advantages and disadvantages of the exercise of the right of collective self-defense and (6) the acquisition of transit permission from third countries in cases where their territories are traveled to for the exercise of the right of collective defense.

Countries around the world share in common criteria 1, 3 and 5. Criteria 2 and 4 are a little stricter than those adopted worldwide. However, they are not too different from the global standards. Criterion 6 takes the national sentiment of surrounding countries into consideration.

As I explained above, these criteria are a little more restrictive than global standards. Among these six, criteria 3 and 5 are most important. The Japanese government must judge these points cautiously and quickly. They are precisely areas where the Japanese prime minister faces a real test of his ability as a leader.

There are people who call the Japanese leader unreliable. But who else can make a judgment? Should we ask the U.S. president or the secretary-general of the United Nations to judge for us? Should we leave the job to government officials? Should we leave the matter as is and let another country invade Japan?



There are even those who absurdly criticize Prime Minister Abe, labeling him a hawk who wants to make war. However, it is impossible for Japan to wage war against a neighboring country that has nuclear weapons<sup>2</sup>. Should the Japanese prime minister make a careless judgment and entangle Japan in a conflict, he or she would be ousted from the post immediately. That is what democratic control is all about.

There is one further point. I am of course not positive about the exercise of the right of collective self-defense myself. However, I believe not accepting the exercise at all is harmful to Japan's national interest. The current discussion does not come from the confrontation of a group for the exercise of the right and another group against it. It comes from a confrontation between a group that wants to enable it to prepare for the worst and another group that finds such an option unnecessary and absolutely refutes it. I think the group that says Japan should keep its ban on the exercise of the right of collective self-defense has the responsibility to demonstrate that the country can defend itself without exercising it. The responsibility for verification lies with the group opposed.

The right of individual self-defense became exercisable with a change in the interpretation of paragraph 2, Article 9 of the Constitution made in 1954. However, Japan has never exercised this right since. In the same way, I hope Japan will never need to exercise the right of collective self-defense after becoming able to do so.

## Cases of Emergencies in Areas Surrounding Japan

Next, let me take up the subject of an emergency in the Korean Peninsula, which is one of the focuses of the right of collective self-defense. Japan has a law for such an event, called the Law Concerning Measures to Ensure the Peace and Security of Japan in Situations in Areas Surrounding Japan (hereinafter the "SIASJ Law"), enacted in 1998. Under the SIASJ Law, Japan can furnish supplies to the ally in areas outside combat zones when an emergency takes place in its surrounding area and the ally is attacked by a third country. Such operation is referred to in the law as rear-area logistic support. However, this is an expression that does not exist in the common-sense understanding of security in the world. The expression was coined just for the matter of convenience. The SIASJ Law also prohibits Japan from furnishing supplies such as arms and ammunition to an ally even in areas outside battle zones.

Japan must provide solid support to operations the ally undertakes in areas near Japan that contribute to Japan's security, except in cases where the concerned ally started a conflict. Support limited in the manner described in the previous paragraph is entirely insufficient in that respect.

Such an odd law was enacted because there is the principle ban on the exercise of the right of collective self-defense, which says Japan may not fight a battle for another country when Japan is not attacked. The supply of goods in combat zones and supply of arms and ammunition are not allowed, either (collectively banned) because such acts are considered the same as fighting.

Some say Japan can apply the right of individual self-defense for defending U.S. warships in surrounding areas. However, it is impossible to deal with such need using the right of individual self-defense unless the Cabinet Legislation Bureau changes its interpretation of this right, considering the fact that the bureau strongly resisted enactment of the SIASJ Law and agreed to make a compromise, employing a concept called backup logistic support.

As I explained above, changing the principal ban on the exercise of the right of collective self-defense is the only way to reshape the SIASJ Law to suit reality.

Some say attacks on U.S. warships in areas surrounding Japan will be a question of the right of individual self-defense because Japan will also be attacked in such cases. Yet that is not always the case. As the tactics of Sun-tzu teach, the most effective policy for forces that regard Japan-U.S. security arrangements with hostility is to divide the two countries. To do so, they may attack U.S. warships but avoid attacks on Japan for a certain period. We must bear such possibility in mind.

