

Freedom, Peace and their Guarantees

- From the Viewpoint of the Constitution of Japan -

KENJI URATA

INTRODUCTION

The main theme of this paper is "Freedom, Positive Peace and the Social System." To clarify this subject I would like to consider some interpretations of the meaning of "freedom" and "peace," and to try and see what is meant by "guaranteeing" them. To this end I would like to set out some details of how Japan understands freedom and peace, and how they are guaranteed in relation to Japan's present situation. Finally, I would like to consider a few problems related to these themes. Before going any further, however, I should perhaps clarify what I mean by "from the viewpoint of the Constitution of Japan." By this I mean the position of the people dominating the constituent power,¹ taking into account the spirit of the Potsdam Declaration with its criticisms of the Fifteen Year War. In short the standpoint of the Japanese common people.²

I. TWO CONSTITUTIONS OF JAPAN

Before moving to a consideration of "freedom," I feel it would be useful to compare and contrast the Constitution of Japan (the Showa Constitution) and the Constitution of the Empire

This paper was originally presented as a draft to the Waseda University Centennial International Symposium at Waseda University on August 22 and 23, 1982. The Symposium was entitled "Facing the 21st Century: Critical Choices for Japan and the World."

Kenji Urata is Professor of Constitutional Law, School of Law, Waseda University.

of Japan (the Meiji Constitution).

One hundred and thirty years ago the "black ships" came to Japan's shores, changing the policy of virtual self-imposed isolation which Japan had been following for more than two and a half centuries. Shortly after this, the shogunate and its feudal clan government collapsed, being replaced by the modern Emperor system (Tennoism from Tenno meaning Emperor) in the Meiji Restoration.

Faced with the problems of controlling the popular pressure led by the Popular Movement for Democracy and Civil Liberties and reforming the unequal treaties being forced on her, the newly-established government issued an Imperial Rescript on the subject of "The Gradual Formulation of Constitutional Policy." Following a Prussian-style constitution, Japan's leaders at that time decided to adopt the doctrine that sovereignty rested with the monarchy. Shigenobu Ohkuma³ and other members of the House of Councilors who were advocating the adoption of a British-style constitution were dismissed, and Azusa Ono,⁴ protesting at the dismissal of Ohkuma, resigned his post in the government. This occurred in Meiji 14 and one year later Ohkuma founded the Tokyo Professional School, the predecessor of the present Waseda University.

The Meiji Constitution was promulgated by the Emperor in 1889. This constitution guaranteed freedom to landowners, capitalists, and the imperial bureaucracy and ensured their profits. Under the Meiji Constitution the use of sovereign power rested in the hands of military and civil officers, so that the power of the members of the House of Representatives, who were elected by popular vote, was strictly subservient to the oligarchy. The subjects had no freedom, and in practice carried the burden of bringing to fruition the state's policy of building up "a rich country with a strong army."

As Japanese capitalism continued to develop, a certain degree of progress was made towards parliamentary government and meaningful democratic participation, but following the Showa Panic of the 1930s, Japan moved into the condition of wartime state-monopoly capitalism and the military faction under the

egis of the Emperor autocratically started to control government affairs without reference to the Constitution. So the gains made by the Meiji Constitution were lost at the time of the Fifteen Year War (1931–1945). In short, the Meiji Constitution was not designed to emancipate the people of Japan and offer them peace; therefore, they had no legal guarantees to freedom and peace.

Before the establishment of the Showa Constitution Japan had to experience such historical events as its defeat at the end of the war with atomic bombs.⁵ Having accepted the Potsdam Declaration of 1945, sovereign power was transferred from the emperor to the people of Japan: then the postwar reforms under the occupation, and the establishment of a pacifist government through the free will of the people followed. However, although the people held the constituent power, the U.S.A. had a great influence upon the drafting of the constitution. At the same time the military faction and parasitic landowners were cleared from the political stage, and the power of the Zaibatsu (the clique controlling industry, business and finance) was heavily damaged. However, even after these reforms, capitalism and bureaucracy still remained, but in a reorganized form.

In order to promote the dignity of man Japan chose pacifism and democracy. Freedom and peace were to be guaranteed under a democratic system of government.

The success of the Chinese Revolution after the War, however, led America to devise her policy of using Japan as a main springboard for American strategy in Asia, encouraging the rearmament of Japan. This American policy was, in fact, contradictory to Article 9 of the Japanese Constitution, which renounces war, and prohibits the maintenance of armed forces as well as other war potential. Japan acceded to the American policy and agreed to the peace treaty, signed by a majority of the combatants, (but excluding, for example, the U.S.S.R. and China), and the Japan-US Security Pact. Legally, Japan regained her independence from occupation with her accession to these agreements. However, despite this independence, autonomy in the fields of

military and foreign policy was severely restricted.

