3. Death Penalty

- The Commission included abolition of the death penalty among the top ten priority human rights issues and raised the issue with the government
- Conducted a survey in 2003
- Recommendation to the government to abolish death penalty (April 2005)

4. Irregular Workers

- Review the draft of the Revised Dispatched Workers Protection Act and the draft of Legislation of the Temporary and Part-time Workers Protection Act to prepare necessary policy alternatives.
- Opinion expressed (April 2005)

5. Improving Human Rights for Patients of Hansen's Disease (Leprosy)

- Redress discrimination against leprosy patients
  - Analyze the status of human rights and discrimination
  - Consider views of relevant NGOs and government bodies
- Raise public awareness on the disease to promote and enhance the understanding of leprosy

Human Rights Counseling Tour to Sorok-do (Sorok Island) in June

Korea-Japan Round Table, July 12th

6. Anti-discrimination Act

- Conduct preparatory activities for the future enactment of the Anti-Discrimination Act in Korea
- Prohibit discrimination on the bases of 20 protected classes and provide remedial measures

7. Privacy

8. Conscientious objectors

6. Strengthening Investigation

1. Strengthening ex-officio investigation

- Establish a system for proactive identification and investigation
- Set priorities on the socially vulnerable groups

2. Improvement of counseling, investigation, and remedial measures with regard to socially vulnerable groups

- Mental health hospitals, social service facilities for children, the military

3. Strengthening monitoring social service facilities

4. Follow-up on implementation of recommendations

5. Improvement of on-site investigations

6. Provision of human rights counseling nationwide

7. Domestic Cooperation

- **Hold meetings with human rights NGOs**
- **Carry out joint projects with domestic human rights NGOs**
- **Develop the expertise and capacity of NGOs by providing human rights training courses**
- **Frequent visits to places where human rights protection is weak.**

8. International Cooperation

1. Take on a leadership role in international community such as APF and ICC

2. Participate in various international meetings hosted by the UN and NGOs

3. Strengthen cooperation in Asia

- Support the expansion of national human rights institutions
- Joint research projects or international workshops 4. Strengthen research on international human rights treaties
- Publish reference books and conduct research projects
- Hold seminars on international human rights laws especially on CAT and CESC

9. Human Rights Education and Public Relations

1. Promotion of human rights education in schools

- Provide human rights education to teachers including those who teach integrated classes with children with disabilities
- Support schools that provide human rights education and monitor their programs
- Provide incentives to reward best practices of human rights education

2. Offer education at the prosecutors' office, police stations, detention centers

3. Build an institutional framework for human rights education (i.e. online education courses)

4. Projects to raise public awareness

5. Publications

We will try hard to see the nation without human rights violations

3 분 과

Conditions for Japanese Participation in the Asian Community

July 7, 2005
Masanori Ikeda, Attorney

1. A trend toward a community of peace has begun in Asian countries

In Session 1 (on the theme of achieving peace) of the 2001 Conference of Lawyers of Asia and the Pacific held in Hanoi, Vietnam I spoke on "A Blueprint for the Asian Community of Peace." After the session I exchanged views with a young lawyer employed at Vietnam's Ministry of Foreign Affairs who chaired the session, and was able to learn about Vietnam's foreign policy. He enthusiastically related the chain of events in which, after World War II ended with Japan's surrender, armed conflict over rights to the Spratly Islands was anticipated among Southeast Asian countries, so to avoid this the countries in this region continued diplomatic efforts to resolve the conflict through dialog instead of arms. As a result, in 1976, the year after the Vietnam War ended, five countries signed the Treaty of Amity and Cooperation in Southeast Asia, which shortly thereafter encompassed 10 countries. Southeast Asians are enthusiastic about building an Asia of peace, and I sensed some of that enthusiasm through my dialog with this confident young man of Vietnam, which has the uncommon experience of resisting and beating back invasions by the representative world colonial powers of France, Japan, and the US over the last half century. At the same time, I was surprised that 20 years ago in Southeast Asia people had started work on what I've presented as my idea for an Asian community of peace, and I was moved that the first step was the same key concept of "no more war." This was the discovery in the invaded land of another world that I had not imagined. The day after my statement in the session, a TV journalist ask me about the intent behind the Asian community of peace, and I explained my thinking that, as restitution for the aggression against other Asian nations, Japan should make a contribution, based on the principles of its peace constitution, to preventing another calamity of war in Asia. A Japanese friend and participant told me that the interview had been broadcast that night.

Just two years later in 2003 the Treaty of Amity was joined by China, India, Pakistan, and Russia, and in 2004 by Japan and South Korea. With these additions, all of Asia's major countries were parties to the treaty, and the time had come when Asia would jointly agree to peaceful resolutions of conflicts. Through the diverse and positive diplomatic efforts subsequently made primarily by Malaysia and other Southeast Asian countries, one can see the orientation toward the future achievement of an economic community, a cultural and social community, and a security community in Asia.

2. Significance of the Asian community

Realization of this blueprint for an Asian community signifies the birth in Asia of a separate and broad security community area which does not accept the US-led global strategy concept and its basic foreign policy of resolving disputes through force of arms. Further, its goal is preventing a repeat of the calamity of war. This is a serious matter to the US government, and to the Japanese government which uncritically follows it. It is likely

these governments will scheme to use whatever means they can to obstruct this unstoppable trend in Asia. There is a difference in values between the US and Asia. While Asia wants to stop war because it has experienced its horrors, the US has not been touched by war and desires to resolve disputes through the force of arms. Japan must choose the no-war route in line with the basic principle of its constitution. The Japan-US military alliance is unnecessary to the Asian community of peace concept, and is injurious to Asian peace.

3. The ideal of peace and trust among nations support the Asian peace community concept

The community that Asian countries want to achieve is characterized by great diversity and complexity in terms of national interests and situations, such as socialist countries, capitalist countries, nuclear powers, non-nuclear powers, countries having military alliances with the US, nonaligned countries which refuse military alliances, two large countries with populations exceeding 1 billion, and some medium-sized and small countries. One would naturally think that mutual cooperation would be impossible for such a diverse group, yet countries which have acceded to the Treaty of Amity have achieved unity around this point of agreement on peace, on which Article 13 says that parties "shall refrain from the threat or use of force and shall at all times settle such disputes among themselves through friendly negotiations." This arrangement can be considered a product of the ultimate human wisdom of never again going to war, a desire that grew out of the indescribable horror visited on Asians by a long war. Further, this arrangement is built on the foundation afforded by a relationship of trust. Relationships of trust between nations and ethnic groups, which are the foundation for the community's unity, are built on the platform of past interaction. If something has happened in the recent past which destroyed that relationship of trust, recovery will be impossible unless that act of destruction is atoned for with sincerity. In the case of Japan, there is a special problem with the relationship of trust between Japan and other Asian countries. I shall therefore move on to an exploration of that relationship.

4. Problems related to trust between Japan and other Asian signatories of the Treaty of Amity

Almost all the treaty signatories suffered aggression by the Japanese emperor's military under his orders for the approximately 70 years from the late 19th century to the end of WWII. What is more, those Asian countries never attacked Japan or displayed any intention of doing so. Hence the relationship between Japan and the other Asian treaty parties is that of aggressor and victims, respectively. This situation makes it impossible to build a relationship of trust. To recover that trust, we need to identify the cause that destroyed that trust and examine its result, then take action needed for recovery.

And in Japan's case another problem related to trust with other treaty signatories is dependence on the Japan-US military alliance for Japan's security. Signatories other than Japan and South Korea are all members of the Non-Aligned Movement (China is an observer). A problem in building trust is that the purpose of the Japan-US alliance is in part incompatible with the purposes of the Non-Aligned Movement and the Treaty of Amity.

As this shows, just signing the treaty is not enough for Japan to gain back lost trust within the Asian community. Japan must of course make amends for its history as an aggressor and reconsider its military alliance with the US.

5. Recognizing the facts of aggression is needed to recover trust

Let's take a brief look at the facts on the harm visited on Asia by the emperor's military.

The Emperor Meiji's government, which started in 1868, did not wait to establish a constitution before creating a military, deploying forces to Taiwan and Korea, and launching the prelude to aggression in Asia.

In 1889 Emperor Meiji enacted the Constitution of the Empire of Japan, which specified that the emperor is the sacred ruler. The imperial government, which established the constitution, was a latecomer to the contest for colonies in Asia by the civilized advanced nations, and it deployed "a military unafraid to die for the emperor" to carry out military operations. Japan had one conquest after another starting with the 1994 Sino-Japanese War, and continuing with the rule of Taiwan, the Russo-Japanese War, and the annexation of Korea (both current Korean governments have affirmed that the annexation treaty is invalid). Then Japan set its sights on China.

Japan's government feared the influence on its people of the Russian Revolution, which occurred during the First World War, and it created a repressive law called the Public Order Maintenance Act. This was effective in thoroughly repressing citizen resistance movements against the policy of expanding aggression in Asia, and in ultimately eliminating the movements against aggression and for democracy.

