Volume 7 | Issue 23 | Number 6 | Article ID 3168 | Jun 06, 2009

Article Nine in Context – Limitations of National Sovereignty and the Abolition of War in Constitutional Law

Klaus Schlichtmann

Article Nine in Context – Limitations of National Sovereignty and the Abolition of War in Constitutional Law

Klaus Schlichtmann[1]

For my friend, William R. Carter, who loved Japan and suddenly passed away on 25 April 2009

I. When we discuss Article 9 of the Japanese Constitution, we have to take into account the history and purpose of postwar constitutions in other countries as well, with regard to peace, disarmament and an international order that would be based on principles of justice and enforceable law. Central issue here is the collective security of the United Nations that would enable all countries to disarm, and resolve their conflicts peacefully.

Early on, while the Japanese Constitution was still in the making, The New York Herald Tribune reported that France had become "the first nation . . . to take up the question of World Peace in its Constitution," approving "restriction of its National Sovereignty," to abolish the instrument of war as a means for resolving conflicts. The new provision was welcomed as "a first step and preparation for the day when hopefully all states will accept such laws and . . . make such determination . . . to participate in a world-wide organization" that would be based on binding and enforceable legal norms as a guarantee for peace (20 February 1946). A half year earlier, U.S. President Truman had declared in his V-J (Victory over Japan) Day speech to the Armed Forces, beginning of September 1945: "War must be abolished from the earth if the earth, as we know it, is to remain."

Following the victory of the United Nations over the Axis powers—the term "United Nations" was proposed by Franklin D. Roosevelt and first officially employed in the Declaration of the United Nations signed by 26 states on 1 January 1942—central concerns of liberated France were national security and a durable peace in Europe and the world. The first constitutional draft, originally proposed by the French socialists, had been approved in February 1946, and the constitution was finally adopted on 27 October after a public referendum. In the new Constitution, France renounced war as a political means and subjected herself to the rules of public international law (Paragraph 14 of the Preamble). The pivotal Paragraph 15 of the Preamble prescribes that France "on condition of reciprocity accepts the limitations of sovereignty necessary for the organization and defense of peace." With this France had, once and for all, defined its position within the community of nations. The renunciation of sovereignty, which was essential for an effective system of collective security, was linked to Article 24 of the UN Charter, which stipulates in its first paragraph that "in order to ensure prompt and effective action by the United Nations" all nations should "confer on the Security Council primary responsibility for the maintenance of international peace and security."

The French concluded that the international community could "not advance without [reliable and effective, global] 'institutions'. To

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

create these was only feasible and made sense only when states delegated to [these institutions] certain competencies which they had earlier exercised themselves." (REUTER: 97) In this way individual nations eventually could be relieved of their traditional obligation to look after their and their populations' own peace and security. Consequently it was the obligation of other states, according to the stated principle of reciprocity, to take the steps needed on their part for putting into practice the security system of the United Nations. Germany was seen as chief postwar ally to cooperate in this task. "So long as the dogma of sacrosanct national sovereignty is not overthrown," a delegate said before the European Congress at The Hague in May 1948, and so long as the nations have not yet "thrown together their governments," as Paul-Henri Spaak, the Belgian socialist leader, and one of the founding fathers of the European Union, expressed it, permanent, durable peace would not be achieved.

Paul Henry Spaak (1899-1972)

André Philip, the chairman of the Constitutional Commission of 1946, later remembered (in Le Monde, 9 June 1954): "We still had no precise ideas about the conditions for European unity, but we did feel the need to create supranational authorities, if possible at the global level, but if not, [at least] at the regional level." Winston Churchill, in his famous Zurich University address in September 1946, a few weeks before the entry into force of the new French Constitution, had also declared: "Our constant aim must be to build and fortify the strength of [the] UNO … and within that world concept … recreate the European family in a regional structure." To do so would be, according to Churchill, above all a matter of cooperation between France and Germany. (Emphasis added; CHURCHILL: 198)

This principle—agreement to limitations on sovereignty in the interests of a

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

comprehensive, common, collective security system—was one of several reasons why the French National Assembly in 1954 rejected France's accession to the proposed European Defense Community (EDC). It was also one of the reasons for the French "Non!"-vote in the May 2005 referendum, rejecting the European Union's proposed constitution, which pacifists criticized for its militarist provisions, authorizing the EU to carry out world-wide interventions, and pursuing an aggressive armaments policy, with the aim to "strengthen the industrial and technological base of the defence sector." (Article 1.41.3 Treaty of Lisbon) It would no doubt be more in accordance with the Europeans' claim to put "right over might" if the Europeans gave the UN the powers to function effectively as a system of collective security, and to disarm and dismantle their arms industries, as had been envisaged by the historic McCloy-Zorin Accord between Russia and the United States in 1961.

With the entry into force of the new Constitution of the Fifth Republic on 4 October 1958, Paragraph 15 was incorporated into the Preamble of the new document, which "reaffirmed and complemented the Preamble of the Constitution of 1946." It is legally binding and continues to be valid, as an essential component of the "political and social philosophy of the state." (BURDEAU: 419-21) On a similar footing, Article 9 of the Japanese Constitution, too, has been recognized as being part of the "basic philosophy of the non-resort to the use of force." (Foreign Minister Kōno Yōhei in September, 1994, and Prime Minister Hashimoto Ryūtarō on 24 September, 1996, before the UN General Assembly.)

