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PEACE IN THEORY AND PRACTICE UNDER ARTICLE 9 OF JAPAN'S CONSTITUTION

LAWRENCE W. BEER*

I. INTRODUCTION

With her defeat fifty years ago in the Second World War, Japan stopped shooting. Japan has never begun shooting again. That fact, by itself, is remarkable for a twentieth-century great power in Asia. Among all the world powers, Japan's record since 1945 has been the most distinctively peaceful, in compliance with ideals of international law and morality and of the United Nations, but also in compliance with the legal requirements of what Japanese call their "Peace Constitution." My contentions here are that Japan's practice of quasi-pacifism¹ under Article 9 of the 1947 Constitution of Japan for a half-century represents an original and valuable contribution to the thought and practice of constitutionalism in world civilization. In addition, the end of the Cold War, the USSR, and colonialism have made the Japanese model appear less utopian and more usefully suggestive for some other countries than was true in the past.

There are inconsistencies between the ideals of Article 9 and certain elements in Japan's defense system, and in the old Liberal Democratic Party which ruled from 1955 until 1993, numerous leaders opposed the Constitution's demands. Nevertheless, the anti-pacifists have been blocked repeatedly in their efforts to ignore or change Article 9, and in substantive practices Japan now provides an anti-militarist example of what is not only desirable but now possible and advisable for many nation states. Japan's record shows that peace, security, and great power status need not depend heavily on military power, and that war or quick belligerent responses to foreign provocations in violation of interna-

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1. I use "quasi-pacifism" because a consistent pacifist position denies a right to self-defense whether in personal conflicts, domestic public affairs or international relations; the Japanese position applies only to international relations, and law allows self-defense.

tional law is not a common sense necessity for national security. Geopolitical factors and the Mutual Security Treaty with the United States (1960)² has eased the pursuit of pacifism in the decades since 1945; but Japan's history and the continued resistance of some nationalistic Japanese leaders to recognize the nature of her barbaric aggression in wartime Asia suggest that a revival of the military's ascendancy was more likely than what happened—a decisive renunciation of war and political militarism, opposition to nuclear weapons, unique restraints on military spending, military activities, and weapons trade, and unmatched Official Development Act (ODA) support for non-military development efforts in the non-West and for ecological protection.³

Bear in mind that no modern or current world power was more aggressively militaristic or culturally more adulatory of military virtues than Japan before August 15, 1945. Moreover, Japan had quickly learned in the nineteenth century that it was not the great civilizational power of Western Christianity, art, philosophy, science, business, or technology that lay behind Western dominance in the past few centuries. Most immediately, it was military power, military force brought to bear on the entire non-Western world, and earlier on Latin America. Beginning with the United States in the 1850s, Western powers forced Japan to sign unequal treaties. As a result, Japan's primary task in the second half of the nineteenth century—as she worked towards independence from unequal treaties and a place of pride in the world—was to achieve military parity with Western powers. There was simply no alternative. This is not to underplay the importance of other elements in Japan's first modernization in government, law, education, technology, and economy—but to stress their instrumental nature in relation to the sine qua non of military capacity. Nor is it to condone Japan's mili-

2. Treaty of Mutual Cooperation and Security, Treaty No. 6, June 23, 1960. For the text of the treaty, see HIROSHI ITOH & LAWRENCE W. BEER, *THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS*, 1961-70 104-05 (1978).

3. Ryuji Mukae, *Japan's Diet Resolution on World War Two: Keeping History at Bay*, 36 *ASIAN SURVEY* 1011 (No. 10) October 1996. In June, 1995 the House of Representatives passed its first formal war apology ever. Of 511 members, only 230 supported the Resolution; the 171 members of the opposition New Frontier Party (*Shinshintō*) and 70 members of the three coalition government parties absented themselves from the vote. This was the first time in more than twenty years that a Diet resolution had been passed in the absence of a major opposition party. A good number of prominent politicians are still unable to admit any wrongdoing in Japan's militarist period behavior, to the consternation of other Asian countries and the world. On this problem, see *Resolution Is Blot on History*, *JAPAN TIMES WEEKLY INT'L ED.*, June 19-25, 1995, at 30. On August 15, 1995, Prime Minister Tomiichi Murayama, at ceremonies commemorating the end of the Second World War, made a formal apology for Japan's aggressions. *ASAHI SHIMBUN*, August 15 (evening ed.) 1995 at 1.

tant nationalist extremes in Asia, especially between 1930-1945.⁴ However, it would be chauvinistic hypocrisy to condemn Japan's militarism without taking adequate notice of the military barbarism at the foundation of Western dominance of Asia.

