The Liberal Democratic Party versus the Constitution

An assessment of Japan’s possible futures must consider the likelihood that the present constitution, which took effect on May 3, 1947, will be significantly amended or even replaced. This is especially true in light of the extensive slate of constitutional amendments proposed by the Liberal Democratic Party (LDP) in 2012 (the “LDP Proposal”).

Since its formation in 1955 the LDP has advocated the adoption of an "autonomous constitution" (jisshu kenpō). Autonomous reflects the view that Japan’s current constitution (the 1947 Constitution) was forced on the country by the United States during the Allied Occupation (1945–52) after World War II. LDP leaders believe the 1947 Constitution does not reflect Japan’s history and culture and should be revised to do so.

The LDP has published proposed constitutional amendments on several occasions, beginning with a report released in April 1956. The party’s ideas were presented in fine detail in a “Draft New Constitution” adopted at the annual party congress in November 2005 and again in the LDP Proposal. So far, none of these proposals have led to change. The text of the constitution is exactly the same today as it was in 1947.

Someday these words may be amended. Vigorous leadership by Prime Minister Shinzō Abe following the LDP’s victory in the December 2012 House of Representatives election suggests that the time may come soon. In this chapter, we discuss the past and present of the 1947 Constitution and possible futures under an “autonomous” constitution of the type contained in the LDP Proposal, which was formally approved on April 27, 2012, and released the following day. The date was symbolic: sixty years previously, on April 28, the Treaty of San Francisco had taken effect, occupation by the Allied Powers had formally ended, and the country had recovered sovereignty.

But had it? The United States continued to exercise dominion over Japanese territory for two more decades (the Ogasawara Islands until 1968, Okinawa until 1972). Even on the main islands the United States has continuously maintained military bases under a one-sided military alliance signed the same day as the peace treaty. By the time Japan formally regained its sovereignty in 1952, the United States was already using these bases to fight the Korean War. Six decades later, it retains significant military bases in Japan, funded largely by Japanese taxpayers and existing largely outside the jurisdiction of Japanese law.

This is the past from which Japan’s constitution was born and the present in which it has existed—without formal amendment—for over half a century. Any self-respecting nationalist would reasonably find this situation objectionable, all the more so because of the charter’s remarkable provenance.

The 1947 Constitution

The document that became the postwar constitution was first drafted in English over the space of about a week in February 1946 by a team of American Occupation officials working in great secrecy and under tremendous time pressure. After their draft was presented to a stunned Japanese government, there followed an intense process of translation and backroom negotiations in which the Americans had the upper hand. Yet both sides shared the goal of presenting to the world a “Japanese” initiative that would both protect Emperor Hirohito and forestall interference by other Allied powers in constitutional reform. An outline of the draft was announced by the Japanese government in March 1946, and the draft itself was presented to a newly elected Diet (its members having won elections in which women voted for the first time) as a proposed amendment (in toto) of the Meiji Constitution of 1889. The Diet (parliament) made a number of changes (including adding some of the social rights contained in Chapter III) to the proposal before approving it. The resulting charter was promulgated by Emperor Hirohito on November 3, 1946 (the Meiji emperor’s birthday) and came into effect on May 3 of the following year.
Much effort went into disguising the constitution’s foreign provenance, including the unusual tactic of drafting it in vernacular Japanese rather than the dense, highly technical classical Japanese used in statutes at the time. Nonetheless, the document showed much foreign influence. To understand this one need look no further than the preamble, which was drafted by an American army lawyer and is probably much more inspiring when read in the original English than in the Japanese into which it was painstakingly rendered.

The significance of the 1947 Constitution can be understood only in contrast to its predecessor, which was bestowed upon the Japanese people as a gift of Mutsuhito, the Emperor Meiji. In fact, many of the provisions of the present constitution represent clear refutations of the Meiji Constitution, starting with Article 1, which declares sovereignty to be vested in the people, not the emperor. The Meiji Constitution did acknowledge that the emperor’s subjects held some rights—freedom of religion and speech, for example—but declared them to be subject to whatever limits might be imposed by the Diet through law.

**Reaction to the 1947 Constitution**

Revising the 1947 Constitution first took a prominent place on the national political agenda soon after the end of the Occupation. Over the decades since, it has been a constant theme in Japanese politics, though often in the form of background noise, with much debate and repeated proposals for change but little concrete progress.

Although the LDP and its allies have ruled Japan throughout most of this period, they have failed to achieve their long-standing goal of transforming the constitution into a document that matches their vision of Japan. Why? Under Constitution Article 96, amendments must be approved by “concurring vote of two-thirds or more of all the members of each House” of the Diet and must thereafter be approved by a majority of all persons voting in a national referendum. Perhaps this hurdle is simply too high: the LDP has never controlled the necessary supermajority of seats in both houses of the legislature.

Another reason might be that enough Japanese have liked the constitution as it is, or at least have liked some of the new things it stood for when it was announced to a country still struggling to emerge from the rubble of a disastrous war. Thereafter, a significant part of the population has remained supportive or at worst ambivalent with respect to the constitutional status quo, particularly when it comes to the pacifist provisions of Article 9. A 2007 opinion poll taken by NHK, Japan’s national public broadcaster, revealed that while 41 percent of those surveyed thought constitutional change was necessary, 24 percent felt no change was necessary, and a further 30 percent could not say either way. A 2013 poll by the broadcaster showed 39 percent of those polled agreeing that “some” provisions of the constitution needed to be changed, with 21 percent feeling that no changes were necessary.

**Abe’s “Technical” Amendment**

We have not found any record that the LDP has ever submitted an amendment proposal to the Diet. Indeed, it was not until 2007, during Abe’s first term as prime minister, that a law (the Constitutional Amendment Referendum Act) was passed establishing the procedures for the national referendum mandated by the constitution as part of the amendment process.