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<sup>2</sup> Refer to my article in the October 2013 issue of *Chuokoron* regarding the point that it is impossible for Japan to become a military power.



## The Sea Lane Issue

Let me take up the issue of sea lanes next. The interruption of crude oil shipments from the Middle East will be a matter of great consequence for Japan. Assume that a conflict like the Iran-Iraq War broke out, causing a certain country to lay mines. Their removal means the obstruction of the actions of the country that sowed the mines. Accordingly, such operation requires exercise of the right of collective self-defense. Removal of these mines becomes possible for the first time after they lose effect and are abandoned for that reason. That is the position the Japanese government takes at the moment.

It will be a matter of the right of individual self-defense when a laid mine strikes a blow on a Japanese warship. It will be a matter of collective security when the act of laying mines produces global repercussions, and Japan will not be able to take steps toward removal of the mines. Japan also will not be able to do so when mines cause damage to a country that has close relationships with it unless it can exercise the right of collective self-defense.

Deterrence is vital in sea lanes. The important thing is to prevent crises from emerging. To cite an example, the U.S. Navy is patrolling the Indian Ocean along with warships from other countries. It is protecting sea lanes through this operation. Japan should take part in this, but it cannot do so because the patrol operation could involve Japan in conflicts with other countries.

In fact, the JSDF are taking part in operations for dealing with pirates in the Gulf of Aden. They are protecting not only lives and assets of the Japanese, but also lives and assets of other people through the operations. The JSDF have never been involved in a battle in the Gulf. This is a matter of course because pirates wanting to make money never take a risk such as a battle with a warship.

The same goes for the defense of sea lanes. Patrols work as a deterrent. Compared with patrols off the coast of Somalia positioned as policing actions, patrols in the Indian Ocean may exceed the bounds of such actions because it is such a huge area. Nevertheless, they are basically deterrent operations. They protect Japan's national interests. It is virtually unthinkable for the patrols to infringe on the rights of other countries. Despite these conditions, the principle against the exercise of the right of collective self-defense and its extended interpretation are making the defense of sea lanes in the Indian Ocean impossible for Japan.

## PKO Cases

Next let's consider peacekeeping operations (hereinafter "PKOs").

Many countries take part in PKOs under the United Nations flag except in unusual cases. As an example, fifty-five countries, including Japan, dispatched troops and thirty-nine others sent police officers to the UN Mission in South Sudan (UNMISS). Troops from other countries come to the rescue if and when JSDF units are attacked. However, the JSDF cannot go to the rescue of its counterparts from other countries if and when they are attacked. Why? Because such an operation is said to constitute participation in a battle fought for another country.

The JSDF can use weapons as a participant in PKOs only when it protects itself or people or weapons under its command. The JSDF are not permitted to use weapons for protecting the armed forces of other countries and civilians. The JSDF cannot participate in a rescue when staff members of the Japan International Cooperation Agency (JICA) working in the field are in danger.

Why are the JSDF supposed to act in such a thoughtless manner? This is because of an erroneous interpretation of paragraph 1, Article 9 of the Constitution of Japan, which stipulates that Japan does not exercise armed force for settling international disputes. The origin of this stipulation is the Kellogg-Briand Pact (Treaty for the Renunciation of War) of 1928, which denied wars as an instrument of national policy. This pact was a milestone in the process for illegalizing wars.

However, Japan stubbornly insisted that the Manchurian Incident was just an incident, not a war, and its actions over the incident did not violate the Treaty for the Renunciation of War. For reasons including this, the United Nations Charter prohibited the use of armed force in general, instead of wars, in June 1945. More precisely, the charter prohibited countries from settling international disputes in which they are interested using armed force or threats employing armed force.



Considering this trend toward the illegalization of wars, international disputes in paragraph 1, Article 9 of the Constitution must be such disputes in which Japan is a party. That is a matter of course. The so-called MacArthur Notes, which served as the basis for the Constitution of Japan, also expressly state that Japan renounce war to solve *its disputes*. In those days, all people regarded international disputes as those in which Japan is involved as a concerned party. In that case, the use of armed force in United Nations PKOs should not fall under the scope of the ban.