In 1998, over fifty years after the worst system-failure in its long history, Japan continues to insist on the ultimate bankruptcy not only of its own previous-nationalist militarism but of ideological, nationalist, and ethnicist militarism wherever it occurs on all continents. The militarization of America's political culture during the Cold War, and the great costs of warring to the United States, Japan's only ally, in the past thirty-five years have not increased Japan's trust in military solutions; but Japan does pay most of the cost of maintaining a few United States bases in Japan.

In the rest of this essay I will try to explain *why* Japan became anti-militarist, then *how* Article 9—the “no war clause”—has affected Japanese law, policy, and national attitudes, and finally what lessons, if any, Japan's experience suggests for constitutionalist restraints on militarism in government, law, and policy.

II. THE IMAGERY OF JAPAN'S CONSTITUTIONALISM

To understand Japan's constitutional pacifism, and indeed its constitutionalism as a whole, it is essential to take into account the radical reaction to pain and failure Japanese suffered under the three-part, integrated constitutional system during “the dark valley period” (1930-1945).⁵ From the 1860s on, Japan's able leaders worked systematically to unite a feudally divided people into a nation of subjects passionately loyal to the manipulated Emperor (*Tennō*) and his increasingly repressive and militarist state. This modern Emperor system differed profoundly from the ancient, weak traditional institution. Modern means of mass education and indoctrination—as well as legal, police, and administrative controls—were used over many decades to create an exquisitely authoritarian, militarist, and nationalist government whose every action was legitimized by legal and quasi-mystical reference to the state

4. See generally RACHELLE LINNEN, *CITY OF SILENCE: LISTENING TO HIROSHIMA* (1995); GEORGE HICKS, *THE COMFORT WOMEN* (1994); SHELDON HARRIS, *FACTORIES OF DEATH: JAPAN'S SECRET BIOLOGICAL WARFARE PROJECTS IN MANCHURIA AND CHINA, 1932-1945* (1993); HARUKO TAYA COOK & THEODORE F. COOK, *JAPAN AT WAR, AN ORAL HISTORY* (1992).

5. The suffering Japan caused others was not an important factor to many Japanese until later. In 1998, a rather small minority of Japanese were still uncritical of Japan's wartime behavior.

sovereignty of a benevolent suprahuman Emperor. Virtual annihilation of self in service to the Emperor-State was the ideal.

Beginning in September, 1945, in the first months of the Allied occupation of Japan (1945-1952), and culminating with the promulgation of the Constitution of Japan on November 3, 1946, the wartime system combining the Emperor, the military, and repression of the individual yielded to a new tripartite constitutional system in which the people are sovereign,⁶ the state is pacifist,⁷ and respect for the individual's freedom and other human rights is the government's prime directive.⁸ What has gradually become institutionalized is one of the world's most stable and peaceful democratic states with a Constitution as its most widely trusted and respected national institution.⁹ Of some 180 single-document national constitutions in the world, Japan's is one of only about twenty ratified before 1950 (roughly 130 current constitutions were ratified since 1970).¹⁰ In studying Japan's vigorous constitutional debates since 1947, it has been important to remember that any tampering with one of the three elements of the system—a powerless Emperor (or better, "King"), pacifism, and human rights—has been commonly seen as a possibly dangerous attempt to alter the other two components of the system.¹¹ Thus, if the Emperor were to be "restored" to his nominal suprahuman and manipulable status, it would bode ill for human rights and pacifism. If the military gained significant political influence, diminution of rights and popular sovereignty might ensue. State weakness in enforcing human rights might encourage right-wing militarist nationalism. For many, the three links have been inseparable. This imagery has been crucial to Japan's psychological pacifism.

Although buttressed by religious and philosophical ideas of East and West both before and since 1945,¹² Japan's pacifism grew—less from ideas than as a reaction to historic national tragedy—into a powerful

6. Nihonkoku Kempō, preamble and article 1.

7. *Id.* at preamble and article 9.

8. *Id.* at articles 11-14 and 97.

9. See generally JAMES S. MARSHALL, OFFICE OF RESEARCH, UNITED STATES INFORMATION AGENCY, *JAPAN'S SUCCESSOR GENERATION* (1985); Lawrence Beer, *The Present Constitutional System of Japan*, in *CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA* (Lawrence W. Beer ed., 1992).

10. Information provided by Albert P. Blaustein, 1995.

11. On constitutional revisionism in Japan, see LAWRENCE W. BEER & HIROSHI ITOH, *THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990* at 3-66 (1996).