II. Like France, Japan also gave itself a new Constitution after the Second World War, which was ended with the dropping of the two atomic bombs over Hiroshima and Nagasaki in August 1945. The victorious powers (without France) had decided in the Potsdam Declaration of 26 July 1945 upon the total disarmament of Japanese troops, the punishment of war criminals, the prohibition of industries which could make possible Japan's rearmament, as well as the establishment in Japan of a peace-loving responsible government (Arts. 9-12). The Declaration was signed by the United States of America, the United Kingdom, China, and later also by the Soviet Union. On 10 August 1945, compelled by the atomic blasts on Hiroshima and Nagasaki and the Russian declaration of war on August 8, the Japanese government announced that it was "disposed to accept" the Potsdam Declaration. On the following day the Allies communicated to the Japanese government: "The ultimate form of Japan's government will, in keeping with the Potsdam Declaration, be determined through the freely expressed will of the Japanese people." On 14 August the Emperor ordered acceptance of the Potsdam terms, and with this the war in the East was ended and peace finally achieved. On 2 September the articles of surrender were signed on board the US-battleship Missouri.

Shidehara Kijuro (1872-1951)

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

In order to discuss constitutional reform, at the beginning of October 1945 the Supreme Commander of the Allied Powers in the Far East, General Douglas MacArthur, met with Prime Minister Shidehara Kijūrō, a long-time diplomat distinguished for his services as Foreign Minister in the 1920s and "one of Japan's most respected and experienced diplomats." (MacARTHUR: 293) Shidehara was considered to be a pacifist (McNELLY 1981: 360n15) and known for his persistent policies of opposing militarism and refusing cooperation with the militarists. In a 12-point declaration of 4 October 1945 the Japanese government had ordered (in Point 10) the elimination of any military influence over the government. A total revision of the old Meiji Constitution of 1889, however, was not yet an issue.

Also in October 1945, Shidehara set up a commission, the Kempō Mondai Chōsa Iinkai, which had the task of investigating constitutional reform and whose chairman was "minister without portfolio" Matsumoto Jōji. Up to its final meeting on 26 January 1946, this commission met fifteen times. In spite of having been given no specific mandate for writing a new constitution, the "Matsumoto Committee" came up with two drafts, representing two mutually contending opinions. One, known as "Draft B," prepared by the whole committee, in conforming with Shidehara's instructions to "simply delet(e) those articles that pertained to the military" (HELLEGERS: 787n2)[2], contained no stipulations about a military establishment, while the other, a less liberal "Draft A," prepared by Matsumoto himself, stipulated: "The system of armed forces is retained"—even though it was to be subject to civilian control. (James E. AUER in LUNEY/TAKAHASHI: 70)

In any case Prime Minister Shidehara, who was to be ultimately responsible for any action concerning constitutional revision, had in the meantime given much thought to what role Japan should play in the world in the years to come.[3] Between the end of 1945 and the first days of 1946 Shidehara was suffering from a lung infection. His friend Ōdaira Komazuchi, after visiting him during his convalescence, wrote down what has come to be known as the Ōdaira Memo, recording Shidehara's "Thoughts about Various Things." In the foreground of these thoughts were the "dread of future wars, in which horrible weapons like atomic bombs would be employed, and the question of how one can keep the world peaceful." (TANAKA: 94) Shidehara, whose pacifist foreign policy of non-intervention had successfully restrained the Japanese military when he was foreign minister in the 1920s, had also been one among several diplomats extending peace feelers during the war with China, and he actively tried to avert war with the United States. (SCHLICHTMANN II: 136 and 133) In his own later recollections Gaikō gojūnen, which were recorded in 1950-51 by reporters from the Yomiuri Shimbun newspaper, Shidehara told how the idea of Article 9 came to him during a train ride through a landscape devastated by war:

"Contrary to expectation I was entrusted with putting together a cabinet . . . at that time I recalled a scene on the train soon after the day of the surrender. This thought suddenly rose in my head when I took over the office of Prime Minister. I had decided to follow the call and somehow use my office to carry out the will of the people. I decided to thoroughly change the ways of politics so that war would be made impossible for all time, and to write this into the constitution. In other words, to renounce war (sensō o hōki shi), and to completely abolish armaments. These goals must be brought about under conditions of democracy. For me this is an absolute conviction which I have spoken of [many times] before. This thought was dominant in my head like a spell (isshu no maryoku) . . . Today Americans often come to Japan and ask if the new Constitution is of Japanese origin, or if the Japanese had been forced to write it by the Americans; but I

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

must say that for me this is irrelevant, since I was under compulsion from nobody." (SHIDEHARA: 213)

On 24 January 1946, a month after the conclusion of the plans to demilitarize Japan, Shidehara paid MacArthur a visit to thank the American commander for the penicillin that he had arranged to have delivered, in response to Shidehara's personal request, during his recent convalescence. This occasioned a 150-minute-long conversation, during which Shidehara, according to the Ōdaira Memo, talked about abolishing war from the world; Japan should as a part of that endeavor renounce the right to go to war in its constitution. And for that purpose a renunciation of a part of its sovereignty was said to be necessary. (TANAKA: 94) In all likelihood Shidehara had also come to know about the provision in the new French Constitution. After their conversation MacArthur informed the head of the political section of his headquarters, General Courtney Whitney, about what he and Shidehara had discussed.

"I (Whitney) was not present during the discussions that followed. But I did go in to see MacArthur immediately after Shidehara's departure at two thirty, and the contrast between the expressions on MacArthur's face before and after the interview told me immediately that something of importance had happened.
"MacArthur explained what it was: Prime Minister Shidehara, after expressing his thanks for the penicillin, had proposed that when the new constitution was drafted, it contain an article renouncing war and the maintenance of a military establishment once and for all. By this means, Shidehara had said, Japan could safeguard itself against the reemergence of militarism and police terrorism . . . Shidehara further pointed out that only if relieved from the oppressive burden of military expenditures could Japan have the slightest chance of providing the minimum necessities for its expanding population, now that all its overseas resources were gone. It was this that they had discussed for two and one-half hours. (WHITNEY: 257)

Shidehara suggesting the abolition of war to MacArthur in a popular history manga. However, with the Gulf War and the criticism heaped on Japan for its "check-book diplomacy," the bubble with Shidehara's suggestion was shifted to come from MacArthur.