In this way the aggression in Asia was further reinforced, leading to a chain of events starting with the invasion of China on the pretext of the 1931 Manchurian Incident (the League of Nations Council resolved that Japan's military action was aggression, which triggered Japan's withdrawal from the League), and proceeding to the Shanghai Incident, founding a puppet government called Manchukuo in China, and sending large military forces to China on the pretext of minor incidents. Further, Japan expanded the war front across all of China, advanced into French Indochina to the south, and, under the declaration of war by Emperor Hirohito, launched into the Pacific War. The Imperial Government surrendered to the US, Britain, France, China, Russia, and the other allies in August 1945.

This is how, over the 70 years from Emperor Meiji's ascension, the emperor's military force invaded Asia and inflicted on many Asians incalculable damage and indescribable suffering including death, deprivation, rape, and destruction before Japan's long war of aggression came to a close.

6. Recognizing that Japan was based on emperor sovereignty is necessary to regain trust.

Certain characteristics of the emperor-sovereign nation-state must be acknowledged.

A. The Constitution of the Empire of Japan claimed the emperor's divinity by saying he was sacred and inviolable, and provided that he ruled the nation as sovereign. This provision was effectively used to make the citizens cooperate in the war.
B. Provisions in the Imperial Constitution to protect the citizens' human rights were nominal and limited by law. Under provisions on the sacredness of the emperor, human rights were ignored as the citizens were obliged to die for the divine emperor.
C. Soldiers of the emperor's military, who did not value human life, had no awareness of respect for the lives and human rights of people in the countries they invaded. They tortured and abused prisoners, used and killed prisoners in human experimentation and combat training, and they committed inhumane acts

against noncombatants such as butchery, rape, plunder, destruction, and arson.

D. Provisions on the emperor's right of rule say that the emperor is the head of state who represents Japan to other countries. This means that the emperor bore the greatest responsibility for the war of aggression.

7. Implement the peace constitution to recover the trust of Asian countries victimized in the war

(1) In both domestic politics and foreign policy, observe and implement the peace constitution's Article 9 provisions for renouncing war and not maintaining war potential.

The basic principle of the preamble and Article 9 is predicated on never again being visited with the horrors of war through the action of government. It is a philosophy that carries even further the idea behind the Asian community of peace. Its implementation is the minimum necessary condition for recovering the trust of countries which have signed the Treaty of Amity. This is because Japan has a history of military aggression against other Asian countries.

(2) In both domestic politics and foreign policy, observe and implement the peace constitution's provisions for citizen sovereignty and basic human rights.

The constitution's provisions on the sovereignty of the people and basic human rights require that a democratic nation be built through the unceasing efforts of the people. These human rights-related provisions were missing from the emperor-sovereign Imperial Constitution.

Human rights provisions are inseparable from peace because they are potent weapons when battling poverty-wealth inequity, poverty, violence, threats, refusal to have dialog, the tyranny of society's strong against the weak, and other problems.

8. Discard contempt for Asia, and carry out measures for recovery from aggression-caused harm.

In the process of carrying out the aforementioned actions for recovering trust, Japan would recognize the historical facts of its aggression and the error of its contempt for other Asian countries, and consider what should be done to recover from the damage. Japan must take the measures needed after having found what the people of Asia want. There are no doubt many things that must be done in addition to apologies and compensation. A revolution in consciousness for the Japanese government and people is essential.

9. If Japan participates in this Asian community of peace, which is now in the process of formation, while making efforts like those above to recover trust, it is virtually guaranteed that Japan and the rest of Asia will achieve peaceful coexistence and co-prosperity (the right to live in peace) which do not rely on the force of arms.

If this comes about, Japan will no longer need its Self-Defense Forces, US military bases, or US forces stationed in Japan, and the Japan-US military alliance will no longer be necessary.

If Japan does not achieve this recovery of trust, it will be left out of the joint prosperity of the Asian community of peace.

アジア共同体への日本参加の条件

弁護士　池田眞規

１、アジア諸国に始まった平和共同体への流れ

２００１年ベトナムのハノイ（ベトナム）で開かれたアジア太平洋法律家会議の第一分科会（テーマは平和の課題）において、私は「アジア平和共同体構想について」を発言した。この分科会の後、私は議長をしていたベトナムの若い法律家（外務省勤務）と意見の交換をし、ベトナムの外交方針について聞くことができた。それは、日本の降伏でアジアでの戦争が終わった後、東南アジア諸国間では、南沙列島の利権をめぐって武力紛争が予想されたので、これを回避するために、周辺国家間で相互に「紛争を武力でなく対話で解決しよう」という外交努力を重ねて、１９７６年（ベトナム戦争終結の翌年）に５ケ国で東南アジア友好協力条約（以下友好条約と略す）が締結され、それが間もなく東南アジア１０ケ国に広がった、その経緯を熱心に語ってくれた。私は、半世紀の間に、フランス、日本、米国という世界の代表的な植民地主義大国からの侵略に抵抗し撃退した稀有の経験を持つベトナムの自信に満ちたこの青年との対話を通じて、平和なアジアを切り開こうとする東南アジアの人々の意気込みの一端を感じとることができた。同時に、私の提起したアジア平和共同体構想がすでに２０年も前に、東南アジアでその端緒が取組まれていることに驚き、それが「戦争を繰り返すな」という同じ「キーワード」であることに感動したのであった。侵略した側では考えられない別の世界の存在の発見でもあった。私が分科会で発言した翌日、テレビ局の記者から「アジア平和共同体構想の意図」を尋ねられ、私は、日本はアジア諸国に対してなした侵略行動に対する罪の償いとして、日本の平和憲法の原則に基づいて「アジアで再び戦争の惨禍を繰り返さないため」に日本は貢献するべきであると考えると説明した。このインタビューはその日の夜、テレビで放映されたことを、参加した日本の友人から聞かされた。

それからわずか２年後の２００３年には、この東南アジア友好協力条約に、

中国、インド、パキスタン、ロシアが加盟し、２００４年には日本、韓国の加盟が実現し、アジアの主要国を網羅することになった。アジアが共同して「紛争の平和的解決を合意する」という時代の到来である。その後のマレーシアなどを中心とした東南アジア諸国の多様な積極的外交努力をみると、その先に、将来のアジアにおける経済共同体、文化・社会の共同体、安全保障の共同体を目指す方向が見えてくるのである。

２、アジア共同体の意味するもの

このアジア共同体構想が実現することは、武力による紛争解決を基本的な外交方針とする米国中心の世界戦略構想を受け入れない、「戦争の惨禍を繰り返さない」ことを目標にした別個の「巨大な安全保障共同体エリア」が、アジアに誕生することを意味する。それは米国政府とこれに追随する日本政府にとって由々しき事態である。日米政府の今後の対応は、阻止できないアジアのこの傾向に対して、あらゆる手段を使って妨害することを画策することであろう。両者の価値観が異なるのである。戦争の惨禍を体験したアジア側は「戦争の阻止」であり、それを知らない米国は原則はは「紛争の軍事力による解決」である。日本は憲法の基本原則にしたがって、前者を選択するしかない。日米軍事同盟は、アジア平和共同体構想にとっては不必要であり、アジアの平和に有害である。

３、アジア平和共同体構想を支える平和の理念と諸国間の信頼関係

アジア諸国が目指す共同体の特徴は、各構成国の国益・国情から見ると、社会主義国、資本主義国、核保有国、非核保有国、米国と軍事同盟関係にある国、軍事同盟を拒否する非同盟諸国、人口が１０億をこえる２大国と他の中小国家、などが多様かつ複雑であり、相互に協力することは無理である、という見方が常識的である。それにもかかわらず、友好条約に加盟する諸国は、条約第１３条の「紛争を生じたときは、武力による威嚇または武力の行使によらず、友好的な交渉を通じて解決する」という平和の理念の一致点で団結する構造である。この構造は、長かった戦争で受けた言語に絶する惨禍の体験から生まれた「戦争を二度と繰り返さない」という「人間としての究

極の叡智」の産物と言うことができる。そして、この構造は信頼関係という基盤の上に構築されている。共同体の団結の基礎となる国家や民族間の信頼関係は、過去の歴史的交流関係の基礎の上にたって醸成される。近い過去において信頼関係を破壊した事実が存在すれば、その破壊を誠意をもって償うことをしない限り、信頼関係は回復しない。日本の場合、条約加盟国と日本との間の信頼関係に特別の問題が存在する。　そこで、次に日本とアジアの信頼関係を検討することにする。

４、条約加盟のアジア諸国と日本との信頼関係の問題点

条約加盟のアジア諸国は、その殆どが明治以来敗戦までの間の約７０年間にわたり、天皇の命令によって、天皇の軍隊が出動して侵略された国々であり、しかも、それらのアジアの国々は、日本に対して侵略の意図を示したこともないし、侵略行動を起こしたこともない。したがって、日本と他のアジアの条約加盟国との関係は、加害者と被害者という関係である。その間にはそもそも信頼関係が成立する余地はない。信頼関係を回復するには信頼を破壊した原因とその結果を確認し、回復のために必要な措置をとらねばならない。