12. FUKASE TADAKAZU, *SENSŌ HŌKI TO HEIWATEKI SEIZONKEN* [RENUNCIATION OF WAR AND THE RIGHT TO A LIFE IN PEACE] (1987); *PACIFISM IN THE JAPANESE CHRISTIAN AND SOCIALIST TRADITION* (Nobuya Bamba & John F. Howes, eds. 1978).

force in Japan's society, politics, law, and foreign relations. Whatever its causes and history, and however hotly debated its theory and practice, this quasi-pacifism and Japan's long maintenance of peace are matters of justifiable national pride. Nationalistic favoritism toward Shinto shrines shown by the visits of some politicians to honor the war dead still causes concern about separation of religion, the state, and the religious rights of others.¹³ However, in 1998, the Emperor had become less a part of the constitutional imagery problem than his father Emperor Horihito was, and the Supreme Court had held unconstitutional local government funding of Shinto shrines to the war dead. The attractive Emperor Akihito and Empress Michiko are not a symbol of imperial militarist resurgence in constitutional discourse, but a model nuclear family and consensus symbol of the "unity of the people"¹⁴ (Article I of the Constitution), that is, of the community coherence of the Japanese.¹⁵ Emperor Akihito has been straightforwardly supportive of the Constitution, while Hirohito was silent over many years. And citizens would rather have the internationalist Emperor seen as representative of contemporary Japan than most Prime Ministers.

The core of constitutional imagery is now the relationship between Article 9 and human rights. National consensus does not come easily; but the primary text is Article 9.

III. THE EFFECTS OF ARTICLE 9

Article 9 of Japan's Constitution reads as follows:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling international disputes.

2. In order to accomplish the aim of the preceding paragraph, land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

In addition, the Preamble of the Constitution proclaims:

We, the Japanese people, . . . [are] resolved that never again shall

13. See DAVID O'BRIEN, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* (1996).

14. KENPŌ, article 1.

15. Discussions in Tokyo, July and August, 1995 and 1997, by the author with authoritative constitutional lawyers Shigemitsu Dando, Masami Ito, Hideo Shimizu, Nobuyoshi Ashibe, Naoki Kobayashi, Yoichi Higuchi, Hidenori Tomatsu, and Isao Sato. See also KENPŌ, article 9.

we be visited with the horrors of war through the action of government [We] . . . desire peace for all time and . . . an honored place in an international society striving for the preservation of peace . . . free from fear and want.¹⁶

The present Constitution of Japan came into effect on May 3, 1947, and has never been amended. Amendment requires the approval of two-thirds of all members of each house of the Diet and by a majority of those voting in a special referendum. No political party has ever had the votes necessary for amendment, and based on the above-described imagery, amendment of Article 9 has been too controversial a project for political party comfort. Amendment proposals from outside the government continue to appear spasmodically—for example, the *Yomiuri Shimbun* document published in late 1994.¹⁷ In 1998, many “revisionists” support the clauses renouncing “war as a sovereign right of the nation” and “the threat or use of force” for dispute resolution. Paragraph 2 disallowing armament has been the main focus of controversy.

Although swept aside by wars, the too-often-forgotten 1928 Kellogg-Briand Pact, ratified by Japan, the United States, Germany, the United Kingdom, the USSR, and other countries, outlawed war and technically was never revoked. Since the 1950s, Japan has gradually developed a military capacity; although the costs are high, the Self-Defense Forces (SDF) are quite modest compared to those of neighboring countries. As noted by James Auer, the leading military analyst of Article 9’s implications, Japan “simultaneously has attempted to live up to the ideals of the Constitution to a degree that the other signatories of the Kellogg-Briand pact never have.”¹⁸ Other nations might well formally adopt a renunciation of the threat or use of force to settle international disputes in their constitutions and statements of basic foreign policy.

16. KENPŌ, preamble. On the writing of the Constitution of Japan, see SHOICHI KOSEKI, *THE BIRTH OF JAPAN’S POSTWAR CONSTITUTION* (Ray A. Moore ed. & trans., 1997). In February, 1946, Colonel Charles Kades, Deputy Chief, Government Section in the Allied Occupation apparatus, drafted Article 9, but the final text was based on both Japanese (Kijuro Shidehara) and American (Douglas MacArthur and Courtney Whitney) influences. The text was debated by the House of Representatives elected in April 1946, and was approved 421-8. The 1947 Constitution of Japan was ratified according to the amendment processes of the Meiji Constitution (Constitution of the Empire of Japan), 1889-1947. BEER, *supra* note 9, at 175-182.