MacArthur could not have agreed more. There is no doubt that the January 24 meeting between MacArthur and Shidehara took place. Both Shidehara's and MacArthur's accounts agree that it was Shidehara himself who suggested that an article similar to or identical in content with the later Article 9 be included in the Japanese Constitution. In his memoirs MacArthur wrote: "It has frequently been charged, even by those who should be better informed, that the 'no war' clause was forced upon the [Japanese] government by my personal fiat. This is not true." (MacARTHUR: 302)

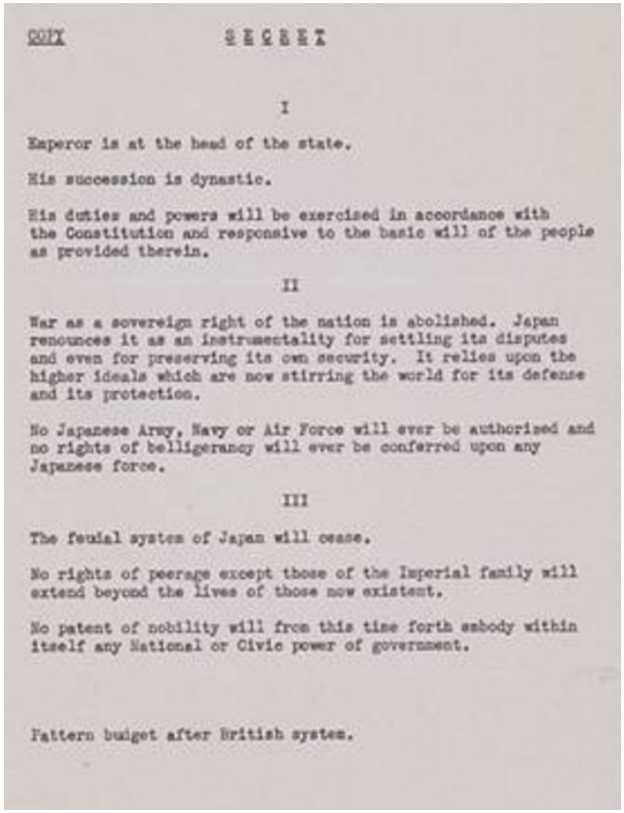
The origin of Article 9 has been a matter of controversy and obscure. The standard interpretation that has emerged over the years, also in Japan, especially after the Gulf War, is that it was foreign-conceived and imposed. (HOOK and McCORMACK: 2; INOUE: 16ff;

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

KOSEKI: 82; McNELLY in ULEMANN: 18;[4] MARTIN: 289ff, 294) However, in my own research I have found no proof of anyone having been the author other than Shidehara. Some authors, like Nakamura, have argued that Article 9 "prescribed the renunciation of war in order to assuage Asian fears of the emperor system's continuation." (NAKAMURA: 158) However, this does not take into account the purpose of Article 9 (and related provisions), i.e. to achieve collective security and abolish war as an institution. Whoever authored the provision, the aim was certainly not to unilaterally disarm Japan, but to abolish war; and everyone knew that abolishing war required limiting sovereign powers in favor of a system of collective security functioning effectively under the United Nations.

Shidehara's suggestion, if indeed it was his, then appeared in the famous "MacArthur Memo" in typed-out form on 3 February 1946 (SCHLICHTMANN 2009 II: 213). Point 2 states:

"War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.
No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force."



COPY SECRET

I

Emperor is at the head of the state.

His succession is dynastic.

His duties and powers will be exercised in accordance with the Constitution and responsive to the basic will of the people as provided therein.

II

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese Army, Navy or Air Force will ever be authorized and no rights of belligerancy will ever be conferred upon any Japanese force.

III

The feudal system of Japan will cease.

No rights of peerage except those of the Imperial family will extend beyond the lives of those now existent.

No patent of nobility will from this time forth embody within itself any National or Civic power of government.

Pattern budget after British system.

The second paragraph especially prohibits any permanent institutionalized military establishment. Shidehara and MacArthur must have spoken in greater detail of those "higher ideals" on which he based his position to abolish war as an institution. Article 9 was, in Shidehara's view, to become a cornerstone of the United Nations system of collective security that would enable all nations to disarm. In the present, ongoing discussions in Japan, any change to the second paragraph of Article 9 and final institutionalization of the military establishment would annul that purpose and have grave consequences with regards to maintaining peace in the Japan area and the world. Furthermore, changing the second paragraph would be contrary to the spirit of Article 10 of the US-Japan Security Treaty which stipulates that the alliance be relinquished if and when the UN System of Collective Security becomes operative in the Japan region. It is apparent that without an

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

effective system of collective security neither nuclear nor conventional disarmament are feasible.