Following the LDP victory in the December 2012 elections that awarded the party and its allies control of two-thirds of the House of Representatives, Prime Minister Abe promised that a proposed amendment would be submitted to the Diet, though his approach may be considered deceptive, even mendacious. Rather than moving forward with the LDP Proposal in its entirety, he instead offered just one amendment: a change to Article 96 that would lower the bar for approving further amendments to majorities of both houses plus the approval of a majority of those citizens voting in a national referendum.

This seemingly transparent ploy, characterized by one critic as an invitation to come into a restaurant with no menu, might nonetheless work on a populace that may have long been vaguely aware of the need to amend something about the American-tainted constitution and might agree with the abstract notion of making amendments easier. But such a change might have profound effects. It would empower simple majorities to change any part of the constitution, including protections for free speech and other fundamental rights.

Moreover, the referendum requirement is likely to provide little real protection, since the Constitutional Amendment Referendum Act seems carefully structured to minimize actual debate over proposed amendments once
they have been approved by the Diet, something most people are likely to learn only when it is too late. With no minimum turnout required by the act and only about 60 percent of voters participating in most national elections, if the LDP gets amendments through the Diet they could be approved by as little as 30 percent of the citizenry.

After the LDP and their coalition partners further strengthened their control of the Diet through victory in the House of Councillors’ election in the summer of 2013, the debate on amending Article 96 died down. Prime Minister Abe instead turned his energy and political capital to using a cabinet resolution to “reinterpret” Article 9 to allow Japan to participate in collective self-defense activities in foreign lands. The Abe cabinet formally adopted such a resolution on July 1, 2014.

Changing the constitution through either amendment or interpretation is clearly an important agenda for Abe and his party. A closer look at the rest of the changes desired by the LDP shows the sort of constitutional future awaiting Japan if the party remains in power.

The LDP Proposal

The extensive changes included in the LDP Proposal can be divided into three categories. The first consists of technical changes such as adding paragraph numbers and titles to articles (already included in most commercial reproductions of the constitution, but not technically a part of it as promulgated), fixing quirky language, and other fine tuning.

The second category consists of substantive changes unlikely to be controversial because they would merely make the constitution reflect what the government already does or courts already allow. For example, the current constitution does not provide for dissolution of the House of Representatives except upon a no-confidence vote. Nor does it clearly accord any formal role to the cabinet in the legislative process. Yet in actuality the great majority of legislation passed by the Diet is proposed by the cabinet, and prime ministers have dissolved the House of Representatives on numerous occasions without a no-confidence vote. Neither of these practices is unusual in a parliamentary system.

The LDP Proposal would also clearly designate the emperor as head of state. Unlike the Meiji Constitution, the 1947 Constitution contains no clear designation of such status, which would arguably be inconsistent with the constitutional principle of popular sovereignty. Yet for all intents and purposes the emperor is treated as head of state in practice, and many foreign diplomats probably already labor under the misconception that he is. In a similar vein, LDP proposals for what might be called the “boring” parts of the constitution to allow budgeted expenditures to be continued over multiple fiscal years would arguably remedy the significant restrictions that the annual budgeting process imposes on fiscal flexibility.

In this second category, one might even include the LDP’s proposal to recognize the existence of a National Defense Force (kokubōgun). This would be accomplished through a drastic rewriting of Chapter II of the constitution, which contains the charter’s famous Article 9 and would be entitled “National Security” rather than the current “Renunciation of War.” Although there is significant popular opposition to changing Article 9, Japan already has a formidable military—the Self-Defense Forces (SDF). So to provide for it in the constitution may amount to nothing more than an acknowledgment of the status quo. Over the decades the nation’s leaders have had to ponder a variety of potential military threats: the Soviet Union in the Cold War era, more recently a bellicose North Korea, an increasingly assertive China, and a vaguely defined “war on terror” that has placed demands on Japan to commit military support in places as far away as Afghanistan and Iraq. Arguably the real issue is not so much the existence of the SDF as the ability of the government to react decisively in emergencies, whether to external threats or to natural disasters of the type discussed in some of the previous chapters. It is here that the LDP proposals become more specific and potentially significant.

This brings us to the third category of amendments proposed by the LDP. As the previous paragraph suggests, there is some overlap between the second and third categories. For decades, the principal controversy surrounding Article 9 has concerned not Japan’s possession of military forces but the constitutional authority to use those forces collectively with the militaries of other countries and thereby to fulfill an important role in global and regional security. Having emerged as an economic superpower that enjoys the commercial benefits of a relatively peaceful world, Japan has been increasingly pressured to share the burden of maintaining peace in regions outside Japan by participating in “collective self-defense” operations recognized by Article 51 of the UN Charter. Japan’s Cabinet Legislation Bureau has consistently interpreted Article 9 to prohibit participation in collective self-defense, a significant limitation on Japan’s ability to contribute to multinational military campaigns involving the use of force.
Here the LDP Proposal would make a real, substantive constitutional change by unambiguously permitting the deployment of the National Defense Force internationally. The revised Chapter II would also clearly commit Japan to protecting national territory, airspace, waters, and resources. This is not an insignificant commitment at a time when Japan is engaged in an increasingly hostile dispute with China over the Senkaku (Diaoyu) Islands, situated between Okinawa and Taiwan. Furthermore, when taken in conjunction with a provision to be added elsewhere obligating the state to assist Japanese nationals abroad in emergencies (LDP Proposal, Art. 25-3), Article 9 as revised could serve as grounds for active, even constitutionally required, foreign military interventions.