また日本の場合、他の加盟国との信頼関係に関連するもう一つの問題は、日本の安全を米国に依存する日米軍事同盟の存在である。日本と韓国以外の条約加盟国は、すべて非同盟諸国首脳会議に加盟している（中国はオブザバーで参加）国々である。日米同盟の趣旨は非同盟諸国首脳会議や友好条約の趣旨とは相容れない部分があることは信頼関係上問題になろう。

こう見てくると、日本がアジア平和共同体の内部において、信頼関係を回復するためには、条約に調印するだけでは足りず、侵略戦争における加害者としての歴史的事実の清算と日米軍事同盟の見直しが必要な課題となっくるのは当然のことである。

５ 信頼関係回復に必要な加害者として認識すべき加害の事実

天皇の軍隊がアジアに対して被害を与え事実の概括を検証する。

１８６８年に発足した明治天皇の政権は、憲法の制定を待たずして軍隊を創設し、台湾、朝鮮に出兵し、アジアへの侵略の前哨戦を開始した。

１８８９年、明治天皇は大日本帝国憲法を制定し、憲法に天皇が神聖な統治者であることを明記した。憲法を制定した帝国政府は、国策としてアジアに対する文明先進国の植民地争奪の争いに遅れて参入し、「天皇のために死を怖れない軍隊」を派遣して軍事行動を展開する。９４年の日清戦争を皮切りに、台湾統治、日露戦争、韓国併合（この併合条約を韓国と北朝鮮の両政府は無効と確認）と征服を続け中国への進出を狙うにいたる。

第一次世界大戦中に起こったロシア革命の国民への影響をおそれて、弾圧法規である治安維持法を成立させ、アジア侵略拡大政策に反対する国民の抵抗運動、特にその中心である共産党への徹底的な弾圧に威力を発揮し、アジア侵略反対や民主主義の運動は最終的に根絶された。

こうしてアジアへの侵略行動は一層強化され、１９３１年の満州事変による中国侵略（国際連盟理事会は日本の軍事行動を侵略と採決、これを契機に日本は国際連盟を脱退）にはじまり、上海事変、中国の領土内に日本の傀儡政権満州国を建国、些細な事件を口実にした中国への軍隊の大挙派遣（日中戦争）となり、さらに中国全土に戦線を拡大し、南部仏領インドシナへ進軍し、昭和天皇の宣戦布告により、太平洋戦争に突入し、帝国政府は１９４５年８月、米英仏中露などの連合国に対し降伏した。

こうして、明治以来７０年にわたる連続的に続いた天皇の軍隊のアジア侵略によって、多くのアジアの人々に殺害、略奪、強姦、破壊、など莫大な被害と言語に絶する悲哀与えて、日本の長い侵略戦争が終わった。

６、信頼関係回復に必要な天皇主権の国家の構造の認識

認識しなければならない天皇主権の国家構造は以下のとおりである。

A　大日本帝国憲法は、天皇を神聖にして侵すべからざるものとして神格化し、天皇が主権者として国を統治することを定めてある。

この規定は国民を戦争に協力させるために有効に利用された。

B　大日本帝国憲法の国民の人権保障規定は法律の制限内の名目的規定であった。天皇の神聖規定によって、国民が神である天皇のために死ぬことを強要されるという、人権を無視する仕組みとなっていた。

C　人命尊重の理念のない天皇の軍隊の兵士は、侵略した国々の人民の

生命・人権を尊重する意識はなく、捕虜を拷問・虐待をし、人体実験や戦闘訓練のために捕虜を利用して殺し、非戦闘員に対して殺りく、強姦、略奪、破壊、放火するなど非人道的被害を与えた。

D　天皇の統治権の規定は、対外的には日本国を代表する元首であることの表明である。したがって侵略戦争の最高責任者は天皇ということになる。

７、アジアの戦争被害国の信頼を回復するには平和憲法を実行をすること

（１）平和憲法の第９条「戦争放棄・戦力不保持」を国内政治及び外交において遵守し、実行することである。

憲法前文及び第９条の基本原理は「政府の行為によって再び戦争の惨禍を繰り返さない」ことを基礎にした原理であり、アジア平和共同体の構想の理念をさらに徹底した理念である。この理念の実行が、アジアの友好条約加盟国の信頼を回復を得る必要最小限の条件である。

何故なら日本がアジアに対して軍事侵略の前科があるからである。

（２）平和憲法の国民主権及び基本的人権の規定を日本国内政治及び外交で遵守し、実行することである。

憲法の国民主権及び基本的人権条項は、国民の不断の努力によって民主主義国家を建設することが義務づけられている。このような人権条項は、天皇主権の大日本帝国憲法には存在しなかった規定である。

これらの人権条項は平和と不可分である。人権条項は、貧困や富の不平等、貧困、暴力、威嚇、対話の拒否、社会的強者に弱者に対する横暴などと闘う場合の有力な武器となるものである。

８、アジア蔑視の観念を捨て、侵略の被害の回復の措置を実行すること

以上検討した信頼回復に必要な事項を実行する経過のなかで、日本は侵略をした歴史的事実を認識し、アジアに対する蔑視の誤りを認識し、被害の回復において何をなすべきかを、検討することになるだろう。アジアの人々が何を求めているかを認識した上で、必要な措置を講じなければならない。謝罪、賠償だけに止まらない多くのなすべき課題があるはずである。ここに

日本政府及び日本国民の意識革命が不可欠である。

9、以上のような信頼回復を重ねながら、日本が形成過程のアジア平和共同体に参加するならば、日本とアジアの、武力に依存しない平和的共存と繁栄（平和に生きる権利）の実現が保障されることになるだろう。

これが実現すると、日本には自衛隊も米軍基地も米軍の駐留も無用になり、日米軍事同盟も要らなくなるだろう。

日本が、以上の信頼回復を実現できなかった場合には、日本はアジア平和共同体の共同の繁栄から取り残されてしまうだろう。

以上(2005.7.7)

Article 9 of Japan's Constitution and Efforts for Constitutional Revision

Satoshi Matsushima, Lawyer
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1. Japanese aggression in Asia, and Japan's constitution

Japan's aggression in Asia began with the deployment of troops to Taiwan in 1874, and progressed to the Sino-Japanese War (1894), the Russo-Japanese War (1904), the annexation of Korea (1910), the Second Sino-Japanese War (1937), and the Pacific War (1941), coming to an end on August 15, 1945 with Japan's defeat. The result was over 20 million victims in Asian countries other than Japan, about 3 million Japanese, and the scars of war and colonial rule.

Japan was placed under American military occupation, and the authorities carried out reforms on national institutions with a basic agenda calling for demilitarization and democratization. Japan's constitution was enacted on November 3, 1946 in this process of demilitarization and democratization.

2. Peace provisions of the Japanese constitution

The constitution's Preamble reads: "We recognize that all peoples of the world have the right to live in peace, free from fear and want," while Article 9.1 says, "Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes," and 9.2 says, "In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized."

The Preamble recognizes that all peoples of the world have the right to live in peace, Article 9.1 renounces war and the threat or use of force, and Article 9.2 says Japan shall have no war potential and denies the state's right of belligerency.

Japan's constitution recognizes that everyone in the world has the right to live in peace, and that Japan renounces not only wars of aggression, but even war in self-defense, and bans the maintenance of a military for that purpose. The document's singularity is in these idealistic and pioneering provisions.

3. Behind the enactment of the constitution

Japan's constitution with these singular provisions arose out of the military and political tensions in Asia in 1945 and 1946.

To Japan's rulers, who had accepted unconditional surrender in 1945, the sole and overriding item on the agenda was maintaining the emperor system, which was the existing state system with the emperor at the center. Preserving this system consumed them. General Head Quarters (GHQ), the occupying authority headed by General Douglas MacArthur, also decided to keep the emperor system so that occupying and governing Japan would proceed smoothly. In that sense, the Japanese and US rulers were accomplices in granting immunity to the emperor, and this was the starting point of forming the subsequent subordinate relationship of Japan to the US.

When the constitution was being prepared, the International Military Tribunal for the Far East was about to begin trying war criminals (May 3, 1946). Australia and the Soviet Union were calling for prosecution of the emperor, and some Americans were also saying that his war responsibility should be inquired into. Japanese and US rulers imposed responsibility for the war in Asia and the Pacific on a handful of nationalists (soldiers and militarists) and absolved the emperor of responsibility. Letting the emperor off the hook was part of a package deal with Article 9, i.e., Japan's disarmament and renunciation of war. GHQ's General Whitney wrote to Joji Matsumoto, who headed the Constitutional Problems Investigation Committee, "As you may or may not know, the Supreme Commander has been unyielding in his defense of your Emperor against increasing pressure from the outside to render him subject to war criminal investigation... But, gentlemen, the Supreme Commander is not omnipotent. He feels, however, that acceptance of the provisions of this new Constitution would render the Emperor practically unassailable." Japan's rulers accepted GHQ's policy, and won immunity for the emperor in return for Japan's disarmament. That is why the emperor system still exists.

Owing to Okinawa's geopolitical position, the US separated it from Japan and made it into a strategic military base in Asia. (In straight-line distance, Taipei, Shanghai, and Pusan are within 1,000 km; Seoul and Pyongyang are within 1,500 km; and Tokyo, Manila, Hong Kong, and Beijing are within 2,000 km).