To state additionally, paragraph 1, Article 9 prohibits the use of armed force, not the use of weapons. The use of armed force refers to an act of a considerably large scale that a nation performs as the exercise of its sovereignty. The use of weapons means an act far smaller in scale.

In fact, PKOs are activities for cooperating in efforts to maintain and restore peace under the United Nations flag. Participation in large-scale military operations is impossible through the PKO framework.

For that reason, all countries lay down the rules of engagement (hereinafter “ROE”) in PKOs cautiously, placing importance on the safety of their soldiers. In particular, advanced nations set rules regarding matters such as when their soldiers can fire warning shots and when they can fire them underfoot. Their ROE prohibit fatal shots except for the really serious cases. Still, there is no country that cannot protect the troops of other countries or that cannot use any weapon whatsoever when there is a small force that prevents it from achieving a mission. Hence, limiting the use of weapons in PKOs based on paragraph 1, Article 9 of the Constitution is doubly wrong.

Consequently, Japan has supplied only with insufficient functions, even though the country has taken part in PKOs successfully and its participation has been highly regarded.

The Cabinet Legislation Bureau does not permit JSDF units from taking part in PKOs to get involved in a fighting with other countries (states or equivalent groups) because such conditions equal the exercise of the right of collective self-defense. However, PKOs send troops to areas where main parties to conflicts have agreed to a cease-fire. For that reason, JSDF units in PKOs seldom clash with a state or equivalent group. The interpretation of the Cabinet Legislation Bureau is prohibiting acts within the scope of generally accepted behaviors in international relations in consideration of risks that are virtually nonexistent, and producing PKO units unable to prepare themselves for highly probable risks.

We should change this situation definitely. In fact, we have no choice but to change the interpretation when it comes to paragraph 1, Article 9 of the Constitution because it is a sensible stipulation like the United Nations Charter from an international point of view, and its revision is unthinkable.

## Paragraph 2, Article 9 of the Constitution and the Right of Collective Self-Defense

That Japan is unable to exercise the right of collective self-defense is just one interpretation based on paragraph 2, Article 9 of the Constitution of Japan, which stipulates that Japan cannot have land, sea or air forces and other military capabilities. Unlike paragraph 1 of the same article, this is a very unique and strange stipulation in the world. It is impossible for a sovereign nation to maintain security without military preparation.

Nosaka Sanzo of the Japanese Communist Party criticized the draft Constitution of Japan, asking if armed forces for self-defense were not necessary, when the Imperial Diet deliberated the draft in 1946. Responding to this criticism, then Prime Minister Yoshida Shigeru explained that all military preparations would be banned under the Constitution of Japan, adding that such a view might lead a country to war. However, Director General Ohmura Seiichi of the Defense Agency stated in 1954 that Japan could possess and exercise military power at the minimum level necessary, regardless of the stipulations of paragraph 2, Article 9. The ruling on the Sunagawa case upheld this position in 1959.

The Sunagawa case was about U.S. armed forces and their bases, though. Legal principles built in the ruling do not necessarily have binding power. However, the ruling contained interesting judgments, including the decision by presiding judge Tanaka Kotaro, the judgment that Japan has the right of self-defense as a matter of course, and the judgment that defending other countries is essential in this age.



That aside, it was rare in those days to discuss differences between the right of collective self-defense and of individual self-defense. In 1972, the Japanese government stated that the minimum level necessary does not include the right of collective self-defense. In a reply given in the Diet in 1981, the government also said the inability to exercise the right of collective self-defense does not seriously affect Japan's security.

However, as I stated earlier, small and medium-sized countries cannot defend themselves against a great power alone. Accordingly, they must form alliances or work cooperatively with other countries and defend themselves with countries with close interest. Such arrangement has been called a relation as close and cooperative as that of lips and teeth since ancient times. It is common knowledge that a nation is in danger when its close partner falls into ruin. The right of collective self-defense is a standardized version of this common knowledge in the postwar world<sup>3</sup>.