17. THE YOMIURI SHIMBUN, A PROPOSAL FOR THE REVISION OF THE TEXT OF THE CONSTITUTION OF JAPAN (1994).

18. James E. Auer, *Article 9: Renunciation of War*, in JAPANESE CONSTITUTIONAL LAW 69-86 (Percy R. Luney & Kazuyuki Takahashi eds. 1993).

What differences has Article 9 made in law and policy? Japan's broader foreign policies and internal law and politics have buttressed Article 9 pacifism. In constitutional and related law, a number of court decisions, including Supreme Court decisions, have kept alive and salient over many years the great issues of peace, militarism, and armament for the Japanese public. The repeated presence of Article 9 questions before the judiciary, amply discussed in the scholarly literature and mass media, has reaffirmed the legitimacy of raising and pursuing significant issues which would be quickly dismissed elsewhere as dealing with legally untouchable acts of State or "political questions."

The Supreme Court has held that under Article 9 Japan retains the natural law right to self-defense,¹⁹ that the Japan-United States Treaty of Mutual Cooperation and Security (1960) is not on its face unconstitutional,²⁰ and that, although generally the Court must take into account the political nature of such issues, that Court retains the right to determine whether a law or other government action is clearly and obviously in violation of Article 9.²¹ The Court has yet to decide directly whether or not the SDF are constitutional; but in the famous *Naganuma Nike Missile Site* Case, the Sapporo District Court in 1973, later reversed by the Sapporo High Court and the Supreme Court on technical grounds, did hold the SDF unconstitutional.²²

Until 1994, when it joined the reorganized Liberal Democratic Party in a coalition government, the Social Democratic Party of Japan (*Nihon Shakaitō*) was the largest opposition party and consistently maintained that the SDF were unconstitutional. In July, 1994, Socialist Prime Minister Tomiichi Murayama announced before the Diet a party policy change: a minimum level of military capacity for self-defense is constitutional.²³ The general public accepts as constitutional a modest SDF whose main purpose is disaster relief rather than defense, but opposes

19. Japan v. Sakata et al; Sup. Ct. G.B., Dec. 16, 1959; 13 KEISHŪ 13 at 3225, translated in JOHN M. MAKI, COURT & CONSTITUTION IN JAPAN 298 (1964).

20. Japan v. Sakane et.al.; Sup. Ct. G.B., Apr. 2, 1969; 23 KEISHŪ 5 at 685, translated in ITOH & BEER, *supra* note 2, at 103.

21. Ito et. al. v. Minister of Agriculture and Forestry; Sapporo Dist. Ct., Sept. 7, 1973; 712 HANREI JIHŌ No. 712, at 24, translated in BEER & ITOH, *supra* note 11 at 83; Minister of Agriculture and Forestry v. Ito et. al.; Sapporo High Ct., Aug. 5 1976; 27 GYŌSAI REISHU 8, at 1175, translated in BEER & ITOH, *supra* note 11, at 112; Uno et. al. v. Minister of Agriculture and Forestry; Sup. Ct., 1st P.B., Sept. 9, 1982; 36 MINSHU 9 at 1679, translated in BEER & ITOH, *supra* note 11, at 130.

22. Ito et. al. v. Minister of Agriculture and Forestry; Sapporo Dist. Ct., Sept. 7, 1973; 712 HANREI JIHŌ No. 712, at 24, translated in BEER & ITOH, *supra* note 11 at 83

23. ASAHI SHIMBUN, July 20-22, 1994.

substantial growth in the military and overseas fighting by the SDF. The great majority of constitutional lawyers still do not recognize any SDF as constitutional. It is critically important to realize that relatively few Japanese have felt Japan has been under any credible foreign threat that would make its pacifist approach obviously unrealistic. The common presupposition of most governments that a military is essential because all states are *under threat* is now empirically questionable.

Many of those accepting the SDF and the right to military self-defense limit the right to fight to Japan's territory. The suggestion that the SDF should guard the sea lanes outward from Japan for 1,000 miles has been hotly contested. The more common position with respect to Japanese involvement in overseas peace-keeping operations ("PKO") is that they be under United Nations auspices, that Japan's participation must be welcomed by the parties to cease-fire arrangements as a neutral party, that Japanese SDF personnel may use firearms (restricted to small arms) only to prevent injury or death, and that Japanese participation will stop if the cease-fire is broken.²⁴ Up to 2,000 SDF personnel may be abroad at any given time; each deployment must be approved by the Diet beforehand, except in cases of humanitarian rescue and relief.²⁵