The liberal democracy instituted by the Showa Constitution provided a fertile soil for the postwar restoration of Japan and the rapid growth of the Japanese economy, providing a close parallel to the case of West Germany. It is commonly accepted that pacifism has contributed greatly in helping Japan become what she is now. With the Showa Constitution freedom and peace were made subject to the control of the people. However, we must realize that in practice freedom and peace have to be guaranteed through total democratic participation and popular movements.

II. FREEDOM

1. Two main-streams can be observed in the development of the concept of freedom. One is represented in the Declarations of Rights by Liberal States, as in the cases of France and America after their respective Revolutions. This stream, in turn, embodies two underlying concepts, typically expressed by John Locke: natural rights and the social contract.⁶ In the American Declaration natural rights are described as "life, liberty and the pursuit of happiness." In the French Declaration of 1789 natural rights are articulated as "liberty, property, security and resistance to oppression." The common denominator is a denial of the state's right to infringe on the individual's freedom. Should the state infringe on the citizen's rights, as a consequence of the social contract, then the people have the right to overthrow such a government (the right of resistance or revolution).

The second of our streams appears in the Declaration of Rights by Welfare States (Social States), where various social rights are guaranteed by the state. The first appearance of such a concept is found in Jacobinism,⁷ where the concept is expressed that property rights should never impinge on a fellow countryman's rights to liberty, security and property. Any conduct which violates these rights is seen as essentially unlawful. Therefore, the state considers it its duty to protect socially weak groups from violation in these areas. This duty of the Welfare State (Social

State) was first promoted in the Weimar Constitution, promulgated just after World War I, and was commonly accepted in new constitutions by European nations, and Japan, after World War II.

The first concept of freedom we have examined encompasses the idea of the individual's freedom from the restrictions of the state's power. If we consider that freedom in this case is when the state does not intervene in personal freedom, then we may call this "negative freedom."

In turn, our second concept of freedom upholds the freedom of social groups through the application of the state's power against the encroachment on their freedom by any other social group. We may, therefore, call this "positive freedom."⁸ There is, of course, the third notion of freedom — active freedom —, which means that the people as members of the state have the power to take part in state activities, that is the right to an election franchise.

2. The Meiji Constitution approved the concept of active freedom to a limited number of the adult men, but did not recognize the concept of positive freedom. Moreover, it did not even tolerate negative freedom. For instance, freedom of worship could be restricted by both Parliamentary and Administrative legislation. In other words, the Meiji Constitution was a system of no freedom.

In comparison to this, the Showa Constitution advances the system of freedom. Stress is laid upon the rights to liberties to protect individual freedom from restrictions by the state. The Constitution also recognizes the state's power to control social powers. So, how is freedom, in practice, guaranteed?

(1) Negative freedom (Modern freedom) — including personal, mental and economic freedom has now taken firm root in Japanese soil. For example, any law that may infringe this kind of freedom requires careful examination from the point of view of its constitutionality. On the other hand, however, any popular rights movement which may be considered to interfere with the

Japan-US Security Pact, or the concept of monopolistic capitalism suffers, in practice, severe restraints in the fields of politics, the media and education. As examples one may cite the censorship of school textbooks and the regulation of election campaigns.

(2) Positive freedom (Contemporary freedom) is probably not well entrenched in Japan yet, as compared with the other developed capitalist nations. For numerous examples the state of the Japanese Social Security system, the educational environment, working conditions, and the restrictions of the labour union movement may be examined. A particular instance that may be quoted is in the case where the Supreme Court judged that the freedom of private companies to pursue profits should be considered as a higher priority than the rights of a worker to maintain the thoughts and creed held by him at the time of his employment. The problem here boils down to: "Can the Constitution be enforced at one's place of work?" and, in fact, the Supreme Court decision in this case⁹ received strong criticism from both the labour unions and law scholars.

(3) With the rapid growth of scientific technology after the War the new pressures on social structures were hard to absorb, leading to the perilous situation now facing Japan in terms of human freedom. Consequently there was a marked increase in concern for legal safeguards, and the notion of New Human Rights has been called into existence. Areas of particular concern in this field are:

- a) the right to know: the right to knowledge about information held by the government;
- b) the right of privacy: the right of everyone to ask for disclosure and modification of information about oneself.

To these examples some scholars have suggested other areas of concern, including the right to a good environment and the right to peace. At present measures designed to approve some of these rights to information are under consideration, through both state laws and local ordinances.

3. Let us examine some freedoms still to be achieved. Since

human beings appeared on earth there has always been a desire to be free from all restrictions and to develop one's personality. In a modern society, in other words a capitalist society, restrictions stem not only from a generalized alienation but also from all forms of economic exploitation. Freedom from exploitation would necessitate a social revolution as well as a political revolution. However, I am not now concerned with the necessary and sufficient conditions for a social revolution in contemporary Japan. Rather I am seeking to find out what it is that opposes freedom of the people, by which I mean the point of maximum development of human ability, and personal independence of the producer from capital, and how this opposition should be overcome.

