

# Pacifism in the Constitution of Japan, 1946 –The Meaning of the Right to Live in Peace–

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## INTRODUCTION

What role has Pacifism in the Constitution of Japan, 1946, been playing in the development of postwar Japanese Society? I would like to examine such an issue not from the point of view of a power politics but from that of the Japanese common people. The following facts are introduced in an essay which one East German philosopher of law has recently sent to me: After a long period of time, a high defence expenditure has a tendency to reduce investment and productivity. For example, in the 1960's, the extremely small amount of the defence-expenditure of Japan – almost one-nineth of that of the U.S. – is in striking contrast to the facts that the investment rate into the gross social production – more than twice that of the U.S. – and the development of labour productivity – more than 6.7 times that of the U.S. – are quite high.

These figures seem to me to need making more accurate from a statistical point of view, but are enough to suggest that the pacifism of the Constitution of Japan has something to do with a rapid development of the Japanese economy. Of course, the

pacifism is not only related to the rapid economic development, but also is closely connected with the issue of the way of life of ordinary Japanese people.

There are two closely connected aspects of the problem which I shall examine in this report. Firstly what is the Pacifism in the Constitution of Japan for the common people and how have the common people been related to the interpretation and use of the peace clauses of the Constitution? Secondly, what does the right to live in peace mean, and what kind of role has the right been playing for the common people?

## 1. MEANINGS AND WORKING OF PEACE CLAUSES

1) The pacifism in the Constitution of Japan, 1946, is a basic precondition by which human rights are respected and the sovereignty of the state is established. The peace clauses are the text in which the content of the pacifism is expressly formulated. It is composed of both the preamble and Article 9. Its normative contents are consistent with the trends in the development of constitutions all over the world, that is, the collective security by the United Nations and the outlawing of wars. Not only that, the contents also go somewhat beyond these trends. It is this that is said to be characteristic of the peace clauses. In other words, the characteristic means that the Japanese people preserve their security and existence, trusting in the justice and faith of the peace-loving peoples, and that Japan renounces all kinds of wars, and does not hold land, sea, and air forces, as well as other war potential.

For example, to be free of the powers of militarism, and to take the position of international harmony and military neutrality to prohibit all kinds of war preparations, and to recognize the right to live in peace; these are the concrete contents of the peace-clauses.

Pacifism should combine with contemporary Constitutionalism which means both a form of democratic government and a respect for fundamental human rights, and the former combines with the latter in the provisions of the Constitution of Japan.

I might be allowed to term the combination of both principles a Japanese form of constitutional pacifism. From a theoretical and normative point of view, constitutional pacifism exists not only as a constitutional institution but also as a standard norm of a state-life as well as a social-process. In this sense constitutional pacifism should exist as a realistic and concrete constitutional order.

2) If that is the case, how and to what degree has constitutional pacifism as a constitutional institution been undermined by the Japanese governing powers? And how much have the common people been restricting the working of the governing powers by putting the clauses of the constitutional pacifism to practical use?

Having been prevented from amending the clauses (or provisions) of the Constitution, the legislature (the National Diet) and the executive (Government), even during the post-military occupation period, followed the American policy in which Japan entered into a military alliance with the United States, and in such a framework did they put forward Japanese rearmament, by means of a change in the interpretation of the peace clauses. By this the important parts of the peace clauses have been undermined. Firstly, the clause in which war preparations, the holding of armed forces and war (the use of forces) are prohibited was undermined both by a rearmament mainly composed of the Self Defence Forces and by a revival and a strengthening of activities of the arms-producing industries.

Secondly it is the military alliance based on the Japan-U.S. Security Treaty that undermined the "military neutrality".

Thirdly, the governing powers prevented "the right to live in peace" from being realized by interpreting the right as simply a political declaration and treated it as though it were not a legal norm restricting the use of state powers actually and concretely.

Under these circumstances, the Government has been adopting such a technique of interpretation of the peace clauses thus: self-defence activities are allowed, provided it falls short of war,

holding a self-defence force is not prohibited, provided it falls short of war potential. And using the right of self-defence does not contradict the renunciation of the right of belligerency.