The above are among the matters clarified by the Peace-Keeping Operations Law (1992) after fierce Diet debate on the appropriate ways for Japan to respond, if at all, to the international belligerency of the Iraq invasion of Kuwait and the United States, United Nations, and "coalition forces" responses in the Persian Gulf War. As elsewhere, there was no consensus (e.g., the United States Senate approved United States actions by one vote) in Japan that the Persian Gulf War was necessary and morally justified (up to 150,000 lives were lost, the majority civilian). There was also no consensus that Japan's \$13 billion contribution was appropriate, or that foreign criticism of Japan's unwillingness to kill and be killed in military actions was called for.²⁶

24. Under the Security Treaty with the United States, it is not clear whether Japan has an obligation to take action in defense of the United States except within the territorial waters of Japan; but RIMPAC military exercises in a larger area have made this limitation more ambiguous since the 1980s. Under new "Guidelines" for cooperation in 1998, many practical details for United States-Japan cooperation during emergency situations (e.g., national disaster, war) were to be implemented by new law.

25. In the Great Hanshin Earthquake Disaster (Kobe) of 1995, which took over 6,300 lives, the SDF lent assistance under law requiring it to act on the request of the local executives.

26. Japan's dispatch of four minesweepers and two support vessels to the Persian Gulf in 1991 after the war was her first overseas military deployment since the Second World War, with one little-known exception during the Korean Conflict in 1950. Auer, *supra* note 17, at

But the Persian Gulf War triggered prolonged national debate on how Japan should fulfill its international responsibilities as one of the world's leaders, preferably by non-military means. In the course of her varied contributions to the United Nations operation in Cambodia in 1992, the largest such United Nations effort ever, two Japanese lost their lives (the father of one volunteered to replace his son); 600 SDF people, 75 police, and 40 election monitors were sent to Cambodia. In 1998, many Japanese opposed Japan's participation in overseas fighting, even under United Nations sponsorship.²⁷ Clearly, Japan's unique security psychology and policies will not lead to proportionate and adequate response to all cases of international belligerency or intervention for protection of human rights and lives. They are premised on the belief and hope that the United Nations will be allowed by the great powers and small nations to develop more adequate peace-keeping capacities and institutions. Yet, Japan is a far more responsible world citizen in refusing to be violent than are those many nations (some with bloated arms industries) quick to seek military solutions and slow and uncreative in using forceful non-military means such as political and economic sanctions to resolve international disputes. The Japanese pacifist principle is that they should not shoot humans and should not, and probably will not, be shot at. This radical position deserves wider study and adoption in some form by other countries which, like Japan, are not demonstrably under specific external threat requiring substantial military response capabilities.

In Japan, military interests are not presumed to be a high priority, let alone the highest priority. Given the central importance of constitutional rights in Japanese law, one cannot presume that property rights or civil liberties and other "rights and freedoms of the spirit" (*seishinteki jiyûken*) may be easily subordinated to military interests under any currently foreseeable security circumstances.²⁸ For example, a Tokyo High Court decision, which was let stand, held that in peacetime there is not a higher public interest in the activities of the Defense Agency than in those of civilian airports or other government agencies. Noise pollution

79. General MacArthur sent over forty minesweepers to Korea in support of the United Nations operation there. *Id.*

27. Symposium, *Japan Redefining Its International Role*, ASIAN SURVEY, June 1993; KOKUSAI KYÔRYOKU TO KEMPÔ [INTERNATIONAL COOPERATION AND THE CONSTITUTION] (Chuma Kiyofuku et. al. eds., 1995).

28. Unlike the German military, the SDF is subject to special restraints on their civil liberties, as are firemen, police, and other categories of public employee (*kômuin*). LAWRENCE W. BEER, FREEDOM OF EXPRESSION IN JAPAN 205-47 (1985).

is a general public concern, and noise pollution from military aircraft which violates the personal rights of citizens is not permissible, the judges held.²⁹

In a similar spirit, the "Anti-War Property Owners Movement" (*Hansen Jinushi Undō*) centered in the small island of Okinawa, where 18% of the best land (58,000 acres) is in United States military bases, has attempted to acquire small pieces of real estate in order to block further government acquisitions or leases of real estate for United States military facilities. United States bases occupy about 78,000 acres in the rest of Japan. After the restoration of Japan's sovereignty over Okinawa in 1972, and even after the end of the Cold War, neither the United States government nor Japan's leaders showed reasonable sensitivity to the extraordinarily disproportionate impositions placed on the people of Okinawa. Moreover, Okinawans remember the battle of Okinawa in the Second World War when one-third of Okinawans were killed, proportionately, the heaviest casualty rate of any area in Japan. In the absence of specific credible threats, bases in foreign partner territory should be rigorously kept to a minimum. Base-related damage to good relations inevitably occurs, even in the best of times. Americans rarely reflect: How would we feel about enormous Japanese bases adjacent to major population centers in any state in our country?