Given this definition I would like to point out four dangerous systems of social control, any one of which has the potential to kill freedom:

- 1) a military bureaucracy;
- 2) an executive bureaucracy;
- 3) a bureaucracy of gigantic private enterprises;
- 4) a system of American control over Japan under the guise of the Security Pact.

These systems have several features in common, of which I would like to draw attention to four only:

the power implicit in:

- a) authority and coercion;
- b) money;
- c) technology;
- d) information.

If the freedom of the people were to be replaced by any of these powers, freedom would no longer exist. So what must the people do in order to avoid such a situation?

From the point of view of the Constitution of Japan, the following solutions suggest themselves:

- 1) The acquisition of four kinds of concrete freedom by the Japanese people:
 - a) Individual human freedom — this includes the various

categories of human rights stated in the Declarations of Rights of Liberal States;

- b) Political freedom for citizens — including the suffrage defined in the Declaration of Rights of Free Nations;
 - c) Freedom of Existence as a member of society — encompassing the social rights in the Declarations of Rights of Welfare States (Social States);
 - d) Freedom of Nations — which means the right to self-determination of a people and the right to choose a social system approved by the International Covenants on Human Rights.
- 2) These suggested acquisitions contain examples of both positive and negative freedom. However, it is probably inappropriate for us to lay too much stress on the concept of positive freedom which is intended to guarantee social rights. Speaking of the rights to information, for example, this concept of positive freedom may lead to too easy a situation for the government in its control over the private mass media. Furthermore, we may be brought closer to the dangerous situation where the importance of individual human freedom is underestimated.
- 3) However, this is not to say that state control over private power is unnecessary. Many of the evils caused by economic monopolies (whether “de facto” or “de jure”) should be restricted by the power of the state. The personal independence and mental autonomy of workers must be guaranteed at their place of work. As well as these guarantees, the degree of restraint on the political freedom of members of a labour union should be kept within the limits of minimum necessity.

III. PEACE

1. The spirit of the French Revolution can be summed up in the Declaration of the Renouncement of Aggressive Wars: “The People of France renounce all aggressive wars and the use of force

against the freedom of any nation.” (Constituent Assembly, May 22, 1790)¹⁰

After World War I, the ideology of Bourgeois Democratic Revolution was clearly articulated in the Kellogg-Briand (Antiwar) Pact of 1928.¹¹ However, with the Second World War mankind experienced the agony of total war, where mankind itself became a victim of war, and learned at first hand the brutality of nuclear weapons, which at the same time pointed to the fragility of human existence. Moral justification became a relative concept under the potential threat to human existence, and the value of peace and the non-existence of war were stressed. International law after World War II illegalized war,¹² and most post-war constitutions, including the Japanese Constitution, recognized the principle of illegalization of war as part of the intrastate law.

However, peace when considered only as the non-existence of war can be called “negative peace.” The mounting distress of people in the Third World countries after the Second World War, where little benefit accrued to their existence, despite the absence of war, led to a distinction being made between “negative peace,” and the realization of social justice which has been called “positive peace.” Indeed “positive peace” can be seen as freedom from poverty, oppression and racial discrimination.¹³

This concept of “positive peace” is recognized in the preamble to the Constitution of Japan, where it is stated that all the people of the world have the right to live in peace, free from fears and want. In other words, the concept articulated there is not only the right to be free from direct violence (such as war), but also the right to freedom from structural violence such as poverty, oppression, racial discrimination and social injustice.¹⁴

2. The superiority of the military under the Meiji Constitution was reflected in the fact that the Army and the Navy were both placed directly under the control of the Emperor. In fact, the military authorities at that time requested the “independence” of the Army and the Navy from parliament and the government, articulating their own primacy. The state acquired a monopoly of

military power by the introduction of conscription.

A complete antithesis to this was introduced under the Showa Constitution, where Japan was not only declared to be a nation of peace, but this was also enshrined in the Constitution. Even now, however, the historical reasons for the incorporation of Article 9 into the Constitution are not clearly recognized, and its author is still a subject of debate. The historical fact is that the Pacifist Constitution grew from the grim experiences of World War II, where 50 million lives were lost. The Potsdam Declaration, setting forth the conditions for the end of the war, was issued in July, 1945, but it was not accepted by the Japanese government until after the atomic bombs had destroyed Hiroshima and Nagasaki. The reason for this procrastination was Japan's attachment to the substance of the Tenno Regime. It is impossible for us to understand the meaning of a Pacifist Constitution for Japan without bearing in mind the following factors: the devastation through atomic bombing; the assaults on other Asian countries during the Fifteen Year War; the belligerent policies of Japan after the Sino-Japanese and the Russo-Japanese wars, and lastly Japan's reflection on these factors.

The pacifism of the Constitution of Japan follows International Law, where its foundation depends on the collective security, in the real sense, offered by the United Nations, and the declaration of the illegality of war. Moreover, the Constitution goes further than International Law in its quality. What I mean by "goes further" may be summarized as follows:

- guaranteeing security and existence by trusting in the justice and the faith of peace-loving nations;

- denying the right to belligerency and renouncing all wars and from these, Japan's refusing to maintain any kind of war potential.