**State of Emergency**

The single proposal that may have the greatest impact on Japan's future course would be an entirely new chapter of the constitution. The LDP would label this new Chapter IX "State of Emergency" and grant the prime minister and his cabinet extraordinary powers. A new Article 98 would enable the prime minister, acting through the cabinet, to declare a state of emergency "in the event of armed attacks on the nation from abroad, disturbances of the social order due to internal strife [nairan], etc., large-scale natural catastrophes due to earthquakes, etc., or other emergency situations as designated by law." This is a broad range of potential situations, enhanced with the Japanese equivalent of "et cetera," apparently to ensure that the prime minister would have broad latitude in judging when to act. Although emergency declarations are subject to some post facto control by the legislature, these amendments would result in a dramatic expansion of executive powers, notwithstanding the preservation of the constitutional designation of the Diet as the "highest organ of state power" and sole legislative body.

Under Chapter IX (LDP Proposal Art. 99[1]), emergency cabinet orders would have the same effect as laws, thus eliminating the ordinary requirement for Diet deliberations of government action, including opportunities for opposition politicians to debate proposed declarations and for the news media to report on such deliberations. The entire process could take place in secret. Moreover, the prime minister would be empowered to issue orders to mayors and prefectural governors. The analysis of Japan's disaster management system by William Siembieda and Haruo Hayashi in chapter 6 of this volume indicates that at least in the case of natural disasters this authority is unnecessary.

Moreover, a new Article 99(3) would state that everyone "must comply with the directives of national or other public institutions . . . to protect the lives, persons or property of the people." What fate would befall civil liberties and other fundamental rights during a state of emergency?

Language is included mandating that constitutional provisions "relating to fundamental rights shall be respected to the greatest extent." These words may sound reassuring, but when one considers the lax attitude of Japan's Supreme Court in protecting individual rights (described below) and another LDP proposal (also described below) that would subordinate individual rights to the "public order," there is good reason to fear that emergency powers might be abused.

The Meiji Constitution also granted the emperor emergency powers, similarly subject to parliamentary restraints that proved ineffective. The lack of an effective safeguard on the abuse of these powers by officers acting in the emperor's name was a key factor leading to Japan's slide into militarism and total war.

**Back to the Present: The Role of the Courts**

The prospect of limits imposed on fundamental rights in emergencies naturally raises the issue of the judicial role in overseeing the actions of the executive branch of government. The American authors of the constitution's first draft looked to the courts to serve as the ultimate defenders of the individual rights guaranteed in the constitution. They eliminated control by the Ministry of Justice over judges and the courts, created a new Supreme Court with administrative authority over lower court judges, and granted the Court the power of "judicial review," the authority to judge the constitutionality of actions by other branches of government.

The failure of the Supreme Court to effectively use its judicial review power ranks as one of the greatest disappointments of the 1947 Constitution. Despite being clearly vested with the power of judicial review and the independence necessary to exercise it, Japan's Supreme Court has been extremely deferential to other branches of government. For the most part it has used procedural techniques such as highly restrictive notions of standing or ripeness and substantive doctrines such as "political question" to avoid using the power.

When it has not avoided the issue, the Court has overwhelmingly upheld laws or government acts in cases where they conflict with individual rights
and freedoms. Moreover, the Court has failed to develop comprehensible standards to explain its judgments in these cases, often relying on poorly articulated reasons such as the broad “public welfare” concept of Articles 12 and 13. Instances when the court has issued judgments holding the act of another agency of government unconstitutional can be counted on the fingers of both hands. Furthermore, with the exception of a handful of rulings on the subject of voting rights, the Court’s unconstitutionality judgments have involved relatively minor issues, such as striking down restrictions on pharmacy licensing and the subdivision of forested land. By failing to exercise its power of judicial review, the Court has allowed other branches of government to determine the law governing issues of widespread importance throughout Japanese society.

Supreme Court acquiescence to most government actions and programs is no surprise. Supreme Court appointments are controlled by the cabinet, and LDP politicians have controlled the cabinet almost continuously since the party was formed. LDP satisfaction with the performance of the Supreme Court to date is suggested by the lack of any significant LDP proposal to amend Chapter VI of the constitution, which creates the judicial branch and defines its powers.

Change as Ideology

Except for Article 9’s restraint on the use of military force, the 1947 Constitution has not been a significant hindrance to the exercise of power by LDP politicians. If the constitution has not been an obstacle, why do LDP leaders seek the comprehensive changes embodied in the LDP Proposal?

Other than the obvious and long-standing example of national defense, few of the constitutional changes proposed by the LDP have actually been justified as responses to identified social or political problems attributable to defects in the current charter. The lack of concrete reasons may explain why Abe and his followers focus on attacking the constitution’s provenance and pushing the largely abstract idea of amendment itself as their initial goal.

Thus it seems that ideology rather than any practical dissatisfaction with life under the 1947 Constitution drives Abe and the LDP to seek constitutional change. The ideology underlying the LDP Proposal appears to be more important than the actual words of either the present constitution or the new one they propose. For this reason, regardless of whether the LDP Proposal is ever implemented in whole or in part, it is worth attention as an indicator of the ruling party’s vision for the future of Japan.

Yet since the proposal’s authors do not expressly declare their ideology it must be divined from the substance of their proposals. There are two primary characteristics. First, it is nationalistic: the LDP asserts that Japan’s constitutional rights are different from rights in other countries, the product of Japan’s unique “history, tradition and culture.” Second, it is authoritarian: the paramount value is not individual freedom and the “pursuit of happiness,” as it may be in Western countries and elsewhere, but “public order.” According to the LDP Proposal, when individual rights conflict with public order, they must give way. In the following sections, we will show how this ideology infuses the LDP proposals for constitutional change.