4. The historical role of Article 9

Apart from the political agenda on the minds of the framers, the constitution's peace provisions have played a definite role for peace in Asia since 1945.

In 1945, Japanese militarism (imperialism) was the biggest peace-disturbing factor in Asia. As such, Japan's disarmament and demilitarization lead directly to peace in Asia. Since that time these constitutional peace provisions, in combination with Japan's popular movement and peace movement, have put the brakes on military invasion and the use of military force by Japan abroad, including other Asian countries.

Generally the Japanese people have been favorably disposed toward these peace provisions. Entrusting to this new constitution a future of liberation from poverty, war, and the repression of freedom, they understood the constitution as a pledge to never again make war. Yet, at the same time, they did not call for a thorough accounting of the responsibility of the emperor — the person with ultimate responsibility for sending over 3 million of his countrymen to their deaths — and even now nothing is done about the responsibility for the war against, and colonial rule of, other Asian peoples. During the Cold War, many countries bowed to US pressure by waiving their right to demand reparations from Japan. South Korea, the Philippines, Indonesia, and other countries gained compensation through economic cooperation. This is the source of one factor underlying the contemporary issue of "history perceptions." (See the report of Akira Izumisawa on the issue of history perceptions.)

5. The SDF and the shift in the US strategy toward Japan

The global (Asia) strategy of the US, which occupied Japan, was the demilitarization and incapacitation of Japan, assuming that China would be pro-America. But that strategy underwent a major transformation with the 1949 founding of the People's Republic of China, and the 1950 Korean War, to which the US sent nearly all the troops stationed in Japan, while launching the National Police Reserve as a defensive force to take the place of US forces in Japan. (At this time a number of plots including the Shimoyama, Mitaka, and Matsukawa

incidents occurred in Japan, and these were used as a pretext to suppress communists and Koreans.)

Later the National Police Reserve became the Self-Defense Forces (SDF), which steadily strengthened and expanded with the former Soviet Union as the imagined enemy. To make Japan into an "anti-communism bulwark," the US brought Japan back into international society with the San Francisco Peace Treaty on September 8, 1951, and on the same day the two governments signed the Japan-US Security Treaty, under which Japan provides the US military with bases.

In response to the creation of the SDF (military forces) under the Japanese constitution, which stipulates disarmament and the renunciation of war, the Japanese people used Article 9 as their authority in seeking confirmation that the SDF are unconstitutional, and their dissolution.

The citizen movement making an issue of the SDF's unconstitutionality and resisting their expansion has used Article 9 as a tool in a number of lawsuits including the Eniwa lawsuit, which arose from the act of cutting an SDF communication line in a protest of live-fire target practice; the Naganuma Base lawsuit, in which people living near the base filed suit claiming that an SDF missile base violates their right to live in peace; and the Hyakuri Air Base lawsuit, whose issue was the unconstitutionality of land acquisition for building an SDF air base.

In equipment and size, the SDF are indeed military forces and clearly violate Article 9. Yet, Japan's Supreme Court avoided a constitutional judgment and virtually approved their existence (see the report by Naoki Nakano on the role of courts and an assessment of it). As a result, these military forces known as the SDF exist even now despite the constitution's Article 9.

Although the SDF remains in existence, Article 9 still imposes constraints on its actions: the SDF is prevented from using the force of arms abroad, and because Article 9 prohibits collective self-defense, the SDF are not allowed to engage in "joint military action" with US forces (the Japanese government's final authentic interpretation). Indeed, the SDF were not sent to the battlefield in the Korean War or the Vietnam War, and Japan has always functioned as a logistic support base and supply base for US forces.

In contrast to the "war state" previous to 1945, since 1945 Japan has sometimes called itself a "peace state." However, it is better to call Japan a "military base state" in the sense that it has always played the role of logistic support base and supply base for US forces.

6. Why is constitutional amendment deemed necessary?

Amending the constitution would be none other than removing the restrictions imposed by the constitution to allow SDF military actions abroad, and joint military actions while integrated with US forces (i.e., restructuring Japan from a "military base state" to a "war state").

The US review of its Asia strategy in the post-Cold War years led to the Japan-US Joint Declaration on Security (a redefinition of Japan-US security) in 1996. It specifically stated that the sphere of action of US forces in Japan would grow from the Far East to the Asia-Pacific region and to global scale, and it pledged that in the Asia-Pacific region Japan would assume a part of the military role. This was fleshed out in the 1997 Japan-US "New Guidelines" and Japan's 1999 Japan-Area Situations Law.

Nevertheless, in a bipartisan 2000 report titled The United States and Japan: Advancing Toward a Mature Partnership ("Armitage-Nye Report"), the US said: "Japan's

prohibition against collective self-defense is a constraint on alliance cooperation. Lifting this prohibition would allow for closer and more efficient security cooperation." This report is a virtual demand from the US for Japan to amend its constitution.

The US has set to work on transforming its military from the Cold War force that assumed large-scale conflict to a global force that is maneuverable and flexible. This is a security strategy review that was occasioned by 9/11. This strategy assigns the highest precedence to defending the US mainland, considers responding to terrorist attacks and other threats to be a matter of urgency, and stresses the transformation from a force that assumes large-scale conflict to a maneuverable and flexible military.

In Asia, the region stretching from Northeast Asia to the Middle East is called the "arc of instability." With responses toward the Middle East for the time being and China in the future in mind, Japan is seen as the strategic nucleus, and US forces in Japan are being reorganized into the command post for forward deployment into this arc of instability. The US wants to reinforce the headquarters function and responsiveness of bases while maintaining US troop strength in Japan, and is trying to integrate its US forces with the SDF. Japan is likewise trying to build a tightly knit relationship, having in mind joint military action by US forces and the SDF. America's Japan strategy is shifting from burdensharing to power-sharing, and it aims to heighten US military efficiency by, for example, incorporating Japan's human and physical resources into the US military's strategic system, having mutual operation of US bases in Japan, and improving supply capability.

Article 9 is the biggest impediment to this Japanese-US joint strategy, so the aim is to change Article 9 to remove the prohibition on exercising the collective right of self-defense, i.e., joint military action.

7. Political situation regarding the constitution

In January 2000 the Diet (House of Representatives and House of Councilors) created the Research Commission on the Constitution for the purpose of " conducting broad and comprehensive research on the Constitution of Japan." This April it issued a final report suggesting that constitutional amendments would be made.

The governing Liberal Democratic Party (LDP) wants to amend the constitution in 2007. In June 2004 it released "Talking Points," and this July the Constitutional Drafting Committee released the first outline of the draft of the new constitution. Plans call for releasing the draft of the new constitution at the LDP convention in November. The Democratic Party, the largest opposition party, is working on its own "constitutional recommendations," which call for amendments.

The Constitution requires that amendments "shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House." Current ratios of the political parties in the Diet are LDP (250/114), Democratic Party (176/84), Komeito (34/24), Communist Party (9/9), Social Democratic Party (6/6), and others (3/5) (parenthetical figures are numbers of legislators in the House of Representatives and House of Councilors, respectively). Only the Communist Party and the Social Democratic Party are unequivocally against amending the constitution, and they are a minority in the Diet.

Three organizations set up by Japan's major corporate leaders — Japan Association of Corporate Executives (JACE), The Japan Chamber of Commerce and Industry (JCCI), and Nippon Keidanren — have all released their own recommendations and opinions on amending the constitution. In April 2003 JACE released an opinion seeking the amendment of Article 9 and other provisions, while in November 2004 JCCI published an opinion stating

that Article 9 should be amended to allow the exercise of the collective right of self-defense. In January 2005 Keidanren issued a report entitled "Considering Japan's Basic Problems," which for the time being seeks amendments for Articles 9 and 96 (procedures for constitutional amendments).

Citizen sentiment on amending the constitution is 56% in favor and 33% opposed, while on amending Article 9, 36% are in favor and 51% are opposed (*Asahi Shimbun* survey of April 2005). Although opposition to amending Article 9 still has the majority, the percentage opposed declines year by year.

For those Japanese who want peace, there is now an "Article 9 Association" whose nationwide organization began at the call of nine inaugural members including a Nobel Prize laureate author. NGOs and a variety of other grassroots organizations, lawyers' groups, and the Center for Cooperation in Opposing Constitutional Amendment, which is composed mainly of labor unions, have joined the campaign to protect Article 9, and other resistance includes a lawsuit with over 3,000 plaintiffs contending that sending the SDF to Iraq is unconstitutional. But these efforts haven't yet become powerful enough to stop constitutional amendment.

8. Thumbs down by Asian peoples needed on Article 9 amendment

At this time in Japan we are about to see a final settlement in the confrontation and dispute over Article 9 that have continued for the past half century. Amending Article 9 to recognize the existence of the SDF and to remove constraints on the right of collective self-defense means that Japan, which has the SDF backed by the world's second-largest economy and third-largest military expenditures, would become a war-making state along with the US around the world. Especially in Asia, Japan would again become a disturber of the peace. The constitution's peace provisions (the Preamble and Article 9) arise out of Japan's contrition over responsibility for the war and colonial rule. Their existence was a condition for postwar Japan's reinstatement to international society, and a pledge of peace to the peoples of other Asian countries. Thus the nations and peoples of the world, especially those of Asia, have a right to speak out against the amendment of Japan's constitution, i.e., against Japan's violation of its pledge.