The Supreme Court decided the Sunagawa Case in favour of the Government: it is held that the stationing of U.S. Forces in Japan is not *prima facie* clearly unconstitutional and void. U.S. Forces are not the war potential of our country itself, and its aim is only to make up for the shortfall in Japanese defence forces.

Japanese peace movements and democratic forces have restricted the undermining of the Constitutional institutions, which the ruling class and groups endeavour to achieve, and have been continuing activities in which they demand that the Government should achieve the full enforcement of the peace and democracy clauses of the Constitution. There has been a tension between the rearmament policy of the Government and the movement of the parties of the opposition of the common people. Taking up one aspect of the Government's constitutional interpretations which has not been undermined, the Government shows such an interpretation of the peace clause as that arms exports to foreign countries, the national conscription system, and overseas deployment of the armed forces are prohibited, and that the three no-nuclear principles — which means not holding, not making, and not allowing anyone to introduce nuclear weapons — remain part of the Government's defence policy, even though the principles are not the direct result of the interpretation of the Constitution. However, with both the recent changes in the international situation and Japan's development into one of the world's major economic powers in the background, Japan entered into a new stage in which she has to decide whether or not she is to take a more positive role than before in her hands in the Japan-U.S. Security Treaty System. The voice from outside as well as inside has been rapidly strengthened, which demands a re-examination of the former defence policy itself. It seems that one of the moves to respond to this voice was, for example, the issue of an emergency bill (Yuhjirippoh), which the Government

attempted to enact two years ago (1978).

Now at the beginning of the 1980's, a more extensive interpretation of the Japan-U.S. Security Treaty is to be advanced. According to this, the possibility is being examined of the Self-Defence Forces engaging in an armed battle in the territory of other Countries. Such an action of the Self-Defence Forces exceeds the boundary of an original right of self-defence of the Country. If so, there seems to exist only two legal interpretations by which the boundary might be evaded. One of them is positively to rationalize the overseas deployment of the Self-Defence Forces by invoking the right of collective self-defence which is formulated in Art. 51 of the U.N. Charter as well as in the Peace Treaty with Japan. The other one is to change a former interpretation, that is, to recognize the use of the "right of belligerency" of a Country in respect to war against foreign invasions. Now these moves have come into the open.

It is the idea of "new human rights," called the right to live in peace, which is serviceable as a weapon of the common people's resistance to such moves.

## 2. MEANING AND ROLE OF RIGHT TO LIVE IN PEACE

- 1) *"We recognize that all peoples of the world have the right to live in peace, free from fear and want." (the Preamble of the Constitution of Japan).*

The movement and thought of Democracy which succeeded in destroying the Fascist forces who had violated peace and human rights, and which tried to build a new human-rights-respect world on a fortress of peace, formulated the idea of the rights to live in peace in the Constitution of Japan. World history faced an utterly new problem as a result of development of science and technology, especially of atomic energy. On the other hand, the common people's consciousness and movement which keeps and struggles for peace came rapidly into existence after the World War II.

The right to live in peace as a positive one came to be confirmed

in the Constitution of Japan, though in search of the ground of legal thoughts of this right, whichever is taken up, the natural law, the maturity of human rights consciousness of the common people, or a combination of the right to resistance, the right to survive, and the right to acquire peace.

It is since the "Eniwa Case" that the ground, contents and applicability to judicial cases of this constitutionally positive right have begun to be discussed. Because it was the first case in which the problem of constitutionality of the Self-Defence Forces was presented in Court. After that, this right was recognized and applied to the Naganuma Naiki base issue by the Sapporo District Court for the first time in the history of the Japanese courts. In 1973 the court held that the inhabitants at Naganuma near to Sapporo in Hokkaido are the legal subject of this right to live in peace.

As a matter of fact, the order of the Minister of Agriculture, Forestry and Fishery which permits the cutting down of a forest reserve for headwaters at Maoiyama for the purpose of making Naiki Base for the use of the Self-Defence Forces, violates the right of the inhabitants to live in peace. Therefore, the court has a good reason to exercise positively the power of judicial review.