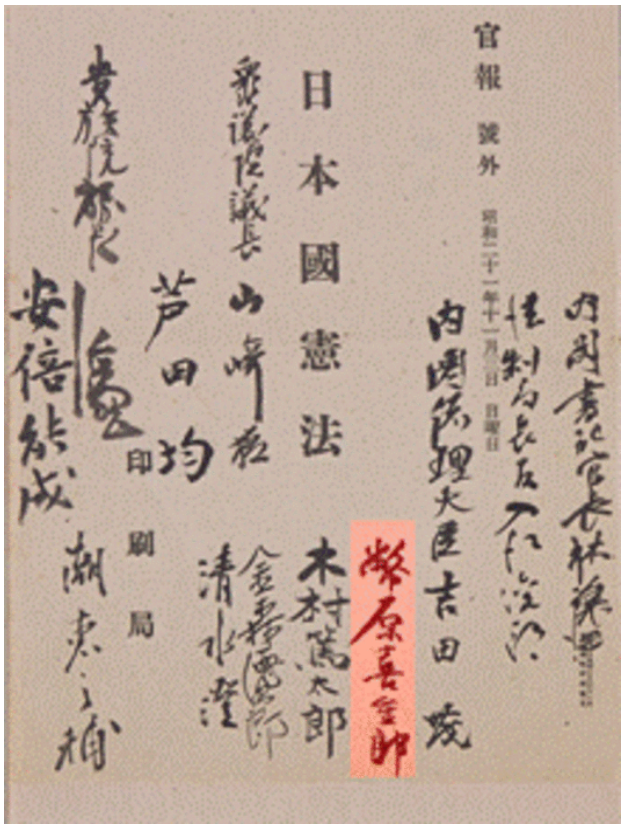
After the conversation with Baron Shidehara, MacArthur was, as he himself described it, "confronted with a time problem," (MacARTHUR: 300; WARD: 293) and all the more conscious of his own responsibilities. He was determined to bring the question of reforming the constitution quickly to a resolution. The constitutional draft, i.e., the less liberal "Draft A" of the Matsumoto Committee was presented on 8 February. On February 1 there had appeared, however, an unauthorized advance publication of "Draft B" in the Mainichi Shimbun, which prompted MacArthur's immediate rejection of this draft on the same day, since it also differed little from the old Meiji Constitution. (Political Reorientation of Japan: 101) It may well be that Shidehara himself planted the evidence, since the draft was apparently found in the room which was Shidehara's "favorite napping spot." (HELLEGERS: 478, 515, 518)

The premature publication prompted MacArthur to take action and, on February 10, nine days after the Mainichi leak, he put forward a draft conceived by the Political Section of GHQ, which corresponded largely to the academic Kempō Kenkyūkai proposal that had earlier been translated by GHQ in its entirety, and been used by the Americans as they wrote the Government Section draft. This draft was printed on February 12 and accepted by the Japanese government on February 22. MacArthur, at a meeting at the residence of Foreign Minister Yoshida Shigeru on February 13, also suggested putting the question of the constitution directly to the Japanese people in such a way that there would be adequate time for discussions. (WARD: 996) MacArthur's and the American occupiers' popularity among the population generally worked in favor of the latter's support in carrying out their policies. (REISCHAUER: 187-188) Thus, the Japanese public and academic opinion directly and indirectly had a bearing on both Japanese and Americans, and found expression in the new constitution, even against the disposition of more conservative forces.

On March 6 the Shidehara cabinet made public the English and Japanese texts. Between early March and the opening of the parliamentary debates in June 1946, there were lively discussions among the public. On March 27, Shidehara expressed himself as follows on Article 9 at a meeting of the War Investigation Commission, which had been established by the Japanese government in November 1945 and whose chairmanship he had assumed:

"No precedent for this kind of constitutional stipulation can be found in the constitution of any other country. Furthermore, at a time when research on atomic bombs and other powerful weapons is continuing unabated, there may be people who think that the renunciation of war is utopian nonsense. However, no one can guarantee that, with the subsequent technological advance and development, new destructive military weapons tens or even hundreds of times more powerful than the atomic bomb won't be discovered. If such weapons are discovered, the possession of millions of soldiers and thousands of warships and airplanes will still not ensure national security. When war starts the cities of the fighting countries will be totally reduced to ashes and their residents will be annihilated in a few hours. Today we hold aloft our declaration renouncing war and go forward alone on the vast plain of international politics. But a new day will surely come when the world will awaken to the horrors of war and march with us under the same banner."[5]

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press



With the opening of the 90th session of the Imperial Diet the Government Draft was debated in parliament, and some alterations were made. The new Constitution was accepted August 24 by a vote of 421 to 8—six Communist representatives as well as two independents voted against it—and subsequently submitted to the Privy Council, which endorsed it on October 29. On November 3, the birthday of the Meiji Emperor, the new Constitution was promulgated in a solemn ceremony and published in the legislative gazette. The London Economist of 9 November 1946 positively assessed the new Constitution:

"The new Constitution is . . . quite admirably democratic and corrects the notably undemocratic features of its predecessor. But this merely brings Japan tardily into line with the parliamentary-democratic states of the world, and gives it no occasion for moral superiority over other nations. It is otherwise with the clauses by which Japan renounces to wage war even in self-defence. No nation has ever before thus adopted complete non-violence as part of its political structure; not even Mr. Gandhi's India is proposing to do so. The Japanese Prime Minister has spoken of the example Japan is setting to the world, and the Japanese are apparently almost as pleased with themselves as if they had won the war . . . Japan has moved to a higher moral plane . . . The cynic may say that, as Japan has been disarmed anyway by the Allies and is to be kept disarmed, this spectacular renunciation of war is only making a virtue of necessity. But, after all, there is a skill in making a virtue of necessity; it is judo, the 'soft art', in which the wrestler throws his opponent by yielding quickly in the direction of pres¬sure."

Indeed, as a Dutch scholar and war veteran and a very special friend of mine (who passed away in 2006), Martin Knottenbelt, maintained, with Article 9 Japan has "staked a claim, as of right, to enforceable world law." The Constitution entered into force on 3 May 1947, carrying, among others, Shidehara's signature. (See image with Shidehara's signature, above!)