For peace in Asia, my hope is that the lawyers and peoples of other Asian countries will take action with those of Japan to stop amendment of Japan's constitution.

ＣＯＬＡＰ-Ⅳに向けて－日本国憲法９条と改憲をめぐる動き

弁護士　松　島　　暁（自由法曹団）

1　日本のアジア侵略と日本国憲法

1874 年の台湾出兵に始まる日本のアジアに対する侵略は、日清戦争（1894 年）、日露戦争（1904 年）、韓国併合（1910 年）、日中戦争（1937 年）、太平洋戦争（1941 年）を経て、1945 年 8 月 15 日、日本の敗北によって終結した。アジアにおいて 2000 万人、日本国民 300 万人の犠牲者、戦争と植民地支配の傷跡を残しての終結だった。

日本はアメリカの軍事占領下に置かれ、非軍事化・民主化を基本方針とする国家体制の変革が実行された。日本国憲法は、1946 年 11 月 3 日、この非軍事化・民主化の過程において制定された。

2　日本国憲法の平和条項

日本国憲法前文は、「われらは、全世界の国民（all peoples of the world）が、ひとしく恐怖と欠乏から免かれ、平和のうちに生存する権利（the right to live in peace）を有することを確認する」とし、同９条１項は、「日本国民は、正義と秩序を基調とする国際平和を誠実に希求し、国権の発動たる戦争と、武力による威嚇又は武力の行使は、国際紛争を解決する手段としては、永久にこれを放棄する」、同条２項は、「前項の目的を達するため、陸海空軍その他の戦力は、これを保持しない。国の交戦権は、これを認めない」と定めている。

憲法前文において、全世界の人々が「平和的生存権」を有していることを確認し、９条１項で、戦争・武力行使・武力による威嚇を放棄し、２項において、軍隊等の戦力・交戦権を否認しているのである。

全世界の人々に「平和的生存権」を認め、侵略戦争ばかりか自衛戦争までも放棄し、そのために軍隊の保持を禁止した日本国憲法は、その理想主義的で先駆的な内容において「特異」な存在である。

3　日本国憲法制定の由来

この「特異」な条項を有する日本国憲法は、1945～46 年当時のアジアにおける軍事的・政治的緊張関係の中から生まれた。

1945 年、無条件降伏を受け入れた日本の支配層にとって、天皇を中心とする既存の国家体制（天皇制）の維持こそが唯一、最大の課題であり、天皇制の温存に血道を上げた。同時に、日本を占領したアメリカ（General Head Quarters

＝ＧＨＱ、連合国総司令部、マッカーサー最高司令官）も、日本の占領統治を円滑に進めるために天皇制を存続させることとした。その意味で、天皇の免責に関して、日米の支配層は共犯関係にあるとともに、その後の日本の対米従属構造を形成する出発点となった。

日本国憲法制定の準備の時期は、戦争犯罪人を裁く極東軍事裁判（東京裁判）の開始（1946年5月3日）を目前にし、オーストラリアやソ連は天皇の訴追を求めており、アメリカ国内からは天皇の戦争責任を問う声が沸き上がっていた。日米の支配層は、アジア太平洋戦争の責任を、一部軍国主義者（軍人と軍閥）に押しつけ、天皇の免責をはかった。天皇免責とセットにされたのが日本の武装解除と戦争放棄、つまり憲法9条だった。ＧＨＱのホイットニーは憲法調査委員会の責任者松本烝治に対し、「最高司令官（マッカーサー）はあなたがたの天皇を戦犯として取調べるべきだという外圧から天皇を守ろうという決意を固く保持してきました‥‥しかし最高司令官は万能ではありません。最高司令官は、この新憲法の諸規定が受けいれられるならば、天皇は事実上安泰になると感じています」と書き送っている。その結果、権能において1945年以前よりは制限された天皇は、立憲君主として現在も生き続けることとなった。

尚、アメリカは、その地政学的位置から沖縄を日本から分離したうえでアジアにおける戦略的軍事基地とした。（沖縄の位置：直線距離にして 1000　圏内に台北・上海・釜山、1500　圏内にソウル・平壌、2000　圏内に東京・マニラ・香港・北京がある。）

4　憲法9条が歴史的に果たしてきた役割

その誕生の際に込められた政治的思惑とは別に、この日本国憲法の平和条項は、1945年以降のアジアの平和にとって一定の役割を果たした。

1945年当時、アジアにおける最大の平和の攪乱要因は、日本軍国主義（日本帝国主義）の存在であり、その武装解除・非軍事化はアジアの平和に直結した。それ以降も、この平和条項の存在は、日本の民衆運動とも相まって、日本の武力侵出、アジアを含む海外で武力行使の歯止めとなってきた。

日本の民衆は、総じて日本国憲法の平和条項を好意的に受け入れた。自由の抑圧と貧困、戦争状態からの解放という未来を新しい憲法に託し、「二度と再び戦争を起こさない」誓いとして日本国憲法を理解した。しかし、同時に、300万以上の自国民を死に至らしめた最高責任者＝天皇の責任を徹底的に追求することはなかったし、アジアの民衆に対する戦争責任や植民地支配責任を放置したまま現在に至っている（冷戦構造のなか、多くの国は対日賠償請求権を放棄し、韓国・フィリピン・インドネシア等は経済協力方式により決着済みというのが日本政府の立場である）。今日の「歴史認識」問題の一つの要因はここに発して

いる。

5　アメリカの対日戦略の転換の自衛隊

日本を占領したアメリカの世界（アジア）戦略は、親米中国を想定した日本の非軍事化・無力化であった。ところが1949年の中華人民共和国の成立、1950年の朝鮮戦争によってその戦略は大きく変更される。朝鮮戦争に際してアメリカは、在日米軍のほぼ全てを朝鮮半島に投入する一方、在日米軍に代わる防衛力として警察予備隊を発足させた。（この時期、国内的には、下山・三鷹・松川等の謀略事件を口実に、共産主義者や朝鮮人に対する弾圧が加えられている。）

その後、警察予備隊は自衛隊となり、旧ソ連を仮想敵国として拡大・増強の一途をたどった。アメリカは、日本を反共の防壁とするために、1951年9月8日、サンフランシスコ講和条約締結によって日本を国際社会に復帰させるとともに、同日、日米安全保障条約を締結し、アメリカ軍への基地提供を行うこととなった。

戦争の放棄と非武装を規定した日本国憲法のもと、自衛隊＝軍隊が創設されたことに対し、日本の民衆は、憲法9条を根拠に自衛隊が違憲であることの確認とその解体を求めた。

自衛隊の実弾射撃訓練に抗議し通信線を切断した行為を発端に起きた「恵庭訴訟」、自衛隊のミサイル基地が平和的生存権を侵害しているとして地域住民が起こした「長沼基地訴訟」、自衛隊の航空基地建設を目的とする土地取得の違憲性が争われた「百里基地訴訟」など、自衛隊の違憲性を問題としその拡大に抵抗する民衆の運動が、憲法9条を闘いの武器にしながら展開された。

自衛隊は、その装備や規模において軍隊そのものであり、憲法9条に反することの明らかであるにもかかわらず、日本の裁判所（最高裁判所）は、憲法判断を回避し事実上自衛隊の存在を容認した。（裁判所の役割と評価については、中野直樹報告を参照されたい。）その結果、日本国憲法9条のもとで、軍隊＝自衛隊が存続し続けるという事態が現在も継続している。

自衛隊は存続し続けたものの、憲法9条の存在によって自衛隊が海外において武力行使をすることはできず、集団的自衛権を禁じた憲法9条のもとにおいてはアメリカ軍との「共同の軍事行動」は認められないとの制約を現在も課されている（政府の確定した有権解釈である）。現に、朝鮮戦争、ベトナム戦争を通じて、自衛隊が戦場に派遣されたことはなく、アメリカ軍に対する後方支援基地・兵站基地国家の役割に徹してきた。

6　なぜ改憲が必要なのか

この憲法によって課された制約を取り払い、自衛隊の海外での軍事行動、ア

メリカ軍と一体となった共同軍事行動を可能とするための改正が、憲法「改正」にほかならない。

冷戦の終結にともなうアメリカのアジア戦略見直しにより、1996 年、「日米安全保障共同宣言」が発表された（日米安保の再定義）。在日米軍の行動範囲を極東からアジア太平洋地域、地球的規模とすることが明言され、アジア太平洋地域における日本の軍事的な役割分担が約束された。それは日米「新ガイドライン」（1997 年）及び「周辺事態法」（1999 年）により具体化された。