The abduction and rape of a 12-year-old Okinawan school girl by three United States servicemen on September 4, 1995, galvanized local and national demands for a reduction of United States troops, a return of much of Okinawa's base acreage, and a change in the Status of Forces Agreement with the United States to give Japanese police immediate custody over suspected United States military felons. Previously, such suspects were turned over to Japanese authorities only after they had issued an indictment. The important difference between the meaning of "indictment" in United States law and "*kiso*" in Japanese law has always made this provision doubly inappropriate and offensive. A prosecutor's *kiso* is often tantamount to a conviction; when penologically appropriate, formal court trials are avoided with legal technicalities in Japan's lenient and effective criminal justice system.

The most common Japanese view is that no credible security concern of the United States or Japan requires the maintenance of current United States troop levels or base acreage in Okinawa or in Japan generally. While some high-ranking American officials have persisted without persuasive explanation to maintain that current levels are im-

29. Tokyo High Court, July 15, 1987; ASAHI SHIMBUN (evening ed.) July 15, 1987.

perative, at times in the arrogant tones of a long-past Occupation period, popular Okinawan Governor Masahide Ota, in November, 1995, referred to the United States military as "uninvited guests," and refused Prime Minister Murayama's demand that he sign legal documents forcing land owners to lease 29 acres for United States base usage. Ultimately, the central government prevailed, but significant changes in base siting were planned. In this writer's view, a drastic cut in Okinawan land used for military purposes would be wise. In determining appropriate troop levels abroad, the expanding United States military's ability to move quickly abroad (e.g., in C-17 aircraft) is critically important but rarely discussed. As Air Force General Fogelman noted, "This nation has a unique capability to project power [abroad]. It's something no other nation can do."³⁰ Among the many factors at work in building undesirable tensions in 1998 was a clash between the militarized American political and economic culture and Japan's quasi-pacifist culture.

The Constitution of Japan contains no provisions relating to acts of war, such as declaring war or concluding a peace; nor does any article touch on martial law declarations or preservation of military secrets.³¹ Special law pursuant to Article 6 of the Japan-United States Security Treaty requires maintenance of secrecy regarding United States weaponry.³² Article 76(2) precludes military courts: "2. No extraordinary tribunal shall be established nor shall any organ or agency of the Executive be given final judicial power."³³ A number of efforts to establish a "State Secrets Law" since the 1980s have failed,³⁴ but a "Freedom of Information Law" is needed to heighten Cabinet and SDF public accountability, and passage of a Freedom of Information Law is expected in 1998. (Many local ordinances give access to local government information and protect individual privacy). No military person may be a Cabi-

30. Associated Press, *Pentagon Plans \$18 Billion Expansion of Air Cargo Fleet*, DENVER POST, Nov. 4, 1995, at A3.

31. However, under the National Public Employees Law, the Local Public Employees Law, and the Self-Defense Forces Law, civil servants must not divulge secrets which have come to their knowledge while performing their duties, whether on active duty or retired.

32. Special Criminal Law to Implement the Agreement under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America Regarding Facilities and Areas and the Status of United States Forces in Japan (Law 138 of 1952, as amended). For a translation, see JAPAN NEWSPAPER PUBLISHERS AND EDITORS ASSOCIATION, *PRESS LAWS IN JAPAN* 10-11 (August, 1993).

33. NIHONKOKU KENPŌ, ch. VI, art. 76.

34. In part, the efforts to protect secrets with new law resulted from discovery that a Toshiba company and a Norwegian company had jointly passed on to the USSR a sensitive technology for milling submarine propellers.

net member.³⁵ Following the spirit of Article 9, under Articles 13 and 18, military conscription is considered unconstitutional as "involuntary servitude" (permissible only for crime). A military career does not have the appeal it has in other countries; legally restricted recruitment quotas are never met.