From “Universal” Rights to “Native” Rights

The nationalistic thread in the LDP Proposal is apparent from the express rejection of both the universal nature of human rights and the “Western theory of natural rights.” The party intends to expunge these foreign influences and replace them with a system of native rights based on Japan’s past.

Japan’s 1947 Constitution was drafted, revised, and adopted during an era of revolutionary change in global human rights, between the founding of the United Nations in 1945 and UN General Assembly adoption of the Universal Declaration of Human Rights in 1948. The list of rights declared in Japan’s 1947 Constitution closely parallels the Universal Declaration and several human rights treaties that Japan signed and ratified thereafter.

“Promoting and encouraging respect for human rights and for fundamental freedoms for all” is one of the primary purposes of the United Nations. These rights and freedoms are defined in the Universal Declaration. The UN General Assembly proclaimed the Universal Declaration to be “a common standard of achievement for all peoples and all nations” and described its purpose to be securing these rights and freedoms “universal and effective recognition and observance.”

Japan joined the United Nations in 1956, one year after conservative factions joined to found the LDP. From that time until the present, government representatives have consistently voiced enthusiastic support for the protection of universal rights. Japan has ratified several international human rights conventions whose goal is the protection of universal rights. Drafters
of these instruments were well aware of differences in culture and traditions among the more than 150 nations that have ratified them. Nonetheless, regarding the “universality” of these rights, the UN High Commissioner on Human Rights is uncompromising. The commission’s website declares: “The principle of universality of human rights is the cornerstone of international human rights law.”

LDP leaders disagree. They declare that rights are not universal, and they propose restrictions on individual rights that will pull Japan in a direction that would surely undermine and contradict Japan’s obligations under international human rights law. This would constitute a radical change to Japan’s fundamental policy and its position in the United Nations’ human rights system.

Rejecting the “Western Theory of Natural Rights”

The authors of the LDP proposals do not directly challenge Japan’s obligations under international human rights instruments. They aim their fire solely at the 1947 Constitution and would replace universality with its opposite, uniqueness. The first sentence of the LDP Constitution would read: “Japan is a nation with a long history and unique culture, with a tennō [emperor] who is a symbol of the unity of the people.”

Regarding the issue of universality versus uniqueness, the LDP Q&A explains, “Rights are gradually formulated through the history, tradition, and culture of each community. Therefore, we believe that the provisions concerning human rights should reflect the history, culture, and tradition of Japan. The current constitution includes some provisions based on the Western theory of natural rights. We believe these provisions should be revised.”

What elements of “history, culture, and tradition” should provide the basis for human rights in Japan? The Q&A’s authors do not tell us directly, but several proposed changes in constitutional wording and statements in the Q&A pamphlet indicate a clear direction.

The express rejection of the “Western theory of natural rights” is a good place to start. Natural rights theory holds that everyone is endowed with various rights at birth. Nearly a century before the American and French Revolutions, John Locke wrote that all men are by nature free and equal and that all have rights, such as the right to life, liberty, and property. Locke declared that the people grant only limited powers to government. His ideas found expression in the American Declaration of Independence, which refers specifically to the “laws of nature” and announces that all men are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” In 1946, these very words found their way into Article 13 of Japan’s new constitution, which tells the world that “all citizens shall be respected as individuals. Their rights to life, liberty, and the pursuit of happiness shall . . . be the supreme consideration in legislation and in other governmental affairs.”

Phrases like these are the core of the Western concept of natural rights. The Q&A is certainly correct in saying that many provisions of Japan’s 1947 Constitution reflect this thinking. But the American authors who planted the words of Locke and Jefferson in Article 13 also diluted their impact by inserting a limitation: citizens’ right to life, liberty, and pursuit of happiness would be the supreme consideration only “to the extent that it does not interfere with the public welfare.” As noted above, when interpreted by the Supreme Court of Japan this phrase has operated as a significant limitation on individual rights.

Whether the individual rights protected by the 1947 Constitution are described as derived from “Western natural rights theory” or from “universal principles,” for nationalistic LDP leaders the problem is the same: the source of such rights is not uniquely Japanese and therefore they are subject to interpretation by reference to standards and definitions that are outside their control. By recasting rights in nativist terms, LDP leaders can preserve for themselves the authority to dictate how human rights should be understood and interpreted in Japan.

LDP Opposition to Individual Rights

Opposition to individual rights is a central theme of the LDP Proposal. Perhaps the most obvious example is Article 13, which begins with the statement that “all citizens shall be respected as individuals” (emphasis added). The LDP authors are so opposed to recognizing individual rights that they would delete the word individual (kōjin) and replace it with the term people (hitō). Thus all citizens would be respected not as individuals but in some other undefined status, perhaps as members of families or communities overseen by a paternalistic state.

Constitutional scholars frequently note the historic importance of the guarantee of individual rights in the 1947 Constitution. Kazuyuki Takahashi
explains that the hostility of Japan’s political leaders toward individual rights was apparent long before the creation of the 1947 Constitution. “Traditionalists who felt nostalgia for the ancient regime of Kokutai [national polity],” he writes, “abhorred the individualist ideas and ideals they sensed the new Constitution embodies.” The term kokutai was closely tied to imperial sovereignty and was “presumed to preexist the [Meiji] Constitution,” which described the sovereign emperor as the descendant of “a line of Emperors unbroken for ages eternal.”

Yóichi Higuchi, a leading opponent of the LDP Proposal, emphasizes the significance of individual rights: “The Constitution designed a society around an intellectual value—respect for the individual—that replaced veneration for the emperor.” The celebration of individual rights in the 1947 Constitution was thus a direct affront to the ideals of Japan’s political elite.