Thus Japan declares her intention to end militarism, to prohibit the maintenance of war machinery and to devote herself wholeheartedly to the principle of international cooperation. As well, the Constitution recognizes that all people in the world have the right to live in peace, free from fear and poverty.

This pacifism is closely linked with contemporary constitutionalism —a form of democratic government respecting fundamental human rights. It is this combination of democracy and total pacifism which seems to me the typical form of Japanese constitutional pacifism. Some features of this form of constitution are that:

- 1) All government policies and political and social systems are directed to guaranteeing the right to live in peace.
- 2) Should the right to live in peace be violated in some way, the Courts must examine any relevant laws which appear unconstitutional.
- 3) The scope of fundamental human rights is clearly articulated.

So the central idea of the Japanese Constitution is constitutional pacifism. The Constitution exists not only to define the criteria for government activities, but also to define the system itself, and social relations within Japan.

Contemporary international anti-militaristic opinion is reflected in Article 9 of the Constitution. However, from a realistic point of view this Article may have been inserted through American strategy, in order to weaken Japanese militarism. In any event, following the defeat of the Chinese Republic government troops, America decided to use Japan as its central base for controlling Asian nations, and so, under the American occupation Japan in practice deviated from her declared constitutional pacifism.

So how are the Japanese people guaranteed peace?

(1) In the sense of traditional (negative) peace, we are enjoying a longer-lasting peace than we ever experienced under the Meiji Constitution. Under conditions such as these the Japanese Self-Defence Forces and the Security Pact system have been reinforced and strengthened. Nevertheless, it should not be forgotten that American bases on the Japanese mainland and in Okinawa were used in the bombing of Vietnam. In fact, the conditions for this peace have been largely a by-product of the Pax American, but at the same time the framework of the Constitution of Japan,

and the effect of both public opinion and popular movements searching for guarantees of peace, have further assured this state. One result of this cooperation is that Japanese militarism lacks independence from America, and is often opposed by popular movements.

(2) The problem of nuclear weapons should be touched upon here. The Nuclear Disarmament movement of the common people originated on the occasion of witnessing the actual effect of the atomic bomb in Bikini Islands, following Hiroshima and Nagasaki. As a consequence, the Government has laid down three no-nuclear weapons principles. But this has been followed only as a policy, not as a requisite of the peace Constitution. Herein lies a problem. It is the official view of the Government that it is not in contravention of the peace Constitution to produce, maintain and introduce ordinary nuclear weapons, except only extraordinary nuclear weapons like I.C.B.M.s. Scholars of law have raised strong criticism against this policy and some of them have proposed the enactment of the three no-nuclear weapons principles as law.

In fact, the U.S. authorities have testified that tactical nuclear weapons are deployed on the American bases of Japan. It has also been reported that the deployment of theater nuclear weapons has been planned before long. Thus the prior consultation system of the Japan-U.S. Security Treaty has been undermined, and a serious contradiction is developing between the actual results of the treaty and the no-nuclear weapons principles of the Japanese government.

(3) In terms of contemporary peace (positive peace), the question arises of whether any results can be seen. The role that Japan should play as a "big economic power" in eliminating the roots of international conflicts which could lead to a World War is unclear, when considered from the constitutional pacifism of the Japanese Constitution. All we can say is that, at present, this role is not being pursued positively.

3. I would like to point out a problem in the issue of peace.

It is possible to describe history up to the present as an alternate relation between war and peace. Many authors write history of this kind. I wonder, however, if we should not say that from today it would be impossible to imagine even a page of a human history without war.

It is true that there have been two kinds of wars so far, that is, just wars and unjust wars, and that World War II was started with the idea of "a holy war" by Japan, but the leaders were punished in the name of peace, humanity and civilization. Now, however, can we say that even limited nuclear wars can be allowed in the name of justice, even apart from the possibility of their leading to World War III?¹⁵ It is beyond my intellectual capacity to be engaged in a philosophical consideration of the value of peace relative to the justification of any war. There remains the fact, however, that armed struggle is considered legal under contemporary international law in order to allow the establishment of national sovereign states, based upon the right to self-determination of the peoples. I acknowledge the legitimacy of struggle.

With respect to peace in a traditional sense, I would like to point out the following four matters which are sufficiently charged with danger to destroy peace: 1) nuclear weapons, 2) military alliance and military blocks, 3) militarism and 4) manipulation of public opinion including state-defence education. The common factors behind these dangers are a view of peace maintained by power, especially military power, and from this the theory of nuclear deterrence, as well as the theory of the balance of power between the East and West military blocks. Based upon this, the Eastern block proclaims the theory of restricted sovereignty in the community of socialist countries, and the Western block in turn asserts the theory of the right of self-defence for collective security, replacing the collective security system afforded by the United Nations.