Under Article 7 of the Self-Defense Forces Law, the Prime Minister represents the Cabinet and has supervisory control over the SDF. There is no independent military command structure, as in earlier modern Japan, but a subordinate Director General of the Defense Agency.³⁶ Under Article 71 of the Police Law, the Prime Minister can declare a state of "national emergency" upon recommendation of the National Public Safety Commission and assume direct control over Japan's police.³⁷ "National emergency" would include such events as a foreign invasion, a large-scale natural disaster, or a major internal disturbance. The House of Representatives must approve emergency actions. If that House is not in session at the time of the emergency, the Cabinet may call an "emergency session" of the House of Councillors, but actions then taken are "provisional and . . . null and void unless agreed to by the House of Representatives within" ten days of the opening of the next Diet session.³⁸

Some government security policies are still much debated, while a virtual national consensus has emerged regarding others, as Japan has creatively concretized implementation of Article 9 over the decades. For example, the "three no-nuclear principles" were approved by a Diet Resolution in November, 1971, prior to the United States restoration to Japan of sovereignty over Okinawa. These principles ban Japan's manufacture, possession or introduction of nuclear weapons, even if potentially hostile neighboring countries should develop nuclear weapons (*e.g.*, China, North Korea, and Russia), even though Japan's nuclear power technology is of the highest order. Japan's annually revived memories of the unique experience of atom bombs—Hiroshima (August 6, 1945) and Nagasaki (August 9, 1945)—have symbolically strengthened the national will to adhere to the demands of Article 9, to oppose

35. NIHONKOKU KEMPŌ Ch.V, art. 66, *reprinted in* BEER & ITOH, *supra* note 11, at 660.

36. PETER J. KATZENSTEIN & NOBUO OKAWARA, JAPAN'S NATIONAL SECURITY (1993). For a comparison, see OSAMU NISHI, CIVILIAN CONTROL: A COMPARISON BETWEEN JAPAN AND THE UNITED STATES (1983).

37. KEISATSU HŌ, Law No. 162 of June 8, 1954, as amended; chapter 6 of the Law deals with emergencies.

38. NIHONKOKU KEMPŌ Ch. IV, art. 54, *reprinted in* BEER & ITOH, *supra* note 11, at 659.

all nuclear weapons testing (as with the popular movement in 1995 against purchasing French products in protest against nuclear testing in the Pacific area) and the proliferation of nuclear weapons, and to advocate worldwide abolition of nuclear weapons. Indeed, the first half of August 1945, ending with August 15, the day the Second World War ended, may be seen as the annual anti-war season, with much national reflection and mourning of the war dead. A valuable tradition.³⁹ In 1997, the Supreme Court forced the Education Ministry to allow mention of the infamous Unit 731 in textbooks. Unit 731 used Chinese citizens in cruel biological weapon experiments during the Second World War⁴⁰.

The export of weapons is prohibited, to Japan's considerable economic loss; but some of the high technology Japan has shared with the United States, under agreements signed in the 1980s, is "dual use" (for example, essential to the optics technology in civilian products but also in United States weapons as in the Persian Gulf War). In making decisions on Official Development Aid (ODA) under OECD guidelines, as the world's leading donor nation Japan claims to look critically at each recipient country's record with respect to the manufacture and trade of weapons of mass destruction, environmental protection, human rights, and democratic government. Unlike the United States, France, Russia, China and other nations, Japan is not a participant in the high pitched salesmanship of the world's weapons market. Some Japanese advocate a full legal ban on both the import and export of weapons.⁴¹

For decades, Japan has almost always limited its defense expenditures to a maximum of 1% of its GNP.⁴² Given the rapid growth since the 1960s and the present giant size of Japan's GNP, even 1% makes Japan's military budget one of the largest. But that is misleading. Japan by itself (*i.e.*, not in combination with its sole military ally, the United States) is not militarily competitive with its smaller neighbors.⁴³ In troop strength, it ranks 25th in the world. In the absence of Article 9, Japan

39. Lightening the mood of August is one of the world's great athletic events, the national high school baseball tournament in which the winners from all prefectures gather to compete at Koshien Stadium.

40. See HARRIS, *supra* note 4.

41. YAMAUCHI TOSHIHIRO, 'BŌEI' HŌSEI [THE "DEFENSE" LEGAL SYSTEM], JURISUTO, No. 1073, at 18, August 15, 1995. See also, Symposium, *Kokusai Kōken to Nihonkoku Kempō* [International Contributions and the Constitution of Japan], HŌGAKU KYŌSHITSU 6-27, 1995.

42. Auer, *supra* note 17, at 83-84.

43. *Id.* at 83-84. Japan has built "a meaningful but limited defense capability, clearly complementary to rather than autonomously separate from United States military power." *Id.*

would likely have become one of the few great, and arguably, nuclear, military powers. Geopolitics have not only made it easier for Japan to maintain its pacifist position; they have spared Asia and the world from a possible resurgence of Japanese militarism.