We have seen no evidence indicating that LDP leaders seek a wholesale revival of the Meiji Constitution or of imperial sovereignty. However, any consideration of constitutional change begins with the Meiji Constitution, the immediate predecessor to the “imposed” 1947 Constitution. The Meiji Constitution was composed by Japanese drafters after their careful study of legal systems abroad. In the early stages of the occupation, Japan’s leaders sought to preserve as much of the Meiji Constitution as possible until the American draft was “forced” upon them. It is therefore the most important reference—other than the 1947 Constitution itself—to understanding Japan’s modern constitutional tradition. While the LDP Proposal does not call for an outright revival of the Meiji constitutional system, its hostility toward individual rights and its imposition of new duties on the people are consistent with the ideals of the Meiji Constitution.

LDP Opposition to Constitutional Limits on Government Power

Because individual constitutional rights are limitations on government control over human behavior, opposition to those rights implies a desire for increased government control. The idea that government power should be limited is a core feature of both natural rights theory and modern constitutionalism, a concept with which the LDP has struggled for decades while ruling in their shadow. Takahashi has described the entrenched opposition to constitutional limits on government power:

We commit ourselves to constitutionalism, which, we believe, is the strategy for freedom, destined to ensure that political power is exercised in conformity with the constitution, guaranteeing fundamental rights and the separation of powers... The problem is that the idea of constitutionalism is a foreign concept to us Japanese; that is, it is not endogenous to our own soil. Before we learned the idea from Westerners, we did not know the idea of imposing law on rulers. Law had always come from rulers; obedience to the law had been a virtue of the people; rulers had ruled by law instead of being ruled by law [emphasis added].

Legal historians agree that constitutionalism and the rule of law, founded on the central idea that government is limited by law, did not evolve on their own in East Asia but were imported from the West. Until the adoption of the 1947 Constitution, Japan employed what scholars have labeled a “rule-by-law” regime in which law was a tool used by government to control the people. Tom Ginsburg summarizes the comparison: “In contrast with Western legal traditions organized around the notion of the autonomous rights-bearing individual, the Imperial Chinese tradition is usually depicted as emphasizing social order over individual autonomy and responsibilities over rights. Law exists not to empower and protect individuals from the state, but as an instrument of governmental control. Any rights that do exist are granted by the state and may be retracted.” This was certainly the case under the Meiji Constitution, which allocated sovereign power to the emperor (tennō). Dan Feno Henderson explains that by vesting sovereignty in the emperor and making all individual rights subject to laws passed by the Diet, the Meiji system “clearly rejected anything like the French natural right theory or the American social contract theory as a limitation on the constitutional policymakers. Rather, as the preamble of the constitution states, these rights were bestowed on the subjects as a benevolent act.”

Resistance to constitutionalism and limitations on government power run throughout the LDP Proposal. Rule-by-law concepts like “social order over individual autonomy” and law as “an instrument of government control” are alive and well in the LDP.

“Public Order” over Individual Rights

As described above, the Supreme Court has interpreted the 1947 Constitution in a manner that imposes very few restraints on government power. But
LDP leaders would nonetheless revise the constitution to further constrain the Court’s power to rule in favor of individual rights. They propose to revise Article 12 to indicate that “public order” overrides individual rights. The LDP version of this article would read that the people “shall be aware that duties and obligations accompany freedoms and rights and shall never violate the public interest and public order [emphasis added].”

The LDP would also go so far as to make it doubly clear that the “public interest and public order” qualification applies to the Article 21 guarantee of freedom of expression. The present resounding declaration that “freedom of assembly and association as well as speech, press, and all other forms of expression are guaranteed,” would gain a new proviso: “Notwithstanding the provisions of the preceding paragraph, activities intended to harm the public interest or public order and associations for such purposes are not allowed.”

Even under the present constitution the law is selectively applied against individuals and groups perceived to be opponents of the established political regime. The police targeted antwar activists who opposed the deployment of an SDF contingent to Iraq, in at least one case they arrested an individual for exhorting attendees not to stand during a school graduation ceremony; and they have consistently surveilled and arrested Communist Party supporters engaged in distributing newsletters and other campaign literature.

The kind of government action shown in these cases—direct attacks on spokespersons for competing policies and ideologies—would gain a constitutional imprimatur as acts that protect public order. Moreover, this LDP revision would restrict not only speech activities but also the right of association, empowering the police to take action against both organizations and individual members. Elevating public order over free speech and association in the constitutional text would put the police in a legally unassailable position when they surveil, arrest, or take other actions against individuals or organizations they deem threats to public order.

How does the LDP itself define “public order”? It doesn’t! In the Q&A, the LDP authors merely explain that “our use of the term ‘public order’ is not intended to refer to ‘regulating activities challenging the state.’ ‘Public order’ here refers to ‘social order’ [shakai chitsujo]; it means peaceful social life [heibon na shakaisei katsu]. There is no question that individuals who assert human rights should not cause nuisances to others.”

According to the LDP Proposal, social order is superior to individual freedom. Threats to freedom arise not from the actions of state authorities but from individuals who assert constitutional rights and thereby inconvenience (meiwaku) and threaten the “peaceful social life” of others. Labeling those who exercise constitutional rights as troublemakers sets the stage for government action to rein them in. The LDP shifts a core constitutional function from limiting state power to limiting individual behavior. What is the source of this kind of thinking?

Constitutional Rights or “Human Rights”?

The term human rights is frequently used in Japan when there is no constitutional nexus at all. Government admonitions to the public to “respect the human rights of others” are commonplace, even in contexts not generally associated with human rights as they are understood in other countries—school bullying, for example. When Japan’s new constitutional order replaced “veneration for the emperor” with “respect for the individual” and raised individual rights to a universal level, the government, news media, educational institutions, and others faced a tall order in educating the people about the significance of their new rights. One major initiative centers around a “Human Rights Protection Bureau” (jinken yôgo kaiyaku) newly created within the Ministry of Justice in 1948. The bureau is charged with promoting awareness of human rights among the people at large and mediating disputes with the help of lay “human rights commissioners.”

