COMMENT

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We just had excellent presentations on three very interesting subjects. Following Professor Auer's discussion,[1] I wish to make two points about Article 9 of the 1947 Constitution. First, this provision was imposed by the General Headquarters ("GHQ") and the Supreme Commander for the Allied Powers when the top priority of the Japanese government was to maintain and save the emperor. Our government was told that accepting Article 9 was indispensable to accomplishing that goal; so the government had no choice. Furthermore, our government understood the meaning of the provision as denying completely Japan's right to maintain any war potential, not only for aggression but also for defense. Perhaps the GHQ did not intend to prohibit war potential for self-defense permanently, as Professor Auer points out in his article. I do not think that the GHQ's intention matters, however. As Professor Auer also notes, our government thought Article 9 prohibited even the Self-Defense Forces and explained it so to the Diet and to the people. Article 9 was enacted with that understanding.

Second, the Japanese government was later forced to reconstruct the army police reserve force. Perhaps we had a choice at this time to refuse the demand of the GHQ, but we were still under the Occupation, and it was difficult to refuse. Article 9, the reality of rearmament, and the contradiction between them were imposed on Japan from the outside. In using the word "imposed," I am not blaming the United States. I am just stating the facts. The contradiction exists, and our problem is to rescue ourselves from it for we cannot live with it long.

The solution is either to amend Article 9 or to abolish the Self-Defense Forces. The government initially opted for the first solution. Under the Hatayama Cabinet, the Liberal Democratic Party ("LDP") announced its intention to amend the Constitution and set it as an issue for the next election. But it failed in that election to obtain the two-thirds of the votes of the lower house necessary to pass the proposed amendment. This defeat was a success for the Socialist party, which had appealed to the people to "Never send your sons again to the battlefield!" This slogan really echoed the sentiment of the people at that time.

Looking back, I realize that this event was harmful to our political system because the Socialist party was time-bombed by the position it took. It lost the flexibility to adapt itself to a changing reality. This led to the permanent

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1. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, LAW & CONTEMP. PROBS., Spring 1990, at 171.

rule of the LDP and degraded our democracy by depriving it of a change of government.

On the other hand, failing in the attempt to amend the Constitution, the LDP changed strategies and adopted the plan of amendment by interpretation. Now our government says that the war potential[2] prohibited by the Constitution means a force sufficient to wage modern war effectively, and the Self-Defense Forces are not such a force. Consequently, it is constitutional. However, this argument seems illogical for if the Self-Defense Forces cannot wage modern defensive war effectively, then there is no use for them.

Instead of taking steps to amend the Constitution in accordance with the procedures in the Constitution, the government obtained the same result by giving Article 9 a distorted interpretation. This is what Professor Auer called a flexible interpretation; I would call it a false interpretation. This is not a question of interpreting the meaning of the Constitution with respect to something that was not debated, predicted, or forecast at the time of making the Constitution. The issue was debated, and war potential was clearly and explicitly denied even for self-defense. The original meaning is completely clear. As a constitutional law scholar, I cannot distort the clear meaning of the Constitution. If we bow to the fait accompli, there would be no constitutionalism and no rule of law. This is the understanding of Article 9 held by the majority of Japanese constitutional scholars. However, I do not think that our scholars want the immediate abolition of the Self-Defense Forces for we all know that is impossible. We have to make sincere efforts to bring the provisions of Article 9 into agreement with reality. Otherwise, the Constitution will lose the trust of the people, and the government will not think itself bound by the Constitution. This will do harm to our rule of law.

I turn next to the issue of malapportionment. With regard to Professor Hata's article,[3] please note that the constitutionality of apportionment is contested in a suit seeking to nullify the election only in the district at issue. It is not a suit against the whole election but only against the election in a particular district. Also, these suits do not challenge the validity of any future election, but only affect an election held in the past. The plaintiff who is a voter in a disfavored district brings suit against the election commission governing that district and seeks to nullify the election by contending that the apportionment is unconstitutional. The remedy is limited to the nullification of the election only in the challenged district. The representatives elected in that district lose their seats and another election will be held in that district.

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2. Professor Auer said that our government now admits to having defensive war potential. Professor Auer translated the word *jieiryoku* into the phrase "defensive war potential." However, *jieiryoku* is difficult to translate into English and defining it as "defensive war potential" is a little misleading because our government actually says that all war potential is prohibited by the second section of Article 9 and we cannot have war potential even for defense. Consequently, *jieiryoku* means something different than war potential in the interpretation of the Japanese government.