III. Italy followed suit in 1948 (1 January), also agreeing to the limitations of her sovereignty "necessary to an organization which will ensure peace and justice among nations;" subsequently, Germany (23 May), Costa Rica (8 November) and India (26 November) in 1949 also committed to renouncing war as an institution. These, together with those of France and Japan, were examples of the new trend toward greater democratic and parliamentary responsibility that served as a model for other constitutions to follow. It was the lesson learnt from the failure of the League of Nations collective security, conceived in the interwar period, and the roots of which went back all the way to the Hague Peace Conferences. Other countries would be obliged, under the ius cogens (binding law) of reciprocity, to agree likewise to the limitations

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

of their national sovereignty in favor of collective security.

Although Costa Rica did not exactly follow the Japanese or French (or Italian) example, in Article 121, No. 4, para 2, it did envisage "transferring certain jurisdictional powers to a communitarian juridical order for the purpose of realizing common regional objectives." Unlike in the Japanese Constitution, but similar to the German and other constitutions, the limitation of sovereign powers here envisaged has not yet been carried out. In addition, in the case of Costa Rica, it is limited to regional objectives. It could, theoretically at least, include a military alliance, as set down in Article 12, "organized under a continental agreement." Article 12 of the Costa Rican Constitution reads: "The army as a permanent institution is abolished." However, military forces "may . . . be organized under a continental agreement or for national defense." If we read this conditional clause carefully, it appears that Costa Rica does not differ very much from Japan, except that it has been able to afford to forego—unlike Japan—maintaining national self-defense forces. In any event, as Professor McNelly stated, "Japan's unilateral constitutional disarmament is an extremely valuable, perhaps necessary, first step in the direction of universal disarmament." (McNELLY 1962: 23) No doubt, so far, an inherent "weakness of constitutional disarmament," in McNelly's judgment is "the absence of an effective supranational supervisory agency." (McNELLY 1962: 26)

Many scholars and even some peace activists believe the disarmament part in the Japanese Article 9 is the most important feature, and indeed Shidehara rejected Japanese rearmament. (KADES: 41-2) However, most researchers agree that it is not possible to disarm into a vacuum, as this would pose the danger of causing significant security gaps. The pacifist and 1911 Nobel Peace laureate Alfred H. Fried said in this regard that "armaments are reasonable as long as the system is unreasonable". Article 9 aims at a system that can do away with the institution of war. Already more than 100 years ago at the Hague Peace Conferences the understanding was that in order to disarm one needs to create an international legal system with binding powers. When there is a dispute countries would be prohibited to go to war and instead have to go to court. It's amazing that this very simple and basic idea and its history are not better known. It of course implies a limitation of national sovereignty, aimed at an effective international organization. This is the main part in the Japanese Constitution, not the disarmament part. In accordance with this, Article X of the US-Japan Security Treaty stipulates that the treaty will become obsolete if and when the UN system of collective security becomes operative in the Japan area.

IV. In Germany, Carlo Schmid, the "superb enlightener . . . statesman . . . [and] advocate of humanity" (as publicist Walter Jens has called him), had argued in 1948-49 before the Parliamentary Council for putting limitations on sovereignty into the Bonn Constitution (Basic Law). Carlo Schmid, who was then Professor at the University of Tübingen and State Minister of Justice, also had the UN in mind. The committee under his chairmanship dealing with questions of peace and security was "unanimously of the view that the Constitution should provide that the Federation can, through a law passed and adopted by a simple majority vote, delegate sovereign rights to international institutions." (Der Parlamentarische Rat—hereafter PR: 206) This would be the logical and suitable follow-up to the Japanese precedent, which many see as a "motion" to abolish war, in need of being "seconded" by some other country or countries.

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

Carlo Schmid (1896-1979)

A report of the German Constitutional Convention referred to Paragraph 1 of Article 24 in these words:

"This [provision] is meant to facilitate the creation of international organs which might be set up in order to . . . look after matters which previously were left to the various national sovereignties. The German people resolve to henceforth renounce war as a means of policy and to draw the necessary conclusions therefrom." (PR: 207)

The delegates were well aware that a mere declaration of intent to renounce war as a policy means was insufficient, but that with it should come a delegation, or giving up, of certain sovereign powers in favor of a system of collective security. Thus in order

"not to be defenseless and subject to alien force, what is required is the inclusion of the territory of the Federation in a system of collective security which guarantees the peace. In the unanimous opinion of the committee the Federation should be prepared, in the interest of peace and of a durable order of European relations, to consent to those limitations of its sovereign powers which would result from such a system." (PR: 207)

The creation of an effective global security system had priority over the organizing of purely European relations, since the global system would guarantee peace and integrity to the Europeans, which is made clear also by the wordings of some of the proposals, which stated that the limitation of national sovereignty in favor of the world organization, is the precondition "through which a peaceful and lasting organization of European relations can be attained and put securely in place." (Dr. Theo Kordt, Nordrhein-Westfalen) (PR: 207) Or:

"The Federation may consent to limitations of its national sovereignty if it is made part of a system of collective security through which a peaceful and lasting organization of European relations will be put securely in place."

According to one delegate, Dr. Kurt Seebohm, this transfer of sovereign rights was "the most important thing" which the German Federation should aim to accomplish, to achieve a permanent peaceful order in Europe and the world. The inspiration for Paragraph 2 of Article 24 "drew on the corresponding provision of the French Constitution," whereby it was given special weight. (PR: 353) However, in contrast to the French Constitution, the constitutional convention delegates omitted in the Bonn Constitution the "condition of reciprocity." This was because the committee was "aware of the fact" that Germany was expected to take the initiative, i.e. the committee was "of the view that after the things that have happened in the name of the German people, such an initiative, which [would] bring in its train corresponding actions by other countries, is appropriate." (PR: 207)

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

As far as security is concerned it is clear that a system of reciprocal and collective security is to be understood as something "essentially different" (FORSTHOFF: 335) from "collective self defense," granted to all member states under the UN Charter's Article 51. The chairman of the constitutional committee, Professor Hermann von Mangoldt, stated what the majority opinion was: "The system of mutual collective security is the world system of the United Nations." (Stenographic Minutes: 772) Prof. Carlo Schmid declared with urgency and conviction: "We must definitely join such organizations; otherwise we will perish (sonst gehen wir zugrunde)." (Stenographic Minutes: 454) In practice, Article 24 has until now, however, been applied only in regard to European integration and not in connection with measures to prevent and abolish war. And, some might argue, that is why wars have not been prevented and war not been abolished so far.