Through this kind of program, the government has consistently promoted the idea that a “human rights violation” is an incident that involves private individuals and organizations. The role of the government in this context is to act as a benevolent overseer, counseling victims and perpetrators and seeking to defuse confrontations while limiting the damage and improving behavior.

Needless to say, this may be valuable work. In most cases, however, these types of violations have little or nothing to do with constitutional rights. According to the government’s 2011 report, the most common incidents come within categories labeled “assault, maltreatment,” “infringement on the security of residence and living,” and “bullying in schools.” Many serious matters may be addressed through this program, but unless they involve complaints against action by government authorities they do not raise constitutional issues. The law provides that disputes between individuals are to be resolved according to Japan’s civil code, not the constitution.
In international forums, the government has often put forth its human rights commissioner system as evidence of its efforts to fulfill duties under international human rights treaties. But international human rights bodies do not agree that a voluntary program to mediate disputes between private parties is sufficient. They have repeatedly recommended that Japan establish "an independent national human rights institution outside the Government, in accordance with the Paris Principles ... with competence to consider and act on complaints of human rights violations by public authorities."²

Japan has not followed this recommendation. An LDP cabinet did propose a bill to establish a new human rights commission in 2002, but the body would have been under the Ministry of Justice, and its primary charge would have been to monitor the acts of private parties, especially the news media, not the acts of government agencies. One provision of that bill would even have prohibited "excessive reporting." The bill was severely criticized by Japan's bar associations and other groups concerned with human rights. After reviewing this proposal, UN High Commissioner on Human Rights Mary Robinson sent a letter to Prime Minister Jun'ichiro Koizumi explaining why it utterly failed to meet the United Nations' recommendation.⁴³

"Constitutional Duties"

Another category of LDP revisions would lay the foundation for more direct government control of the people by expanding the range of "constitutional duties."²⁷ The salient proposal in this regard is amendment of the constitution's Article 99, which currently reads: "The Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution." This duty is a direct corollary of the principle that government powers are created and limited by the constitution. The LDP would flip this idea on its head with new language declaring that "all of the people must respect this constitution."²⁸ This would lay the foundation for government to both define and enforce those duties through law and other official acts. Regarding specific new duties, the most obviously inflammatory proposal is new wording that would mandate respect for the national flag and anthem. Together with the emperor himself, these are the most powerful symbols of Japanese nationalism and have been a flash point for much of the postwar period.

LDP efforts to raise their status reached a landmark in 1999 with passage of a law formally establishing them as Japan's national flag and anthem (kimigayo, a poem to the imperial lineage). At the time government spokesmen assured the public that the new law would not lead to mandatory ceremonies. But the spotlight then moved to local governments, led by Tokyo governor Ishihara Shintaro, which adopted rules requiring public school teachers to participate in school ceremonies involving the flag and anthem. This action incited a rare example of public civil disobedience, as hundreds of teachers defied orders to stand and sing. They were punished with official reprimands, pay cuts, and removals from classrooms. These sanctions were challenged in court, leading to a series of Supreme Court decisions in 2011 that vindicated Ishihara and his followers by dismissing the teachers' claims for protection under Constitution Article 19, which declares a right to belief and conscience.

Insertion of these duties into the constitution would enable government leaders to impose discipline and restrict freedom of belief and expression. Obligatory veneration of nationalistic symbols could be extended to all persons subject to the constitution, including the descendants of Korean, Chinese, and other victims of Japanese militarism.

Other proposed new duties would also create government power to control behavior. Of special interest is the proposed new Article 19-2: "No person shall improperly acquire, possess, or use information concerning individuals."²⁹ This language imposes new constitutional duties with potentially extremely broad applications. "Information concerning individuals" is a virtually limitless category, including not only names, photographs, and vital data but potentially any type of information describing any aspect of specific people. This duty would apply to news organizations, bloggers, and writers of all kinds, as well as a vast range of businesses and voluntary organizations whose actions might be deemed "improper." For example, debate on public policies and social issues might be suppressed in the name of protecting privacy, and it could be very risky for anyone but the government to publicly attribute responsibility for any problem to any identifiable individual.

Another new duty concerns the family. The LDP proposes a provision that reads: "The family shall be respected as the natural and fundamental unit of society. Family [members] must mutually support each other."³⁰ A provision like this would put the state in position to define family duties. It also raises the question whether one specific goal in the LDP campaign is revival of the patriarchal household system. As Ayako Kano explains in
chapter 4 on gender in this book, new forms of family and household in Japan defy traditional categories.

Other proposals reinforce the suspicion that the LDP goal is to formally reestablish a "rule-by-law" system in which the role of law, including the constitution, is to provide tools to enable the state to control society. Examples include language proposed for Article 12 that would require people to "realize that freedoms and rights are accompanied by responsibilities and duties" whose scope is undefined. Presumably it will be left to the government to define them as it deems necessary.

Our analysis shows that the ideology displayed in the LDP Proposal for constitutional change contradicts fundamental notions of democratic government. Rather than limiting the power of government, the LDP would use the constitution to limit the rights of the people. The LDP Proposal is not the result of a quick or halfhearted committee process. It is the culmination of more than fifty meetings carried out over a period of nearly two and a half years. Four former LDP presidents including Shinzō Abe were "supreme counselors" to the primary committee charged with preparing these changes.

The LDP Proposal is the product of a powerful and determined political force.

