



Anomaly of Japan's Constitutional Debate about Security Policy

IWAMA Yoko, Professor of International Relations, National Graduate Institute for Policy Studies (GRIPS)

Every day in Japanese newspapers, you read arguments about whether the new security related legislation of the Abe Government is against the Japanese Constitution. It was a constitutional debate from the beginning. Prime Minister Abe wanted to change the constitutional interpretation of the Government related to the use of the right of individual self-defense. Until now, starting from the seventies, the Japanese Government had taken the view that Article 9 of the Japanese Constitution only allows for the very minimum use of the right of self-defense: that “minimum” only included the right of individual self-defense and not that of collective self-defense. From there, it was surmised that the Japanese Self-Defense Forces (JSDF) could not participate in any activities that could be seen as forming part of the “use of force” that other countries may be undertaking. So whether in Cambodia or Iraq, the JSDF was there to transport “unarmed” personnel and goods that cannot be used in combat operations. They could transport food but not ammunition. They could provide fuel to vehicles not participating in combat operations, but if the vehicle was heading towards a combat area, no fuel could be provided. So every time they provided fuel, they were supposed to ask, “Where are you heading off to?” Otherwise they were engaged in reconstruction work like building and mending roads and bridges.



IWAMA Yoko, Professor of International Relations, National Graduate Institute for Policy Studies (GRIPS)

Probably, you had heard about this. And probably you tried to understand how the Abe



government tried to introduce a minuscule change of interpretation, allowing Japan to make use of the right of collective self-defense only if “an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn people’s right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan’s survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measured for self-defense in accordance with the basic logic of the Government’s view to date.”¹ Now, how many conditions are posed in that sentence I leave it to you to count.

It has been a year since this decision. The Government has introduced a package of legislation to deal with this change of interpretation. It is now being debated in the Diet. And the Government approval rating has been sinking lately. The immediate cause for the decline was a hearing at the Commission on the Constitution in the Diet on June 4th. The hearing was supposed to be about Constitutionalism. Three constitutional lawyers were invited to give their opinion on the matter. In the course of the discussion, one opposition parliamentarian asked if the academics thought the use of the right of collective self-defense was permitted under the present Constitution. All three, including the one invited by the governing Liberal Democrats, replied that it was not permitted under the present Constitution. It was a huge embarrassment for the Liberal Democratic Party. Since then, it has been trying to persuade the people that the legislation is in fact constitutional, with little success. According to the most recent poll taken on July 6 by the *Mainichi shimbun* newspaper, the number of those who disapprove of the Abe Government (43%) has surpassed those who approve (42%) for the first time. That is an epoch making moment for a Government that prided itself on high public approval.

So who is to decide whether this legislation is constitutional or not? According to the Constitution itself, it is supposed to be the Supreme Court.

Article 81. The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act.

If this is so, those who think that the Government is violating the Constitution should take the case to the Supreme Court. That would make things clear for everyone. The government also agrees that only the Supreme Court has the right to judge upon the constitutionality of

¹ Cabinet decision on development of seamless security legislation to ensure Japan’s survival and protect its people, July 1, 2014. http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei_eng.pdf



any law. Unfortunately, it is not so easy. The last ruling of the Supreme Court concerning the right of self-defense was in 1959. Yes, 1959. Fifty-six years ago. Even the Prime Minister himself was only five years old. Why? Because the Japanese Supreme Court has acted very restrictively in making use of this right. The verdict confirmed that Japan has the right of self-defense, but did not go into the difference of individual or collective self-defense.

In the Japanese legal system the Supreme Court is the court of last resort for all cases, not just for constitutional reviews. That makes it pretty busy. Further, the Japanese judicial system has restricted the possibility of making constitutional cases in the first place. Only those who have actually suffered infringement of concrete right can appeal to the court. In the 1959 Sunagawa Case, a group of people were arrested under special penal law, when demonstrating inside the American base in Tachikawa, Japan. In relation to this arrest, they tried to argue that the presence of the American Base and American Forces in Japan itself was unconstitutional.

Even where there has been infringement of right, the Supreme Court has been very slow to respond. Usually the Supreme Court has chosen to remain neutral and let the Diet lead the way in changing social customs. So the women in Japan are currently waiting for a verdict whether, according to the Constitution which supports equality of gender, they may also be allowed to use their maiden name even after getting married. Currently, a couple must choose one or the other's surname, which according to social custom means that it is the women who have to change their surname. It was only last year that it was judged that it was unconstitutional to discriminate between children born inside or outside legal marriage when inheriting their parent's property.

So in the current case, the draft legislation is not even law yet. Nobody can possibly claim to have had their right infringed by this, and hence there can be no law case.

Many countries have a Constitutional Court which can judge the constitutionality of legislation itself in abstract terms. The Japanese system is supposed to be modeled on the American system, but in the United States itself, the Supreme Court has become far more active since the 1950s. It has not shied away from giving verdicts on socially controversial issues like race and gender. The most recent case has been the ruling on the right of same-sex marriage.

We are still decades away from expecting the Japanese Supreme Court to hand out a ruling on same-sex marriage. But on issues like security, we really need a rule to clarify the constitutionality of certain acts. Because the Supreme Court has not functioned as the ruler of the last resort on this issue, the Government, and the Cabinet Legislation Bureau, has held sole responsibility for the interpretation of the Constitution.



Theoretically, the separation of the three powers (the legislative, the administrative, and the judicial) is supposed to guard the Japanese citizens from the abuse of power. In reality, the administrative power has weighed far heavier than the other two in postwar Japanese democracy. It is about time we start considering how to restore the balance. We need clarity in order to move forward. If we say we believe in the rule of law, then we should entrust our judicial system with more responsibility and power.

Translated from an original article in Japanese written for Discuss Japan. [July 2015]

IWAMA Yoko

Professor of International Relations, National Graduate Institute for Policy Studies (GRIPS) Graduated from KyotoUniversity in 1986 and earned her Ph.D. in Law at the University. Served as Research Assistant of KyotoUniversity (1994–97), Special Assistant of the Japanese Embassy in Germany (1998–2000) and Associate Professor at GRIPS (2000). Professor since 2009. Her specialty is international security and European diplomatic history. She has served on numerous government committees including the Council on Reconstruction of a Legal Basis for Security (2006-7, 2013-).