The decision was overturned by the Appeal Court, and the case is pending before the Supreme Court. Some constitutional lawyers and scholars do not support the District Court's decision by which the system of a forest protected by the Forest Law guarantees concretely the rights of the inhabitants to live in peace. They say that the right is so abstract that it is not possible for the right to be applied to the individual case in court.

It is certain that there seems to be a series of difficult problems to be solved in this matter, but it is also true that the actual possibility of the inhabitants suffering damage by a putative enemy's counter-attack seems to exist in fact as a result of constructing a Missile Base on the ruins of the forest reserve. As far as it is so, it is just and proper that the inhabitants present their demand to prevent the danger coming from anyone who

introduces this actual possibility. And if the Government and the Administration refuse the inhabitants' demand, the demand cannot be presented other than before the Court, it is fully necessary to recognize that the right to live in peace is applicable to a case in court.

2) The contemporary meaning of the right to live in peace is not limited in its applicability to judicial review. In so far as a whole conception of the Constitution set up a new world to respect human rights on a fortress of peace is recognized, the right to live in peace should be situated in the heart of the conception. It is a contemporary idea which is useful to change a predisposition of an old society itself and to build up a basis of a new society as well. And it denies an old government of the state the opportunity of using war as a political weapon, and delineates the future course of all activities of a government of the State as serving the purpose of creating peace. So to speak, it is an idea of law which would be useful to a "revolution for peace."

Japanese scholars and researchers have been studying the idea of this right not only from the viewpoint of law, but also from those of economics, politics, culture, international relations and so on, by setting up some academic associations of peace studies.

By the way, it is not until 1978 that the idea of the right to live in peace came to be expressed in the documents of the United Nations. It is a matter of being given a welcome in the sense of an internationalization of the constitution as well. The Declaration of the Special Session General Assembly for Disarmament of the United Nations in 1978 — Declaration on Social Preparation for Life in Peace — will be one of the important documents as one in which the United Nations for the first time recognized this right. Already, of course, Article 20, section I of B Convention of the International Conventions of Human Rights (adopted in 1966) had the following provision: "Any propaganda for war is prohibited by law." This provision which was ratified

by Japan as well as the USSR without any reservation is expected to be effected under individual conditions in the future by the Covenant itself. In this connection, the UNESCO World Conference on Disarmament Education held in Paris in June, this year (1980) recognized this right to live in peace in its Final Document.

## CONCLUSION

The national movements for realizing the right to live in peace have been developed in Japan arising from the first atomic devastation in the history of mankind. The following are some of the ways in which the legislature and others have been prevailed upon to make a statute or treaty. The first is to enact a law for those attacked by the Atomic Bomb. The law should not simply be one of social security, but should contain the principle of the state compensation for war damages resulting from the use of the atomic bomb. The second is "the law on the prohibition of holding, making and allowing anyone to introduce nuclear weapons and so on." This law aims at keeping rigidly to the three no-nuclear-weapon principles which prohibit the Japanese Government from holding, making and allowing anyone to introduce a nuclear weapon. The third is "the Draft of the international treaty preventing the use of nuclear weapons." This demands that the principle of not being the first to use a nuclear weapon "under any circumstances" ought to be established. And those three demands for enacting the laws and the treaty form a trinity.

If we not only recognize the right to live in peace as an idea, but also conceive the right to be realized practically, the true "revolution for peace" is necessary in all matters concerning mankind, social relations, the state and the world. If it is a revolution, a change should be wholesale as well as radical. If so, the philosophy itself should be reconstructed in order to achieve the revolution for peace.

At any rate, we should stop insisting that some pacifist ideologies are absolutely right. It is reality in which peace is a precondition of "human rights-respect" as well as democracy, that



lays the foundation of the reasoned assertion of the need for peace. In this sense, it is true that the problems of the right to live in peace demand that both the ideology of law and the science of law in contemporary Japan be fundamentally re-examined.

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