3. Hata, *Malapportionment of Representation in the National Diet*, LAW & CONTEMP. PROBS., Spring 1990, at 157.

Here we face a problem, however, because before we proceed to the new election, we have to reapportion, and this is the job of the Diet. The new election has to be held within forty days after the nullification, and the date of new election has to be announced at least fifteen days beforehand.[4] This leaves only twenty-five days for the Diet to amend the apportionment, and this is almost impossible. If the Diet fails to amend the apportionment, however, its disregard of a judicial order may cause the court to lose face. Although I do not believe that the court will lose prestige in this situation, the court evidently does and is therefore reluctant to nullify elections.

One solution might be for the court to declare the election invalid as of a certain effective future date. This gives the Diet more time to agree on a redistricting plan. Our Supreme Court has not adopted this solution because no one thought of such a prospective ruling at the time that the Supreme Court handed down its 1976 decision declaring an apportionment unconstitutional.[5]

The Supreme Court believes that if an apportionment is declared unconstitutional, the elections in all the districts might possibly be annulled. That would be disastrous, for no Diet would exist that could alter the apportionment. However, this analysis is faulty because most of the districts (I would say at least three-fourths of them) are fairly apportioned. Of course, the number of legally apportioned districts depends on what measure is used to judge constitutionality. But even using as the maximum permissible deviance the ratio of two to one, which coheres with the prevailing opinion among constitutional scholars, more than 75 percent of the districts are constitutional and would not be challenged in court. The voters in those districts have no standing to challenge the malapportionment. Since the Constitution only requires a quorum of one-third of the Diet members to enact valid legislation, enough legally elected representatives would exist to alter the apportionment.

I will also say a few words on the availability of injunctive relief. An injunction is a commonly used remedy in the United States for malapportionment cases. It is a restriction on future elections that does not affect the validity of past elections. When the apportionment is found unconstitutional, an injunction could prevent future elections from being held without a change in the apportionment scheme. It is therefore a very effective remedy. If the legislature fails to alter the apportionment in due time, the judge can order the appropriate authorities to carry out the election at large. He or she can even reshape the apportionment. In Japan, however, judges have never enjoyed these sweeping powers. Politically speaking, I am not against our judges having that power, but the traditional mentality of our judges would prevent them from wielding that power in practice. Our judges always seek justification for their actions in explicit provisions of law, and we do not have any provisions that would authorize injunctive relief. Therefore,

4. *Id.* at Part V.
5. Kurokowa v. Chiba Election Comm'n, 30 Minshū 223 (Sup. Ct., G.B., Apr. 14, 1976).

so long as Japanese law does not grant judges wide discretion for remedies, no injunctions will be issued. Personally, I would like to see the judges approve the issuance of an injunction, but it is unlikely that such a remedy could succeed.

Finally, I move to the third issue, which was discussed by Professor Usaki:[6] the electoral campaign. Our electoral campaign is regulated in every aspect and it is almost impossible for voters to participate voluntarily in campaigning. For example, if Japanese citizens want to campaign for or against political candidates without becoming a member of the campaign group of a candidate, they face extensive restrictions on the types of activities in which they can participate.[7] The Supreme Court has found these regulations to be constitutional by analyzing them only in relation to the convenience they create for the candidates. Equal footing among competing candidates is more important to the Supreme Court than the individual liberties of the voters. If equality is guaranteed by a particular regulation, it will pass constitutional review, however irrationally it may restrict the activities of the voters.

The Supreme Court does not view campaigning as a right of the voters, but as a question of fair play among candidates. So, as long as all the candidates are ruled by the same equal regulation, that regulation is permissible. This is why the Supreme Court gives wide discretion to the Diet and refuses to require the government to show a compelling state interest in any particular regulation. Given these facts, I fear we have a long way to go before we can truly have democracy.

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6. Usaki, *Restrictions on Political Campaigns in Japan*, LAW & CONTEMP. PROBS., Spring 1990, at 133.

7. If Japanese citizens are not members of a candidate's campaign group, they cannot distribute handbills, display campaign posters or placards, use cars or loudspeakers, communicate political opinions in newspaper, television or radio advertisements, or campaign door-to-door. *Id.* at Part II.