V. A year earlier Italy had also favored a strong commitment to organizational pacifism in its new postwar constitution. Article 11 of the Constitution of 1 January 1948 reads:

"Italy renounces war as an instrument of offense to the liberty of other peoples or as a means of settlement of international disputes, and, on conditions of equality with other states, agrees to the limitations of her sovereignty necessary to an organization which will ensure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose."

As earlier in France and Japan, and a good year later in Germany, with the wording of this Article 11 of its Constitution, Italy felt that after the inferno of the Second World War the Italian state must be assured an honorable place in the family of nations. Already prior to the founding of the United Nations Organization there had been a strong public interest in the new global organization. The Allies had concluded an armistice with Italy in September 1943, and in early 1945 numerous detailed reports in the Italian press dealt with the upcoming UN conference in San Francisco (25 April through 26 June 1945). "Liberated" Italy was deeply disappointed not to be invited to the conference.

In March and April 1947 the Constitutional Assembly discussed the proposals for the new constitution. A court decision was later required, to determine that the laws of the European Community did not contravene Article 11, even if strictly speaking European integration was not an original purpose of the provision. (PERGOLA/DUCA: 598) Like in Germany, the universal objectives of Italy's Article 11 were temporarily subordinated to the aims and purposes of European integration. In the words of the chairman of the commission that had in 1947 prepared the constitutional draft:

"The burning desire for European unity is very much an Italian principle, but in this historical moment an international organization can and must, in view of the fact that other continents, like America, wish to take part in international organizations, extend beyond the borders of Europe." (Atti dell'Assemblea Costituente: 243)

This was the view generally held at the time. In spite of relatively little resistance to membership in NATO, the later proposal for a European Defence Community treaty was rejected also in Italy. In December 1955, one year before Japan, Italy became a member of the United Nations, after the Soviet Union—ever since Italy's first application for membership in 1947—had repeatedly used its veto to prevent Italy's joining the world body.

VI. We should also mention some the other, mostly European constitutions in which a similar transfer, limitation or delegation of sovereign powers is specifically envisioned for the purpose of preventing and abolishing war

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

and of creating, in the course of this endeavor, the necessary supra-state institutions. Here the Danish Constitution, which entered into force in June 1953, is likewise of exemplary significance for the postwar period.

Of relevance to its preliminary history, there had taken place in Bern (28 August - 2 September 1952) a Conference of the Inter-Parliamentary Union (IPU), an international association of elected members of national parliaments founded in 1889 as a model for a future world parliament. (Japan became a full-fledged member in 1910.) At the 1952 IPU Conference it was resolved that the participating states should adopt in their national constitutions provisions aimed at effective international cooperation in the fields of economics, politics and culture. Toward this goal the parliamentary delegations were to submit proposals.

Principal issues of the IPU Conference debates were limitations on the sovereignty of individual countries and the question of how to legitimately represent the various nations at the global level in an eventual world parliament. The members of a Danish constitutional commission had already proposed a text in 1946, which ultimately was adopted in the course of making the new constitution of 1953:

"Article 20. (1) Powers which according to this constitution rest with the authorities of the kingdom, can, through a bill, to a specifically defined extent, be transferred to international authorities, which are instituted by mutual agreement with other states to promote international legal order and cooperation." (ANDERSON: 654)

As in the German and Italian constitutions, lawmakers are given special executive powers to shape the future international organization and to prevent war, by the transfer of specified legislative, judicial and executive powers to an international institution such as the UNO. In the report of the constitutional commission the control of atomic energy was given particular attention in this context.

Also as a result of the 1952 IPU Conference, in the Netherlands a similar Article entered into force in 1953, and was reconfirmed in the constitution of 1983. (PANHUYS: 540-541; 551-552) Executive powers to effect a universal system of collective security and peaceful cooperation are also granted to parliamentarians in the following constitutions, in alphabetical order: Argentina (1994), Austria (1981), Belgium (1971); Burundi (1981), Republic of Congo (1979), Costa Rica (1968); Greece (1975); Guatemala (1985), Ireland (1937); Luxembourg (1973); Norway (1814/1905), Portugal (1982), Singapore (1980), Spain (1978), Sweden (1976), East Timor (2002), and Zaire (Democratic Republic of Congo, 1978). A frequently recurring constitutional formula (e.g., in Antigua and Barbuda, Barbados, Belize, Brunei, Jamaica, Lesotho, Malawi, Vanuatu, Zimbabwe) is: "The parliament may make laws for the peace, order and good government [of the state]."

In the countries of the Anglo-Saxon "legal orbit" such as the United States and the current or former British Commonwealth states, the relevant formula is that "The law of nations is a part of the law of the land" (BLACKSTONE: 67) and thus a component of "common law"—which is automatically given priority over "domestic law." It has sometimes been said that "in substance" the traditionally uninhibited 'right of belligerency' of continental European coinage was hardly any different from Anglo-Saxon doctrine. But this is not true. There was and is, in the Anglo-Saxon countries—and also in France and the 'Latin' countries—a much greater interest in institutionalizing the international 'rule of law', i.e. despite resistance from some European countries where international law does not automatically precede domestic law. Thus, in

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

states which are outside the Anglo-Saxon legal orbit, international law must be first transposed, or "transformed," to become effective. In the Bonn Constitution (i.e., Basic Law), Article 25 specifically states, for example:

"The general rules of public international law constitute an integral part of Federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the Federal territory."