As I stated above, the right of collective self-defense is the right to align with countries in close relationships. In some cases it prevents conflicts. In other words, the idea that underlies the right is deterrence. The Cabinet Legislation Bureau's way of thinking that the minimum level necessary does not include the right of collective self-defense goes against the common-sense understanding of security.

The view that the minimum level necessary does not include the right of collective self-defense has huge problems as a theory.

There is also the view the government expressed in 1981 that Japan had experienced no particular disadvantage from its disallowance of the exercise of the right. Ironically, this view was correct. The defunct Soviet Union was a major threat for Japan in this period. Japan, the United States and China under the leadership of Deng Xiaoping cooperated with each other against the Soviet Union. They overwhelmed Soviet Russia with their combined force. Within this framework, Japan played sufficient roles from a geopolitical viewpoint by defending its own territory.

However, the situation is different now. Can Japan defend itself against surrounding countries possessing nuclear weapons without the right of collective self-defense? Some people say there is the Japan-U.S. Security Treaty. The treaty is not the Constitution, however. The treaty expires in a year if the United States gives notice of its annulment. I do not think such a thing will happen in the foreseeable future, though.

## Conclusion

Discussions by the Advisory Panel drew criticism including the opinion that the discussions took place out of the blue. However, the Research Committee on Constitutional Issues of the *Yomiuri shimbun* newspaper pointed out the need for Japan to terminate its prohibition on the exercise of the right of collective self-defense in the first recommendation it issued in 1992. The Liberal Democratic Party has also already advocated reexamination of the right of collective self-defense as a party decision. The panel submitted its first proposal in 2008. Calling the panel's discussions sudden and abrupt, disregarding all these developments, is simply neglectful.

The government should take more time to create a consensus among the people. Trustworthy explanations and respect for the popular will are important. That is a matter of course. However, statesmen cannot fulfill their responsibilities just by standing close to the popular will.

It took former Prime Minister Takeshita Noboru ten years to successfully introduce a general consumption tax after a failed attempt by then Prime Minister Ohira Masayoshi in 1979. It took former Prime Minister Hashimoto Ryutaro eight years to raise this tax to 5%. It took seventeen more years to bring the tax rate to the current level of 8%. How much debt has the government accumulated during this while?

We cannot keep peace just by strictly observing the Constitution. Anyone with common sense can understand this. Japan's surrender in 1945 violated the Constitution of the Empire of Japan. Japan could not have surrendered and would certainly have caused decisive fighting on its mainland and

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<sup>3</sup> Mori T., 2009. *Jieiken no kiso* [The underlayer of the right of self-defense]. Tokyo: University of Tokyo Press.



sustained greater damage if it dwelled too much on the strict observance of the Constitution of the Empire of Japan.

The Constitution of Japan is important. However, it is the highest written standard within Japan only. The law of nations, which is a global standard, and military balance maintain peace in addition to the Constitution. The very approach of making a start from the question of how to defend the Constitution is wrong. How to keep peace is the top priority. A state must think of how to maintain peace.

All groups have their objective or mission. The objective or mission of a company is to manufacture quality products, offer good service, generate profits and raise the happiness of its employees. All groups establish internal rules for achieving their objective or mission. Rules are important. However, observance of the internal rules should never be an end in and of itself and cause observers to forget the original mission. The security and happiness of its citizens are the goals of a state. State security is the basis for these goals. The security and happiness of citizens are impossible without this foundation.

Members of any organization group sometimes forget its great mission and pay excessive attention to rules. Yet such conditions represent a crisis for it.

*Translated from “Tokushu: Shudan-jieiken toiu sentaku — Garapagosu anpokan karano dakkyaku/Kenpo ni koshushite kokka no anzen wo wasureruna —Anpohoseikon hokokusho no igi (Feature: A Choice Called the Right of Collective Defense – Break Away from a Galapagos View of Security / Do Not Forget About National Security by Clinging to the Constitution – Significance of a report submitted by the Advisory Panel on Reconstruction of the legal basis for security),” Chuokoron, June 2014, pp. 72–79. (Courtesy of Chuo Koron Shinsha) [June 2014]*

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