Peace for the common people is confronted by this reality and the conflicting ideologies. Such peace should vanquish both the peace-threatening examples given above, and the conflicting ideologies. The following points are the tasks to be fulfilled for actu-

alizing peace for the common people.¹⁶

(1) The first task is to demand of the Japanese government that they follow three basic policies:

- a) the strict observance and practice of the three no-nuclear weapons principles, which in practice should lead to the enactment of the three no-nuclear weapons principles in local as well as in central government, and the establishment of a nuclear weapons-free zone in the Far Eastern area,
- b) the establishment of an politically independent attitude to take steps for general and complete disarmament,
- c) the build-up of a security system in place of military alliances, following a policy of non-alliance.

(2) Of these policies some will be formulated and realized only through accepting a contemporary and positive view of peace as well as the traditional view of peace. For example, choosing a policy of non-alliance is to respect the economic sovereignty of the South, and to aim at the establishment of the New International Economic Order suggested in the International Economic Charter. In practice, this involves the recognition of the right to development of the peoples of the South against the big economic powers of the North, including the U.S.A. and U.S.S.R.

(3) Further progress in the areas of peace research and its connection with peace education and disarmament education¹⁷ are required in order to establish the idea of peace held by the common people. Through this process the reality of constitutional pacifism will be widely recognized and the method of its actualization, including the creation of popular movements and the establishment of institutions for positive peace, will be made.

IV. DEMOCRACY

1. Intranational and international democracy is a measure intended only to ensure the cooperation of freedom and peace of the common people. It does not mean that only democracy is needed, but it is one of the necessary conditions.¹⁸

The democracy discussed here refers to political form of democracy in the broadest sense. Political democracy originally meant a sovereignty of the people. It is important above all as a fundamental idea which gives the people the constituent power, endows a state-power with legitimacy, and in certain cases lays the foundations of the right to disobedience or revolution. The reason why such stress is given to the idea of the sovereignty of the people is that it is the people as a subject of power who give consent to politics, as far as they have precise and sufficient information. Another meaning of political democracy is a representative parliamentary system, which is related to a method of government where as the sovereignty of the people indicates the foundation of the legitimacy of politics. This method of government (i.e., a representative parliamentary system) is a combination of a representative system and parliamentary politics. What is essential for the representative system is the giving of sufficient information to the voters who constitute a mother body to elect representatives. The realization of parliamentary politics, which symbolizes the predominance of parliament over administration and judiciary, today requires a supervision of, and positive participation in, government by the common people.

2. Democracy was not found in the Meiji Constitution, which did not offer the people any opportunity to have information of, or to participate positively in politics. The Showa Constitution contains and institutionalizes the two meanings of democracy, as I have mentioned before. The structure of government of the present Constitution is, however, so complicated that the principle of government called democracy is subject to certain modifications on the level of the system of judicial review and by the symbolic Emperor system.

To what extent is democracy actualized in reality for the common people?

(1) The system of universal suffrage has been established including woman's elective franchise. Yet a question remains as to

whether the preconditions of the exercise of the elective franchise have been sufficiently fulfilled (e.g., freedom of political movements and election campaigns, access to information on national administration, and the reasonable balancing of a fixed number of diet members in electoral districts).

(2) The parliamentary system is maintained as a framework so that policy-making is conducted partly under the initiative of political parties. It has been said, however, that in the important fields of the national administration such as military diplomacy, economy and finance, the bureaucracy of the administration office in practice takes the initiative in deciding and formulating policy. In cases of major changes in policy by any administrative department on a national level a procedure, known as an inquiring commission, is followed (for example, the Second Temporally Administrative Inquiry Commission is one of these commissions). But most of the members of the commissions are the supporters of the political party in power, and important information submitted there is sifted through the hands of the bureaucrats of the administrative office concerned. A question remains, therefore, as to the objectivity of these commissions. The parliamentary system is required to provide the common people with necessary information about national administration when it is asked for. This information may be requested by any concerned citizens or groups of citizens (for example, information on scandals concerning politicians, etc.).

(3) The judicial review system which grew out of the U.S. system of judicial decisions does not always synthesize with the representative parliamentary system, which was primarily a European development. However, even though the judicial review system is considered to be in harmony with their liberalism by the United States, there would, nevertheless, appear to be an inherent contradiction between these two systems since the judicial review system is a sort of oligarchy. But it has been approved since it fulfills the function of guaranteeing the fundamental human rights, which is seen as the essential purpose of democracy. Therefore,

in the Japanese regime of government any breach of freedom and peace should be examined under judicial review, as far as freedom and peace are seen as the fundamental human rights. For example, the courts should be active in guaranteeing the right to live in peace so far as it is one of the most important human rights (this case is at present being considered by the Supreme Court), but all the courts, save one district court, have so far been strictly passive on this issue.