にもかかわらずアメリカは、2000 年、超党派レポート（「米国と日本：成熟したパートナーシップに向けて」アーミテージレポート）において、「日本が集団的自衛権を禁止していることが同盟国、同盟間の協力にとって制約になっている。この禁止事項を取り払うことでより密接でより効果的な安全保障協力が可能になろう」とした。このレポートは、アメリカからの日本に対する事実上の改憲要求となった。

アメリカは、大規模紛争を前提とした冷戦型の戦力構築を改め、世界規模での機動的で柔軟な軍への再編に着手している（トランスフォーメイション）。９・１１テロをきっかけにした安全保障戦略の見直しである。米国本土防衛を国防の最優先課題に据え、テロ攻撃など新たな脅威への対応を急務とし、大規模紛争を前提とした戦力構築からより機動的で柔軟な軍への変革が強調されている。

アジアにおいては、北東アジアから中東に地域を「不安定の弧」としてとらえ、当面は中東、将来的には中国への対応を念頭に、日本を戦略的中核に位置付け、在日米軍を「不安定の弧」に対する前方展開の司令部として再編しようとしている。在日米軍兵力を基本的に維持した上で、基地の司令部機能や機動性の強化するとともに、米軍と自衛隊の一体化を図ろうとしている。日本側もアメリカ軍と自衛隊との共同軍事行動を念頭においた緊密な関係を築いていこうとしている。アメリカの対日戦略は、責任の分担（burdensharing）から力の共有（power-sharing）へと転換し、日本の人的・物的資源の米軍の戦略体系への組み込み、在日米軍基地の相互運用、兵站能力の向上等による米軍の効率を高めることが目指されている。

この日米の共同戦略にとって、日本国憲法９条は最大の障害であり、９条改憲によって集団的自衛権行使＝共同軍事行動禁止の歯止めを取り払おうとしている。

7　憲法をめぐる政治状況

2000 年 1 月、国会（衆議院及び参議院）に「日本国憲法について広範かつ総合的に調査を行なう」ことを目的に憲法調査会が作られた。今年 4 月に相次いで、改憲を示唆する最終報告書を出した。

与党自由民主党は、2007 年の憲法改正を目指しており、2004 年 6 月、憲法改正プロジェクトチームによる「論点整理」を発表し、本年 11 月の党大会に憲法草案を出す予定である。最大野党民主党も、本年 7 月に「憲法提言」をとりまとめるとしている。

日本国憲法上、その改正には、「各議院の総議員の３分の２以上の賛成で、国会が発議する」ことが必要とされているが、現在の国会における勢力比率は、自由民主党（250・114）、民主党（176・84）、公明党（34・24）、日本共産党（9・9）、社会民主党（6・6）、その他（3・5）（括弧内は衆議院と参議院のそれぞれの議員数）である。明確に改憲に反対している政党は、日本共産党と社会民主党のみであり、国会内では少数野党である。

日本の大企業経営者によって組織される３つの団体、経済同友会、日本商工会議所、日本経団連も、それぞれ改憲の提言・意見を発表している。経済同友会は 2003 年 4 月に９条などの改正を求める意見書を公表、日本商工会議所は、2004 年 11 月に９条を改正し、集団的自衛権の行使を容認すべきとする意見を発表した。日本経団連も 2005 年 1 月に「わが国の基本問題を考える」という報告書を出し、当面９条と９６条を改正することを求めた。

憲法に関する国民意識は、憲法改正賛成 56%、反対 33%であり、９条改正に賛成は 36%、反対は 51%である（2005 年 4 月の朝日新聞調査）。９条改正反対は、過半数を維持してはいるものの年々減少してきている。

日本の平和勢力は、知識人９名の呼びかけで始まった「９条の会」が全国的に組織されはじめており、労働組合を中心とした共同センターの組織、ＮＧＯその他さまざまな草の根組織、法律家団体が９条擁護の運動に立ち上がっているほか、３０００名を超える原告による自衛隊の「イラク派兵違憲訴訟」の運動などでこれに対抗している。しかし、まだ改憲を阻止するまでの力関係をつくるに至っていない。

8　アジアの民衆は９条改憲に「No!」を

今、日本においては、半世紀にわたり続けられてきた憲法９条をめぐる対立・抗争に最終的な決着がつけられようとしている。日本国憲法９条を「改正」し、自衛隊の存在を認め集団的自衛権の制約を取り払うことは、世界第２位の経済力を持ち世界第３位の軍事費の裏づけを持つ自衛隊を有する日本が、世界のあらゆるところで、アメリカとともに「戦争をする国」になること意味する。とりわけアジアにおいては再び平和の攪乱要因となる。憲法の平和条項（前文及び９条）は、戦争責任及び植民地支配責任に対する日本の反省に由来し、その存在が戦後日本の国際社会への復帰の条件であり、アジアの国家と民衆に対す

る「平和の誓約」であった。したがって日本の憲法改正＝誓約違反に対しては、世界、とりわけアジアの国家と民衆は反対の声をあげる「権利」を有している。

アジアの法律家と民衆が、日本の法律家や民衆とともに、アジアの平和のために、「日本国憲法の改悪を許さない」共同の行動に立ちあがることを訴える。

Japan's Constitutional Amendment and Peace in Asia

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1. Research Commission on the Constitution and the Issue of a Constitutional Amendment

1-1 Report of the research commission on the constitution

The research commission on the constitution, a Lower House panel on constitutional reform presented a final report to the Speaker on 14 April 2005 after ending a five-year review. It was followed by an Upper House panel, which submitted a similar report in April.

The Japanese Constitution, which was established on 13 Nov. 1946 and came into effect on 3 May 1947, has been called a pacifism constitution since it contained the following principles of disarmament and pacifism in Article 9.According to the article, Japan is prohibited from having the army, navy and air forces.

Clause 1: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

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

The operation of Self-Defense Force(SDF) in 1954 and security treaties with the U.S., however, sparked an endless controversy over the constitutional violation.

Against this backdrop, as the Diet decided to launch constitutional review panels, the Lower House and the Upper House set up their own review commissions respectively. The Lower House panel suggested the need to review the constitution on the ground that the present constitution was out of touch with today, emphasizing the gap between constitutional regulation and reality. The panel added that the changing international environment highlighted the need of ever-increasing Japan's cooperation with the international community, which witnessed the 9/11 terrorist attacks and North Korea's

nuclear ambition.

As a result of the five-year review, the Lower House panel presented a 683 page-long report, which started with the majority opinions that constitutional modifications regarding the right to self-defense and SDF should not be denied, and the present system of symbolic emperor be maintained. The Upper House review panel reached the consensus on maintaining Clause1, Article 9 while not reaching a consensus on the maintenance of Clause 2 Article 9, the issue that the symbolic emperor should play as the chief of the state.

Although those contents may seem to include various opinions, the fact is that the report contains, in regards to Article 9, words that they do not deny a certain kind of modification. Such 'some modification' handles complementary measures to clarify the constitutional ground of the right to self-defense and change from Self-Defense Force to military forces, and therefore, implies the empowerment of SDF through a constitutional amendment. For this reason, Asian nations, including Korea, which have appalling memories of the Japanese rule, view such a movement of Japan as a critical threat to peace in Asia.

1-2 History of Japanese attempts to amend the constitution

The attitude of the Japanese government toward the right to self-defense and SDF has continued to change. At the time when the constitution was written, then prime minister Yoshida denied even the right to self-defense. Around the Korean War in the 1950s, however, he changed his attitude by saying that the constitution did not deny the right to self-defense.

When the launch of SDF in July 1954, came under attack for violating Article 9 since it was part of war potential, the Japanese responded by stressing that SDF was just for defense, so called minimum ability, not aggression. Against this backdrop, in order to resolve the possibility of relentless controversy over violation of the constitution and to strengthen SDF, the ruling parties such as the LDP played the leading role in unfolding a discourse about a constitutional amendment.

In 1957, the government tried to set up a commission to review the constitution in the Diet. Objection from the opposition parties and the public made the commission belong to the Cabinet, not the Diet, and the commission ended its operation in 1964 without any substantive outcomes after publishing some reports. Since then, renouncing its

effort to amend the constitution, the government has maintained that since SDF was a minimum defensive force , its maintenance does not violate the constitution. In the 1980s, in the name of coming to terms with the post-war politics, the ruling party tried another revision, to no avail.

In spite of numerous failures, the Japanese seemed to never abandon their efforts to widen the gap between the constitutional regulations and their military ambition by extending the operation of SDF. The 1992 PKO Cooperation Law sent Japanese troops abroad and the 1999 Shuhenzitaihou (a newly revised law letting the U.S. use Japanese military bases during war time) let the Japanese troops provide backup during times of war. In the end, the 2003 Iraq special law let the troops be sent to areas of conflict during the war.

In regards to dealing with SDF, while Japan took a passive stance in the 1980s by arbitrarily interpreting the constitution, it actively tried to revise the constitution by sending SDF overseas and widening the gap between reality of the deployment and the constraints written in the constitution. This argument turns out to be more persuasive when considering that the Lower House panel pointed out the widening gap between the constitution and today's reality, bringing the rationale behind reviewing the present constitution. Of course, the panel reasoned on the surface that Japan should make more contribution to the international community.