In contrast to the standard understanding of popular sovereignty, in which the people create and oversee government, the LDP proposes a different dynamic. According to this dynamic, the people, rather than the source of sovereign power, are the source of problems to be managed by government authority through the constitution in the first instance and through potentially sweeping legislation in the second. We view the LDP Proposal as a sort of "anticonstitution" in which the roles of the state and the people are reversed.

The LDP Proposal is based on an ideology that is nationalistic and authoritarian. Nationalistic political leaders like Shinzō Abe have borne a deep animosity toward the 1947 Constitution since it was adopted, but so far they have been unable to change a single word. By their words and actions, they have demonstrated their commitment to change the constitution, by amendment if possible, by their interpretation if not.

In chapter 12 of this volume, Ellis Krauss and Robert Pekkanen query whether Japan will produce a new "transformational leader." We can only wonder whether Abe or someone like him will become such a leader and whether the LDP Proposal will be the core of their plan for Japan's future.

Notes
1. All translations of LDP constitutional proposals and of excerpts from the LDP Q&A pamphlet are by the authors, who have sole responsibility for their accuracy.
3. Public opinion in many Allied countries demanded that Hirohito be tried as a war criminal. For a history of this era, see Ray A. Moore and Donald Robinson, Partners for Democracy (New York: Oxford University Press, 2002), 36–49.
4. On the subject of amending Article 9, only 28 percent expressed support for change, with 41 percent opposed and 26 percent undecided. The survey results are discussed in Koji Shioda, Kenpō kaisetsu giron to kokumin no ishibiki [Public political consciousness and the debate over constitutional revision], Hōsō kenkyū to chosa, December 2007, 72–80, www.nhk.or.jp/bunken/summary/yoron/social/005.html.
6. A group of scholars led by Yūichi Higuchi was formed in May 2013 to oppose this move. See "Gakushara yōjōnakai" kessei, san'inshinmu kaisetsu hantai yōkiakete [Scholars and others form "Article 96 Group," call for opposition to revision as House of Councillors election looms], May 23, 2013, Doko e iku, nihon [Where are you going, Japan?], http://blog.livedoor.jp/gatarooclone/archives/27376713.html.
7. The English version of the constitution is misleading in this respect, since in Article 72 it says, "The Prime Minister, representing the Cabinet, submits bills . . . to the Diet," which seems clear. However, the Japanese version does not use the term meaning "proposed law" (i.e., bill) that is used in Article 59, which sets forth the
legislative process. Since Article 41 declares the Diet to be the sole lawmaking organ of the state, the important role the cabinet actually plays in the legislative process may conflict with the constitution's intent.

8. Insofar as the roles typically associated with a head of state, particularly in the area of international relations, are, under the current charter, performed by the cabinet, with the emperor providing only an attesting role, constitutional theory generally holds that he should not be considered the head of state. See, e.g., Nobuyoshi Ashibe, Kenpō [The constitution], 4th ed. (Tokyo: Iwanami Shoten, 2012), 47; Kōji Satō, Nihon kokuseki kenpō [The constitution of Japan] (Tokyo: Seibundo, 2012), 51-72; Hideki Shibusani, Kenpō [The constitution] (Tokyo: Yuhikaku, 2007), 58-59.

9. The most prominent citizens' group devoted to protecting Article 9 is the Article Nine Association, launched in 2004 by Nobel Prize winner Kenzaburō Ōe and other well-known writers and public intellectuals. See their website at www.9-jō.jp.


11. The prime minister would also be empowered to "make such disbursements and dispositions as are fiscally necessary," thus eliminating Diet budgetary approval.

12. Craig Martin has compared the failure of Japan's Supreme Court to pronounce clear standards to be used in cases involving conflicts between government action and individual rights with the work of courts in other countries where they have final authority. See Craig Martin, "The Japanese Constitution as Law and the Legitimacy of the Supreme Court's Constitutional Decisions: A Response to Matsui," Washington University Law Review 88, no. 6 (2017): 1327 and its citations.

13. Malapportionment in both houses of the Diet resulting in gross disparities in the number of voters represented by different seats has generated a steady stream of constitutional litigation. The Supreme Court found the apportionment scheme unconstitutional in two cases but stopped short of declaring the elections invalid. See, e.g., Shigenori Matsui, The Constitution of Japan (Portland, OR: Hart, 2011), 50-54. The Court has also invalidated an electoral statute that limited the rights of Japanese voters overseas; see Supreme Court (Grand Bench), September 14, 2005, 59 Minshū 2087, www.courts.go.jp/app/files/hanrei_jp/338/032338_hanrei.pdf (in Japanese, accessed February 13, 2013; we have deleted the reference to an English translation because this seems to have disappeared.). It should be noted that at the time of writing, the December 2012 election that brought Abe to power was the subject of constitutional challenges before the Supreme Court, with lower courts finding unconstitutional levels of inequality and one even declaring the election itself to be void on such grounds.

14. The LDP Proposal would allow for postappointment ratification of Supreme Court justices to be defined by statute. It would also relax restrictions on reducing judicial compensation and would allow the tenure of lower court judges to be set by statute instead of the ten-year terms currently mandated in Article 86.

15. Lawrence Beer notes, "Most rights contained in the 1948 Universal Declaration were guaranteed to Japanese a year earlier." Lawrence W. Beer, "Human Rights Commissioners (Jinken Yogo In) and Lay Protection of Human Rights in Japan," in his Human Rights Constitutionalism in Japan and Asia (Kent: Global Oriental, 2009), 54.

16. The Universal Declaration was followed by a series of international human rights conventions that converted the aspirational statements of the declaration into binding legal commitments. The most important of these conventions is the comprehensive International Covenant on Civil and Political Rights (ICCPR), which Japan signed and ratified in 1979. The ICCPR has been ratified by more than 160 countries; see United Nations, "The Universal Declaration of Human Rights," 1979, www.un.org/en/documents/udhr/index.shtml.