V. A CONSIDERATION OF THE ISSUES

Where does a perspective on building a social system with freedom and peace exist? It is, I think, only to be found by the efforts of the common people to carry through daily thinking and practical movements in order to realize freedom under conditions of peace. I would like to raise two basic issues which become clues to understanding the thoughts and practice of democracy from the standpoint of the common people.

1. The first issue which we should take up for the solution of the problems of the realization of freedom, from the viewpoint of completing democracy, is that the common people should first have a system of open government to make available all information to the public, and to organize a self-education system, and secondly to construct a system to control government through the choices of the common people.

(1) The right to have information about the national administration is established in the United States as the right of everybody to be able to make use of any information, except for information of limited legal interest related to national security or privacy, through the Freedom of Information Act of 1966 (amended in 1974 after the Watergate case) after the formulation of the legal theory by judicial decisions. This produced The Government in the Sunshine Act of 1976. In Japan also, a similar civil movement has recently been promoted to the extent of submitting the drafts of "Declaration on the Right to Access of In-

formation” and “Seven Principles of the Opening of Information,” and so on. In some local governments a trend has developed to draw up regulations to realize these rights.

From the standpoint of the Japanese Constitution “national defence secrets” should not even exist as long as the principle of non-military pacifism is carried through. It is an urgent matter to make an information network useful for peace security among free subjects, such as local government, universities, labour unions, citizen’s groups and so on, without tolerating the concept of a military secret. Secrecy is an enemy of individual freedom.

In relation to this it is also an important issue to cultivate the abilities of the free subjects to organize a system of self-education, in which disarmament education should take an appropriate part. For the solution of this issue the role which the intellectuals of various specialized fields should play will be emphasized anew.

(2) It is necessary for the common people to devise a permanent managing organization as one of the means to vitalize democracy in order to operate a representative parliamentary system, to supervise the autocracy of the monopolistic groups and the bureaucracy, and to inform the public of their activities. As a matter of course, this is a field of activity in which representatives of parliament and journalists can play their own roles. It is necessary, however, for the common people to form a conscious and special organization to deal with a “remote problem” called peace guarantee, in other words, a problem whose close relation to ordinary interest of the common people is difficult to emphasize. Although the ombudsman system can be taken as an example, is it at all possible to devise systems which are not produced by parliament or administration offices, but which work from a standpoint of the common people (Non-Governmental Organizations) in a special manner?

A system maintained by the common people to restrict the power of the anti-democratic forces is imperative especially in order to oppose the manipulation of public opinion, conducted by the complex of industry, bureaucracy and the military, with

their background of powerful influence.¹⁹

2. The second issue which should be taken up for peace security is the following. The Cold War started after World War II because the powers which fought for liberation of the peoples and against fascism were attached to the differences between their social system.²⁰ In about 1950 during the Cold War, the intellectuals and the common people at last organized a peace movement with a perspective for considering the possibilities of avoiding a future World War. Looking back, this reflects a basic change in power relations, and in a sense is one of the political factors causing this basic change in political thought.

The Helsinki Declaration of 1975 is a document which symbolizes the *détente* between the West (NATO) and the East (Warsaw Pact).²¹ I am not sure, but it has been said that we have now entered into a new Cold War period since the Iranian Revolution and the Soviet invasion of Afghanistan. Also it is important that the so-called North-South problem of world politics be solved, as symbolized in the documents of U.N. General Assembly. In view of the problems deriving from the differences of the major social systems, there is no other way, I think, than to make the problems facing democracy clearly known and have the people of the world solve them.

Considered from this viewpoint it becomes important to understand freedom and peace in relation to the aims of democracy. The aim of democracy is human liberation, that is, respect for human dignity. From this teleological viewpoint, it is useful to consider the meaning of freedom and peace in the context of the problems of the rights of the subject, in the various senses of individuals, human beings, citizens, nations and mankind. Considering rights, I would like here to emphasize the following two concerns. One is the right to live in peace, and the other is the right of self-determination of the people.

(1) Through problems concerned with the interpretation of the Japanese Constitution, Japanese scholars of constitutional law have constructed and advocated the theory of the right to live

in peace, a theory which is now attracting increasing international attention.²² Nevertheless, many problems still remain which require inter-disciplinary research, into the genesis and development of the idea, and its position in positive law. The international attention generated does mean that the right to live in peace is now included in the resolutions of the U.N. General Assembly and in the documents of the World Conference of UNESCO.

One of the topics for further consideration is an analysis of the similarities and differences observed when the right to live in peace is considered in relation to the right to peace. The latter (that is the right to peace) seems to be regarded as a concept of right as a guideline for government on the political level, and not as the subjective right of individuals from the state. On the other hand, the former (that is the right to live in peace) contains not only an idea of the right of the people which provides them with conditions to live in peace, but also a declaration of the freedom of individuals from killing and from being killed in conflicts. This is again a subjective right from the state. No one has any objection to the fact that the right to live in peace is a political guideline; the main problem is the question of the contents of the guideline.