As far as Japan is concerned, it has already made a lasting contribution by adhering to Article 9 of the Constitution, which is indeed a cornerstone of the prospective future collective security of the United Nations.

VII. Some Contradictions

Many misconceptions have arisen with regard to Article 9 over the years. The erosion of the original content of the war-abolishing provision parallels the decline of the original intent and meaning of collective security. In spite of that, Japanese governments deserve credit for upholding Article 9 for so long, more than 60 years, still keeping its core provision intact. No doubt, in this respect the Japanese people also have played a crucial role in keeping politicians "on track."

Japanese fan with signatures of the delegates to the First Hague Peace Conference 1899

Article 9 is the "dot on the i" of a development that got officially under way with the Hague Peace Conferences in 1899 and 1907. The great powers, the USA, Russia, Britain and France, since they attempted at these conferences to create an international legal system with an international court with binding powers, have quite persistently followed up on their initial endeavours that had unfortunately been brought to nought by their adversaries. While at the Hague conferences collective security, i.e. an international executive, was not yet an issue (it was going to be at the planned Third Hague conference in 1914, which never happened), after the First World War the victorious powers established the principle of collective security as part of the League of Nations system. However, the League Council, including Japan as one of the great powers, lacked provisions for allowing member states to delegate competencies or responsibilities to the organization—a necessary condition, as they soon realized, for establishing an effective world executive that would be competent to oversee and secure international disarmament and relieve nations of their responsibility to take measures for safeguarding their peace and security by themselves. After the Second World War the victorious powers took care while creating the new world organization, to make the international court a part of the UN system (the international court had been an institution separate from the League) and secondly to open the Security Council to allow members to delegate executive powers to it in a democratic, legislative act, through passage of a bill enacted by parliament. Toward this end, and to facilitate the process, the Japanese adopted Article 9.

In Japan the discussion among politicians, academics and the people (who are said to have internalized Article 9) as to whether it may be necessary to bring the ideal of a warless world down from its heights to the level of the existing reality (of an armed peace), and consequently change the constitution, or whether and how to lift reality to the level of

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

the ideal has been going on for decades. This in itself is an astounding fact. But the fact also is that it has been very difficult to communicate the idea to the outside world, in spite of the fact that the UN Charter, too, is a blueprint for getting from the present state of an armed peace to an unarmed peace.

At this time the criminal omission, with regard to putting the UN System of Collective Security into effect, has given rise to a critical situation.

The Japanese Cabinet Legislation Bureau (CLB), which is the "primary authority on the interpretation of Article 9," (Martin: 316ff) has, as Craig Martin has shown, been extremely conscientious in keeping the core essence of Article 9 intact. What the CLB has been doing, since it was instated by Prime Minister Yoshida Shigeru in 1957, is something well known to jurists, i.e. applying remedies (J. kyūsaisaku), to protect the provision's legal substance. In other words, the changing interpretation over the years is nothing else but the application of remedial measures to protect Article 9. Remedies are legitimate instruments to uphold an important legal principle in a changing environment. The concept of "self-help" (jiriki kyūsai), in relation to Article 9, is also important in this regard, since it explains and gives credence to the existence of the SDF. In this author's view, the Japanese government should be seen not as bent on "revision by interpretation" to undermine Article 9, but as a responsible agency attempting, in an unfriendly international environment, to uphold the clause against many odds, including foreign pressure. In the process a certain erosion of the "outer layers" has been inevitable and could in the end affect the core, if no action is taken by the international community to restrict and ultimately abolish the institution of war. The consequences of such inaction should be obvious.

This is a revised, expanded and updated version of a German-language article that appeared in 1996; a Japanese version appeared in the March 2005 issue of SEKAI (World). It was prepared for The Asia-Pacific Journal.

Klaus Schlichtmann is lecturer in peace studies at the Japan Women's University and the author of Japan in the World: Shidehara Kijūrō and the Abolition of War. (2 vols.).

Recommended citation: Klaus Schlichtmann, "Article Nine in Context – Limitations of National Sovereignty and the Abolition of War in Constitutional Law" The Asia-Pacific Journal, Vol. 23-6-09, June 8, 2009.

Sources

ANDERSON, Stanley V., "Article Twenty of Denmark's New Constitution," The American Journal of International Law, vol. 50, no. 3 (1956)
AOKI Tokuzō (ed.), Taiheiyō sensō chōsakai, 3 vols., Tokyo 1953
BIX, Herbert, Hirohito and the Making of Modern Japan, New York 2001
BLACKSTONE, William, Commentaries, vol. IV (1769)
BURDEAU, Georges, Droit Constitutionnel et Institutions Politiques, Paris 1978
CHURCHILL, Randolph S., The Sinews of Peace. Post-War Speeches by W.S. Churchill, Cambridge 1949
Der Parlamentarische Rat 1948—1949, Akten und Protokolle, vol. 2, Der Verfassungskonvent auf Herrenchiemsee
DOWER, John, Embracing Defeat. Japan in the Wake of World War II, New York and London 1999
FORSTHOFF, Ernst, in: Institut für Staatslehre und Politik (ed.), Der Kampf um den Wehrbeitrag, vol. 2., München 1953
HELLEGERS, Dale M., We, the Japanese People: World War II and the Origins of the Japanese Constitution. 2 volumes. Stanford:

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

Stanford University Press, 2001
HOOK, Glenn D. and McCORMACK, Gavan, Japan's Contested Constitution, documents and analysis, London and New York 2001
INOUE Kyōko, MacArthur's Japanese Constitution: a linguistic and cultural study of its making, University of Chicago Press 1991
Italy and the United Nations, Report of a Study Group set up by the Italian Society for International Organization, New York 1959
KADES, Charles L., "Discussion of Professor Theodore McNelly's Paper, 'General Douglas MacArthur and the Constitutional Disarmament of Japan'," Transactions of the Asiatic Society of Japan, vol. vii, no.1 (1982)
KOSEKI Shōichi, The birth of Japan's postwar constitution, (Ray A. Moore ed. and transl.), Boulder 1997
LUNEY, Percy R. Jr., and TAKAHASHI Kazuyuki (ed.), Japanese Constitutional Law, Tokyo 1993
MacARTHUR, Douglas, Reminiscences, London 1964
McNELLY, Theodore, "Constitutional Disarmament and the Global Abolition of War: The Meaning of the Japanese Experience," paper presented at the Southeast Conference, Association for Asian Studies, 20th Annual Meeting, Washington and Lee University/Virginia Military Institute, January 22-24, 1981, Southeast Review of Asian Studies, Annals, vol. III
McNELLY, Theodore, "The Renunciation of War in the Japanese Con¬stitution," Political Science Quarterly, vol. 77 (September 1962)
MARTIN, Craig, "Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum," University of Pennsylvania Journal of International Law, vol. 30, no. 1 (2008)
NAKAMURA Masanori, The Japanese monarchy: ambassador Joseph Grew and the making of the "symbol emperor system", 1931 – 1991, Armonk, NY etc. 1992
van PANHUYS, Jonkheer H.F., "The Netherlands Constitution and International Law," The American Journal of International Law, vol. 47 (1953)
La PERGOLA, Antonio and Del DUCA, Patrick, "Community Law, International Law and the Italian Constitution," The American Journal of International Law, vol. 79 (1985)
Political Reorientation of Japan, Report of the Government Section, Supreme Commander of the Allied Powers, vol. 1, Washington D.C 1949
REISCHAUER, Edwin O., Japan—Past and Present, London 1947
REUTER, Paul, La Communauté européenne du charbon et de l'acier, Paris 1953
SCHLICHTMANN, Klaus, Japan in the World. Shidehara Kijūrō, Pacifism and the Abolition of War, Lanham etc. 2009
SHIDEHARA Kijūrō, Gaikō gojūnen, Tokyo 1951
TANAKA Hideo, Kempō seitei katei no oboegaki, Tokyo 1979
ULEMANN, Fred, Rethinking the Constitution: An Anthology of Japanese Opinion, Kawasaki 2006 (The Constitution of Japan Project 2004)
WARD, Robert E., "The Origins of the Present Japanese Constitution," American Poli¬tical Science Review, vol. 50, no. 4 (December 1956)
WHITNEY, Courtney, MacArthur: His Rendezvous with History, New York 1956

Notes

[1] This article is based on one previously published in German: Klaus SCHLICHTMANN, "Artikel 9 im Normenkontext der Staatsverfassungen. Souveränitätsbeschränkung und Kriegsverhütung im 20. Jahrhundert," Gewollt oder geworden, Referate des 4. Japanologentages der OAG in Tokyo, ed. Werner SCHAUMANN, Munich: iudicium, 1996, pp. 129-50. A Japanese version appeared in the March 2005 issue of SEKAI (World).

[2] SHIDEHARA, as John DOWER and others have pointed out, was not keen on constitutional revision or writing a new constitution. (DOWER: 351) However, DOWER appears to have been ignorant of SHIDEHARA's instructions concerning the military provisions, and instead maintains that "Shidehara

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press

apparently gave his advisory [MATSU-MOTO] committee no serious instructions…" (DOWER: 352)

[3] Herbert BIX paints SHIDEHARA in very dark colors. (BIX: 231 and 241-243; 556) I certainly don't agree that SHIDEHARA had been "the main defender of the Kwantung Army during its 1931 Manchurian aggression." (BIX: 556) My interpretation is that he was genuinely concerned with restraining the army, while at the same time trying to uphold law and order in the region. (SCHLICHTMANN II: 106)

[4] I have had a long, personal correspondence with Professor McNELLY on the issue of the authorship of Article 9. Although we agreed to differ on this question, Professor McNELLY conceded that it was "my [his] view that in his two long sessions with MacARTHUR, it seems quite plausible that SHIDEHARA discussed or proposed that Japan renounce war as a matter of policy or even as a constitutional provision . . . There is no question that SHIDEHARA was a strong advocate of Article 9." (Email dated 30 July 2000) While McNELLY stuck to his point, rejecting SHIDEHARA's authorship, if not his involvement, my conclusion is based on the general history of the movement to abolish war as an institution (war outlawry movement), beginning with the Hague Peace Conferences, and SHIDEHARA's involvement in and knowledge of this movement—something McNELLY did not consider in his argumentation.

[5] Cited in MARUYAMA Masao, Thought and Behaviour in Modern Japanese Politics, London 1969, p. 308 (my emphasis); see also loc. cit., "Shidehara's statement foresaw the new meaning of Article IX in a thermonuclear age and he curiously assigned Japan the mission of being a vanguard in international society." Chapter 10, 'Some Reflections on Article IX of the Constitution,' is an adaptation of a report delivered at the regular ninthly meeting of the Association for the Study of Constitutional Problems. See also Richard STORRY, A History of Mod-ern Japan, Penguin 1960, p. 244.

https://doi.org/10.1017/S1557466009024127 Published online by Cambridge University Press