The right-winged media such as Daily Yomouri were at the forefront of developing an environment for the revision. The review panel of the Upper House also presented the gist of a constitutional amendment on 17 Nov. 2004. Furthermore, the ruling Democratic Liberal Party (LDP) said that it would present its own version of an amended constitution on 15 Nov. this year, on the day of its 50th anniversary , escalating regional tension.

2. Problems with the Constitutional Review Panels and Prerequisites for the Constitutional Amendment

2-1 Problems with the constitutional review panels

The Upper House and Lower House commissions concluded their reports through majority vote and the Lower House Panel went further to declare its decision to be final. The lengthy reports contain contents that are far from the large-scale and comprehensive

investigation of the Japanese constitution, which is required under the Diet Law, Clause 6, Article 102. Rather than the issue of Japan's responsibility for war and the evaluation of the state's responsibility and consciousness regarding the constitution, the reports only deal with justifications to revise the present constitution by reviewing every relevant clause and the relevant issues in detail.

Their review over Article 9 is a case in point. Despite its stipulation of abolishing war potential, the panels failed to review whether half-century long SDF since 1945 has met the principles of the constitution, such a neglect of duty. Furthermore, there are still other problems: The fact that an emperor who was responsible for the war and a system of imperialism, albeit only symbolic, coexists with Article 9 which provides for disarmament and pacifism, in ignorance of the traditional, historical treatment of disarmament, pacifism and relationship between responsibility for war is a major cause for concern.

As for decision-making process, their heavy resort to majority vote excludes various opinions. The Lower House panel was composed of 26 from the LDP out of total 50, and 4 from another allied ruling party, Komeitou. Despite such a dominant majority in member composition within the panel, agenda decision depends on a majority vote. Nonetheless, the results are concluded as "major opinions". As for Article 9, an opinion labeled as "majority" stating that "the constitutional principles regarding the right to self-defense and SDF are not denied a certain kind of modification" is a case in point.

2-2 Pre-requisites for a constitutional amendment

In order to recover the trust of victimized Asian nations, a sincere constitutional review should precede the Japan's constitutional discussion. First of all, the Japanese need to reflect how their reality is out of touch with the constitutional regulations, not the other way around. In other words, comprehensive and extensive reflection, such as 'What made the current state far from the regulations?' and 'Who should take the responsibility and what should be done?', should go in advance. SDF has 190,000 personnel and most of them are officers. In addition, Japan is the world's second largest country in military spending. Furthermore, the 1992 PKO Cooperation Law opened the door to the overseas deployment of SDF, and the Iraq special law let Japan deploy its troops during war, although non-combatant soldiers. All this tells that time has come to reflect how far the present situation goes from the constitutional principles.

Second, considering the fact that the Japanese constitution was established after the perpetrator lost the second World War in the end, such an emphasis on disarmament and de-militarization written in the constitution came needs to be more reminded. The coercion of the Allies' supreme command cannot be an excuse. The matter is why the command could not help arranging that constitutional draft, why the Allies did not have any choice but to attack Japan and how Japan's war crimes are related to the principles of disarmament and de-militarization Japan had to accept. In other words, a review based on historical contexts should be preceded. In addition, the Japanese need to reflect whether their post-war compensation cases such as sex-slave women and involuntary drafting were enough to meet the foundation of their present constitution.

Third, a sincere comparative reflection on the constitution based on Article 9 should focus on a universal, forward-looking and non-military pacifism. The Japanese constitution has not reflected any future-oriented progress such as people's right to know or environment issues for the last three decades. Although the constitutional review panels did comparative studies on other nations' constitutions, spending huge expenses, its direction is far from forward-looking. Rather, it focused on finding evidence that every nation's constitution recognizes the existence of its own army except Japan. Another example is that the panel pointed out that Japan does not have a constitutional court while South Korea, such a politically underdeveloped country already has one.

The norms should be contemplation over how pacifism, such a long-lasting human value, has been institutionalized within the constitution since the Kellog-Briand Pact. Or reflection on non-military pacifism accompanied by the prerequisite of disarmament and a more strengthened control by civil government, although with permission of armament, is what Japan should focus on.

Nonetheless, the Japanese panel failed to show its in-depth reflection from the comparative studies.

3. Undesirable Constitutional Amendment and Peace in Asia

3-1 Motive

Internal and external factors seem to contribute to such a premature discussion of whether to revise the constitution without meeting any pre-requisites.

Internally, Japan seems to want to resolve the current controversy over the state of SDF. A post-war Japan could achieve rapid economic developments with little military

expense thanks to the U.S. support and its light armament-based pacifism. Now, such economic developments resulted in Japan's heavy investment in the region, whose profits started to plummet as Asia's movement toward democratization led to political unrests. As a means to secure profitable overseas investment, empowering and deploying the troops, when necessary, should be made possible. In this sense, the Japanese recognize the need to resolve the current constitution-violating state of SDF. In other words, their rationale of contributing to the international community is just lip service to justify the overseas sending of SDF. Its ultimate goal lies in economic profits. The warm attitude from the Japanese business toward the amendment strongly supports this argument.

In addition, taking advantage of other controversial issues such the prime minister's visit to Yaskuni shrine or the distortion of history textbooks, the Rightists stress in widely read magazines that Japan should confront such an intense conflict between nations with armament. All this seems to boil down to the final destination, "constitutional amendment."

As for external factor, the U.S. strategy involving regional allies can be counted. After the collapse of communism, the U.S. has become the world's super single power and pursued sophisticatedly designed policies and strategies in order to maintain its hegemony in the 21st century. The U.S.'s pursuit of the world's hegemony is well reflected in its interventionist policies. Such a tendency can be seen in a series of papers. The Joint Vision 2020 showing a future direction of the U.S. policies, and the Quadrennial Defense Review Report tell that the U.S. military defense policies have four basic directions. The contents contain the movement of the U.S. core strategy to Asia, the reduction in its resort to forefront forces but strengthening the ability to mobilize war potential when necessary, backed by science and technology. The maintenance of superiority in information system is added. As the Soviet Union and other communist nations collapsed, the U.S. uses threats from mass destruction weapons and terrorism to justify its pursuit of hegemony. Against this backdrop, Bush doctrine came out, which justifies the pre-emptive use of force including nuclear weapons. The U.S.-Japan-Korea military alliance is much reiterated by the U.S. as part of its regional alliance strategy.

In spite of such internal and external factors, whether Clause 1 Article 9 of the Japanese constitution prohibits its own right to self-defense or not, the explicit prohibition of the second clause prevents Japan from having its own army. Such prevention makes the

U.S.-Japan military relationship just unilaterally defensive. In order to form a mutual defensive relationship as with the case of South Korea, Japan has to amend Article 9.

3-2 Undesirable amendment of the pacifist constitution and the current state of Asia's peace

3-2-1 Armament race in Asia

In a case in which Japan can change SDF to armed forces, Asia including East Asia is expected to witness a substantial change in regional peace and security.

First, such transformation means Japan's change from the past light armament based on SDF to heavy armament under the auspices of the U.S. Considering that Japan now takes the second position in military spending in the world, such change should raise tension in the region. Japan's poor apology for the past war crimes, continuous visit to Yaskuni shrine and the distortion of history textbooks will intensify neighboring countries' concerns over another rise of militarism and regional hegemony.

Meanwhile, as China recognizes the change of the U.S. military strategy and the three nations' military alliance as part of the U.S. effort to contain its possible rise, it will focus on military build-up. In the Korean peninsula, North Korea, a rogue state labeled by the U.S., will take a tough stance to South Korea and Japan.

3-2-2 Setback of pacifist arms reduction.

The 21st century has witnessed progress in South Korea's peace movement. The peace movement was been mistaken as just part of the reunification movement or the anti-American movement. It is, however, ironic that increasing tension around the North Korea's nuclear issue let the peace movement become an independent variable, not subject to the reunification movement. The anti-military camp movement and the de-nuclearization movement are a case in point.

Such movements are based on activated communications between the two Koreas as the 6.15 Summit in 2000 was realized. Despite the soured relations between North Korea and the U.S. and between North Korea and Japan, vigorous movements for peace and arms reduction have something to do with such detente in the Korean peninsula. Nonetheless, Japan's ambition for heavy armament will cause military reaction from other nations and therefore, pose a great threat to the arms reduction movement.

3-2-3 Retreat in Recognition of History.

Japan's constitution is related with the way of historical recognition since it was established as punishment for the responsibility for the war and self-reflection on its act. If Japan does not realize such an implication, it cannot justify the maintenance of the emperor system since the emperor is responsible for the war. Therefore, Japan's movement toward heavy militarization without any sincere and thorough self-reflection of what it had done in the past means a critical neglect of its duty and backwardness of its history.

4. Asia's Collective Action in Response to an Undesirable Constitutional Amendment

4-1 Proliferating a common recognition of limitations and achievement in the pacifist constitution

Although the Japanese constitution stipulates non-military pacifism, it has some limitations.

First, despite the emperor's responsibility for the war, the emperor system is still maintained. This might be attributable to the American intention to use the emperor to smooth its rule over Japan. The main reason, however, is Japan's lack of will to bear its responsibility as perpetrators.