Finally, mass political education has been a factor in institutionalizing Japan's quasi-pacifism, just as it has been important to an explanation of why military establishments in many other countries are so seldom questioned. Since the latter 1940s, Japan's mass media and its educational system at each level have taught the young to respect the "Peace Constitution," Article 9, human rights, and popular sovereignty. A foreigner teaching at a university of Japan may be surprised to find students who are genuinely puzzled at the difficulty many foreigners have in understanding Japan's abhorrence for war and preference for peaceful means of settling even the most intractable international disputes. In another context, although other nations may see it as rank irresponsibility, even cadets of the multi-service academy, the Defense University (*Bōei Daigaku*) have in significant numbers resigned upon graduation, because they have felt SDF might be becoming too "3D"; dirty, difficult, and dangerous. Cadets cannot be legally forced to serve. After all, war is horror, peace is pleasant. The Preamble capsulized it as "the right to live in peace, free from fear and want."

IV. SUGGESTIONS FROM THE JAPANESE EXPERIENCE

Besides conscious choice, historical, geopolitical, economic and sociocultural factors have made Japan's distinctive quasi-pacifism possible. What useful suggestions for the international relations of other nations might Japan's fifty-year postwar experience contain? Japan has in practice and in policy brought to its own international relations and to world politics a seriously proposed assumption that radical renunciation of war is not only an acceptable and desirable option, but also an imperative and realistic option for some countries, large and small.

Second, in effect Japan calls into question the realism, in many countries and contexts, of assuming that unrestrained military development and an integrated government-military-industrial complex are necessary for the national security of large powers. Japan's experience suggests the uselessness of militarism as a primary basis for international and national planning, and the importance of economic, democratic, human rights, and environmental concerns in an adequately comprehensive concept of national security.

Third, Japan illustrates the possibility of changing from domestic and

international politics dominated by military leaders and military considerations, to politics decisively subordinating the military to civilian leaders and military priorities to more productive socioeconomic and human rights needs. Many nations now suffer from military indigestion, but none is more militarist, more aggressive, or more extreme in its nationalism than Japan was until August, 1945. Major peaceful change in a constitutional culture and system is possible.

Fourth, the fundamental change in Japan's international outlook over the past fifty years illustrates the educative power of schools, mass media, law and politics to support democracy and exceptionally peaceable international behavior.

Fifth, Japan's example of peaceful success stands out in a century unsurpassed in deranged barbarism with modern weaponry. Japan's quiet exemplar style of leadership in recent decades in the movement to reduce and eventually abolish nuclear, biological, and chemical weapons encourages other nations to limit their own military development. Like Japan, some can join in arms reduction without fear of endangering their national security.

Sixth, with Article 9 Japan's SDF is a much more modest military force and sociopolitical influence than it would be without Article 9. Japan's apparently utopian constitutional provisions against war and militarism actually make an appreciable difference in legal, political, and diplomatic practice. Many Japanese take pride in Japan being "an international conscientious objector nation" at a time when few feel intense patriotism. "It is no exaggeration to say that in contemporary Japan anyone who offered to sacrifice his or her life for the country would be considered crazy."⁴⁴ Although not easy, it may be easier to imagine Japanese being willing to die for the international community under United Nations jurisdiction than to envision citizens fighting for a Japanese interest, other than defense against an invasion of Japan.

Be that as it may, promotion of practical pacifism and human rights can be a salutary counterforce to myopic nationalism (or ethnicism), militarism, and predatory capitalism in the gradual formation of a more constitutionalist and civilized world. Japan's peaceful record, stable government, human resources, economic power, contributions to the United Nations, and world-leading provision of non-military foreign aid

44. Kazu Ogura, *The Rupture Between Japan and the United States: Exploring the Communication Gap Between a Disoriented People and an Idealistic Empire*, in JAPAN'S POST GULF WAR INTERNATIONAL INITIATIVES 47 (Ministry of Foreign Affairs ed., Aug. 1991).

make it worthy of a permanent seat on the Security Council of the United Nations. Whether or not Japan has a permanent seat, as part of the small group of *de facto* world leaders, Japan will "have to take positions on how the [United Nations] should deal with crises far from home on a daily basis."⁴⁵ It is not clear whether Japan will be willing to deal in an aggressively peaceful manner with situations least amenable to peaceful settlement; but Japan should remain a valuable exemplar of the nonmilitary road to success.⁴⁶

45. Edward C. Luck, *Layers of Security: Regional Arrangements, the United Nations, and the Japanese-American Security Treaty*, ASIAN SURVEY, March 1995, at 247.

46. See generally EDWARD J. LINCOLN, JAPAN'S NEW GLOBAL ROLE (1993).