(2) There is controversy about the historical and intellectual basis of the right of self-determination of the people.²³ This right has, however, now been approved as a legal principle (Declaration of 1960 on the Granting of Independence to Colonial Countries and Peoples), and has developed and been enriched as the economic right of self-determination (General Assembly Resolution of 1962 on Permanent Sovereignty over Natural Resources), and as the right of dependent people's demanding freedom to choose a political system from their government (Declaration of 1970 on Principles of International Law concerning Friendly Relations and Cooperation among States). There exists a legal consciousness that the contravention of this right means the violation of the freedom of the people and a hindrance to peace-keeping.

The Suzuki-Reagan Joint Statement declared that the Japan-

US Security System is closely connected not only with the peace and security of the Far East, but with that of the whole world. The problem which arises in relation to this is that people who suffer from their imperialist suppression demand the right of self-determination against the international activities which Japan, together with the U.S. promotes. The reinforcement of the Japan-US Security System will in reality suppress the freedom of the Japanese people to choose a social system.

Reflecting upon the development of contemporary international law, and the real problems of the right of self-determination of the Japanese common people, it can be said that an urgent issue is to evaluate positively the idea of the right of self-determination of the peoples as an external aspect of the principle of democracy of the Constitution, and to legalize it as an intranational law.²⁴

CONCLUSION

As we face the World of the 21st Century, our actions should now be directed to realizing the spirit of the Constitution of Japan. The Essence of this spirit lies in the cooperation of freedom and peace, and the way to its realization lies in the establishment of a democracy of the common people. There is, I feel, no other way.

Such an approach is similar to that of the United Nations, so I, for one, appreciate the positive role that the United Nations plays today. Now, however, that the Second Special Session on Disarmament has ended without any notable results, I would like to conclude my paper by quoting the following paragraph from the final document of the First Special Session:

“Disarmament, relaxation of international tension, respect for the right to self-determination and national independence, the peaceful settlement of disputes in accordance with the Charter of the United Nations and the strengthening of international peace and security are directly related to each other. Progress in any of these spheres has a beneficial effect on all

of them; in turn, failure in any one sphere has negative effects on others.”²⁵

NOTES

- (1) Cf. Nobuyoshi Ashibe, “KENPOH SEITEI KENRYOKU (A Constituent Power),” in NIHONKOKU KENPOH TAIKEI (The System of the Constitution of Japan), Vol. 1 (1961), 73–136.

In my opinion the constituent power should be circumscribed by legal principles defending human dignity. As a consequence the people (the subject of the constituent power) should also be where the constituent power derives its legitimacy.

- (2) The meaning of “the people” and of “the common people” is almost identical in this paper. Two aspects of the common people are highlighted in the case of constructing a historical image of the common people. One of these is that they are workers, the exploited as well as oppressed class in the field of production and ordinary life, and the other is that they have already started on the road to achieving self-consciousness and their development as political subjects.

Cf. T. Kadowaki et al. (eds.) NIHON MINSHU NO REKISHI (*A History of Japanese Common People* (1974–5) vols. 1–10.

- (3) Cf. M. Inada, MEIJIKENPOHSEIRITSUSHI (*A History of the making of the Meiji Constitution*) (1960) vol. 1.

Ohkuma who took office as President of Waseda University in 1917, started “a civilization movement” and expounded “a harmony of the civilization of the West and of the East”. Cf. Ohkuma, TOHZAI BUNMEI NO CHOHWA (*A Harmony of the Civilization of the West and of the East*), Waseda University Press, 1922.

- (4) *The Complete Works of A. Ono*, Waseda University Press, 1978–82, vols. 1–5. His KOKKEN HANRON (A Study of the Constitution) (in the first volume) is especially useful for us to understand his perception of British Constitutionalism.
- (5) *A Call from Hibakusha of Hiroshima and Nagasaki: International Symposium on the Damage and After Effects of the Atomic Bombing of Hiroshima and Nagasaki*, held from July 21 to August 9, 1977 at Tokyo. Hiroshima and Nagasaki (Asahi Evening News, Tokyo, 1978).
- (6) J. Locke, *An Essay Concerning Human Understanding* (1690); *Two Treatises of Civil Government* (1690); Cf. J. W. Gough, *John Locke's Political Philosophy* (1950).

F. A. Hayek criticizes both Cartesian rationalism and Benthamian utilitarianism in the tradition of Western liberty, and upholds the banner

of Old Whiggism in England which traces back to Locke who advocated a natural law recognizable in "the light of nature". (F. A. Hayek, *The Constitution of Liberty*, 1960, pp. 54-70, 407-411).

Hayek is the opinion leader of neo-liberalism, and from this viewpoint strongly criticizes socialism (*The Road to Serfdom*, 1944), pointing out the crisis of freedom in the Welfare State (*The Constitution of Liberty*), and proposes an alternative to Parliamentary Democracy (*Law, Legislation and Liberty*, Vol. 1, 1973, Vol. 2, 1976, Vol. 3, 1979).