21. It goes on to say: "This principle, as first emphasized in the Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations, and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is 'the duty of States to promote

22. LDP Q&A, 14.

23. It seems quite unlikely that the Americans who participated in making the original draft could foresee the transformation of the words public welfare into a restriction on individual rights. Their own experience was shaped by a very different problem—the actions of an aggressive US Supreme Court which had repeatedly declared “public welfare” legislation such as restrictions on working hours to be violations of the US Constitution. For a very readable account of this era in American constitutional history, see Noah Feldman, Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices (New York: Grand Central Publishing, 2011). The attitude of Japan’s nationalist politicians must have caught them by surprise. During 1946 Diet debates, political leaders were already declaring that the “public welfare” clause would restrict individual rights. See William Marrott, Money, Trains, and Guillotines: Art and Revolution in 1960s Japan (Durham, NC: Duke University Press, 2013), esp. 67–70.

24. A linguistic problem with the standard English translation of the 1947 constitution is that it frequently uses the term the people where the Japanese version uses kokumin, which would be better translated “citizens.” The LDP Proposal is thus better translated as “Citizens shall be respected as people” in the sense of “Each citizen shall be respected as a person.” Note that the use of the term kokumin in defining constitutional rights has left numerous uncertainties as to the degree to which the rights of non-Japanese are protected. The LDP Proposal does not seek to remedy this deficiency.


26. Takahashi also explains: “The word Kokutai is not found in the Meiji Constitution. It was created to express the nature of the existence of the Japanese polity, which was presumed to preexist the [Meiji] Constitution. The [Meiji] Constitution reflects the distinguishing feature of Kokutai to the extent that the legal terms can give expression to it, but there is more to Kokutai than can be translated into legal terms. The word is heavily loaded with emotion, and it is extremely difficult to confine it to the legal sphere.” Ibid., 40.

27. Yōichi Higuchi, ed., Five Decades of Constitutionalism in Japanese Society (Tokyo: University of Tokyo Press, 2000), 5. On July 29, 2012, Deputy Prime Minister Tarō Asō, speaking before an ultraconservative group in Tokyo, said Japan should change the constitution stealthily as the Nazis did with the Weimar Constitution. After a public outcry, Asō said he had been misunderstood and withdrew the suggestion.


29. For an account of the February 1946 presentation of the American draft to the Japanese government, see Moore and Robinson, Partners for Democracy, 108–10.

30. Takahashi, “Why Do We Study.”


33. LDP Q&A, 44.

34. Ibid., 46.


36. For a description of these prosecutions, see Nihon Kokumin Kyukenkai [Japan People’s Relief Organization], “Tokyo-kokkōhōdan’atsu horikoshi jiken” [Tokyo—The Horikoshi case: Repression through national public law], www.kyuenkai.org/index.php%BP%Fr%BB%F8%CB%A3%CB%A5%CB%A4%CB%92%BB%DB%BB%F6%BF%EF (accessed February 12, 2013).

37. See National Police Agency, “Keibi keisatsu shonin no ayumi” [The fifty-year history of the Security Police], n.d., www.npa.go.jp/archive/keibi/syouten260/secor/sec010301.htm (accessed February 14, 2015). A surprising amount of Japan’s postwar constitutional jurisprudence is derived from cases involving government efforts to suppress the Communist Party of Japan. One showcased significant abuse of police powers, including an intensive undercover investigation to prove that the defendant, a low-level bureaucrat, was distributing Communist Party literature on his days off. See Nihon Kokumin Kyukenkai, “Tokyo-kokkōhōdan’atsu horikoshi jiken.”

38. LDP Q&A, 14.

39. Late in 2012, one of the authors came across a small sign posted in a public restroom in a train station. It was sponsored by both the Legal Affairs Bureau and the Prefectural Federation of Human Rights Committees and carried the imprimatur
of the MOJ's human rights mascot characters. The sign warned whoever had previously written offensive, discriminatory graffiti on the bathroom wall that such behavior infringed rights protected by the constitution! This is perhaps an extreme example of the way in which government actors trivialize human rights and reframe the notion that citizens themselves, not the government, present threats to human rights.

41. Ibid.
44. Currently the constitution provides for only three such duties: to educate children (Article 26), to work (Article 27), and to pay taxes (Article 30).
45. LDP proposed Article 102(1), in LDP Q&A, 64.
46. Ibid., 45–46.
47. Ibid., 46.
48. Ibid., 4.
49. Ibid., 79.

About the Contributors

Anne Allison is Professor of Cultural Anthropology at Duke University and is the author of four books on contemporary issues in Japan. Her most recent book is Precarious Japan (2013).

Frank Baldwin represented the Social Science Research Council in Japan and is an independent editor and researcher. He is the translator of Haruki Wada’s The Korean War (2013).

Takahiro Fujimoto is Professor of Economics at the University of Tokyo. He is the author of The Evolution of a Manufacturing System at Toyota (1999) and Monozukuri kara no fukkō [Manufacturing and economic growth] (2012).

Haruo Hayashi is a Professor at the Disaster Prevention Research Institute, Kyoto University. He is a coeditor of a special issue of the Journal of Disaster Research (August 2012) entitled "Sustainability/Survivability Science for a Resilient Society Adaptable to Extreme Weather Conditions."

Jacques E. C. Hymans is Associate Professor of International Relations at the University of Southern California. He is the author of Achieving Nuclear Ambitions: Scientists, Politicians, and Proliferation (2012), winner of the American Political Science Association’s 2013 award for Best Book in Science, Technology and Environmental Politics.