- (7) J. M. Thompson, *Robespierre and the French Revolution* (1953); E. J. Hobsbawm, *The Age of Revolution* (1977), 73-98, 92-93, 300-301.

Robespierre was deeply influenced by J. J. Rousseau who expounded an egalitarian liberty and freedom from despotism and exploitation.

Further, see, G. Volpe, *Rousseau e Marx* (1957), which discusses the idea of freedom contained in a Rousseau/Marxist social justice.

- (8) T. H. Green, "Liberal Legislation and Freedom of Contract," in R. L. Nettleship (ed.), *The Works of T. H. Green* (1880), Vol. 3. The distinction between "positive" and "negative" liberty was popularized by Green, deriving ultimately from Hegel.

This distinction mainly connected with "inner freedom", has since been put to many uses. Cf. I. Berlin, *Two Concepts of Liberty* (1958), also *Four Essays on Liberty* (1969) xxxvii, pp. 118, 131-4, and C. B. Macpherson, "Berlin's Division of Liberty," in *Democratic Theory* (1970), 95-119. which criticizes Berlin's individual liberalism and the concept of "positive" freedom.

- (9) Supreme Court Judgement, December 12, 1973, [MITSUBISHI JUSHI v. TAKANO] 27 *Minshū* 1536.
- (10) Tadakazu Fukase, "SENSOH HOHKI TO GUNBI TEPPAI NO HOHSHI-SOH TEKİ KENKYU (A Study of Legal Thought on the Renunciation of War and the Abolition of the Armed Forces) (1)", in *KENPOH NO GENDAITEKI KADAI* (Contemporary Issues on the Constitution) (1972), 174, 183.
- (11) Cf. I. Brownlie, *International Law and the Use of Forces by States* (1963), 67-92.
- (12) Ibid. at Ch VI-VIII.
- (13) J. Galtung, "An Editorial", *Journal of Peace Research*, 1964, pp. 1-4; "Violence, Peace, and Peace Research" J.P.R.VI, 1969, in *Essays in Peace Research* Vol. I. pp. 109-134, 388-9 (note 31).
- (14) Cf. J. Rawls, *A Theory of Justice* (1972); R. P. Wolff, *Understanding Rawls* (1977).
- (15) Cf. M. Walzer, *Just and Unjust Wars* (1977), 274-283.

- (16) *Common Security : A programme for disarmament* — The Report of the Independent Commission on Disarmament and Security Issues (1982), 138–176.
- (17) UNESCO World Congress on Disarmament Education — Report and Final Document, SS–80/CONF. 401/37, Paris, 13 June 1980.
- (18) A. Rosenberg, *Democratie und Sozialismus* (1938, 1962 by Europäische Verlagsanstalt); A. Landy, *Marxism and the Democratic Tradition* (1946); C. B. Macpherson, “Related Papers on the Twentieth-Century Predicament”, *Democratic Theory* (1973); *The Real World of Democracy* (1979).
- (19) Cf. M. Margolis, *Viable Democracy* (1979).
- (20) Cf. D. Yergin, *Shattered Peace* (1977, Pelican 1980).
- (21) Cf. M. F. Dominick (ed.), *Human Rights and the Helsinki Accord* (1981).
- (22) T. Fukase, “Théorie et réalités de la formule constitutionnelle japonaise de renonciation à la guerre,” *Revue du Droit Public*, 1963 no. 6, pp. 1109–1159; “De quelques aspects particuliers et universels de la paix constitutionnelle japonaise,” *Revue Internationale de Droit Comparé*, 1978 no. 4, pp. 987–1008.
 S. Takayanagi, “Peace as a human right,” *Annals of the Institute of Social Science* (University of Tokyo) 1981, No. 22, pp. 124–151.
 Y. Hirano, *KIHONTEKI JINKEN TO MINSHUSHUGI NO TOHSHO* (Fundamental Human Rights and the Struggle for Democracy) (1977), 66, 107–113.
 H. Klenner, “Zum heutigen Recht auf ein Leben in Frieden,” *DDR-Komitee für Menschenrechte*, Heft 2 (1981) S. 26ff.; “Der Menschen Recht auf Frieden,” *Neue Zeit*, Heft 4 (1981) S. 149ff.
- (23) Cf. A. Cassese, “Political Self-Determination: Old Concepts and New Concepts,” in Cassese (ed.), *UN Law/Fundamental Rights* (1979), 137–165; O. Šuković, “Principle of Equal Rights and Self Determination of Peoples,” in A. Šahović (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation* (1972), 323–373.
- (24) Cf. K. Fukuda, “KAIHATSU, SHUKEN, SEKAICHITSUJO (Development, Sovereign State and World Order)” *Sekai*, August 1982.
- (25) Final Document of the Tenth Special Session of the General Assembly, §34, in *Yearbook of the United Nations* 1978, Vol. 32, p. 42.