Second, the constitution confines basic rights to nationals. The original draft of the constitution stated that 'people' were subject to basic rights. The Japanese government, then, insisted on 'nationals' not 'people', which excludes Koreans and Chinese who were made to live in Japan. As a result, those who were forced to work without any payment during the Japanese colonial rule are excluded from post-war compensation and still now discriminated against in Japanese society.

Third, although pacifism seems like the very foundation of the Japanese constitution and democracy, it is actually just a reaction to prevent the repetition of the appalling memory of nuclear bombs dropped in Hiroshima and Nagasaki. Therefore, the more the memory fades away, the weaker the Japanese pacifism will get.

Nonetheless, there is no denying that the pacifism made a great contribution to the development of democracy and human rights. Under Article 9, SDF cannot grow into national army, and its overseas deployment is denied any combatant missions. Article 9 gets rid of any logic to constrain basic rights for national security. For example, in 1997, the Cabinet confirmed three non-nuclear principles and three principles of banning the

export of weapons.

Notwithstanding such desirable outcomes, Asian nations have more focused on dark sides of the Japanese constitution, expecting that highlighting the estrangement between Article 9 and SDF rather than the success could keep Japan's outrageous ambition and behavior under the control of the constitution. The recent rise of the Rightists who insist on the amendment, however, reveals the need to highly appreciate the achievement so far and pacifist movements.

4-2 Re-discovery of the constitution within historical context and Asian identity.

While the maintenance of the emperor system reveals the limitations of the constitution, Article 9 is the minimum expression of Japan's self-reflection. The article is the promise to itself to be re-born as a pacifism-based democracy and at the same time, Japan's public declaration to the victimized nations not to repeat such barbarious actions.

Today, as the issue of distorting historical textbooks shows, the Rightists are trying to develop the controversy into a confrontation between nations in order to stimulate the discussion about the amendment. Therefore, understanding the historical context of the constitution and re-discovering an Asian identity is what Japan should focus on now. This means that time has come for pacifism to move from the suffered to perpetrators. A proliferation of such perceptions about Japan could make Article 9 not a symbol of an 'outcast nation' as the Rightists insist, but a symbol of Japan's responsible recognition of history and the war.

4-3 Formation of peace community in North-East Asia and proliferation of common recognition of its future.

The proliferation of recognizing the constitution's outcomes should be accompanied by an enhanced future orientation. In other words, rather than viewing the constitutional pacifism as an ideology of a single nation, we need to review it as a very foundation of the regional security and community.

Notwithstanding increasing tension due to the lack of security in Japan, reconciliation rather than conflict, and peace rather than war are spreading out in Asia. Various kinds of peace movements unfolding in South Korea is a case in point.

The enhanced need to form a Northeast Asian and more broadly, Asian community, furthermore, lets people in the region recognize the importance of human security rather than military security, and peace community rather than military or economic

community. As in the case of 6 party talks and as the case of GGPAC(Global Partnership for Prevent Armed Conflict) shows, for peaceful conflict resolution, programs to prevent and resolve conflict should be further developed.

All this process will help Article 9 based on disarmed pacifism move away from the narrow concept as just Japan's constitutional ideology to a common ideology for a Northeast Asian peace community.

4-3 Collective action of Asian civil society

A more proliferating common recognition of the pacifist constitution will get more empowered with each Asian nation's self-reflection on its armaments. In this sense, the recent spread of peace-centered mind, instead of military-based security concept, is expected to lay the groundwork for the collective action of Asia's civil society.

Furthermore, the Japanese movement opposing the revision of the constitution is now seeking the alliance with other Asian nations, which means the protection movement is now getting out of the internal category. At the same time, this reveals a weaker position of the protection movement within Japan and limitations in the peace movement carried out only by the victimized.

An increasing maneuver of the Rightists for the amendment rather stimulates more exchange of Japanese and Korean activists. Such an exchange, however, should not be limited to a level of individual exchanges, friendships, and alibi--it needs to be reorganized in a larger suprapartisan scale. Only then can the solidarity be powerful enough to bring changes to the status quo.

일본의 헌법개정과 아시아평화

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1. 헌법조사회와 평화헌법 개정문제

(Research Commission on the Constitution and the Amendment of the Constitution)

1-1 헌법조사회 보고서

지난 2005년 4월 15일 일본의 중의원 헌법조사회는 지난 5년간의 헌법조사회 활동을 마무리 하고 중의원(House of Representative) 헌법조사회 보고서를 발표하였다. 이어 참의원(House of Councillors) 헌법조사회도 지난 2005년 4월 00일 마찬가지로 지난 5년간의 헌법조사회 활동을 총괄하는 헌법조사회 보고서를 발표하였다.

일본국 헌법은 1946년 11월 3일 제정되어 1947년 5월 3일 시행되었으며, 제9조에 다음과 같이 비무장평화주의를 규정함으로써 그간 평화헌법으로 불리워 왔다. 이에 따라 육해공군을 설치할 수 없었다.

제1항 일본국민은, 정의와 질서를 기조로 하는 국제 평화주의를 성실히 희구하고, 국가권 력의 발동에 의한 전쟁과 무력에 의한 위협 또는 무력의 행사는 국제분쟁의 해결수 단으로서는 이를 영구히 포기한다.

제2항 전항의 목적 달성을 위하여 육해공군 그 밖의 전력은 이를 보유하지 않는다. 국가 의 교전권은 인정하지 않는다.

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

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

recognized.

그러나 1954년 자위대가 발족하고 미국과 안보조약을 맺음으로 인하여 위헌 논란이 끊임없이 이어져 왔다.

이러한 가운데 일본의 국회는 공산당을 제외한 여야의 합의로 국회에 헌법조사회를 설치하기로 합의하고 지난 2000년 1월 12일 중의원과 참의원에 각각 헌법조사회를 설치하였다. 중의원 헌법조사회의 보고서에 따르면 현행 일본국 헌법은 헌법규범과 헌법의 현실이 심하게 괴리되어 규범성이 저하되었으며, 그간 9.11테러사건이 발생하고 북한의 핵개발 의혹이 일고 있으며, 일본의 국제협력이 강조되는 등 개헌을 둘러싼 환경의 변화되었으므로 헌법문제에 대한 조사의 필요성이 있다는 것이다.

5년에 걸친 헌법조사회 활동의 결과 중의원 헌법조사회는 다수의견으로 '자위권 및 자위대에 대한 모종의 헌법상의 조치를 부정하지 않는다','현행 상징천황제를 유지한다'는 다수의견을 시작으로 하는 총683쪽에 이르는 조사보고서를 발표하였다. 참의원 헌법조사회는 9조 1항을 유지에 대해서는 공통인식을 확보하였으나 9조2항의 유지에 대해서는 의견이 분분하였으며, 상징천황제를 유지하되 천황을 원수로 할 것인가에 대해서는 의견의 일치를 보지 못하였다는 내용의 최종보고서를 발표하였다.

이러한 보고서의 내용은 다양한 의견의 총집합체처럼 보이지만, 일본국 헌법의 핵심이라고 할 수 있는 제9조와 관련하여 '모종의 조치를 부정하지 않는다'는 문구를 담고 있어 주목하지 않을 수 없다. 이때의 모종의 조치란 '자위권 및 자위대의 헌법상 근거를 명확히 하는 조치'를 포함하는 것으로서 헌법개정을 통한 자위대의 국군화의 길을 암시하는 것이다. 이 때문에 일본 군국주의의 피해자인 한국을 비롯한 아시아 각국은 이를 아시아평화의 중대한 위협요인으로 인식하고 있다.

1-2 헌법개정관련 주요 일정

그간 일본 정부의 자위권 및 자위대에 대한 태도는 변화를 거듭하여 왔다. 일본국 헌법제정 당시의 수상인 요시다수상만 하더라도 제정 직후에는 일본은 자위권조차도 보유하지 않는다고 하였다가 1950년 한국전쟁을 전후하여서는 일본국 헌법이 자위권을 부인하는 것은 아니라고 하였다.

1954년 7월에는 자위대가 발족하였는데 자위대가 일본국 헌법 제9조에서 금지하고 있는 전력에 해당하지 않느냐는 비판에 대하여 일본정부는 자위대

는 필요최소한(minimum)의 실력일뿐 전력에 해당하지 않는다는 태도를 취하고 있다.

그러나 이러한 정부의 태도에도 불구하고 위헌논란이 끊임없이 지적되면서 자민당을 비롯한 일본의 정부여당에서는 논란의 소지를 없애고 자위대를 군대화하기 위하여 개헌논의를 줄기차게 진행하여 왔다.

1957년에도 개헌을 목적으로 하는 헌법조사회(Commission on the Constitution)를 의회에 설치하고자 하였으나 야당과 여론의 반대에 부딪혀 내각(Cabinet) 산하에 설치하였다가 이렇다할 결론 없이 1964년 장문의 보고서 제출 후 종결된 적이 있다. 1960년대의 안보투쟁을 거치면서는 제9조에 대한 명문 개헌을 사실상 포기하고 '자위대는 필요최소한의 실력이므로 헌법에 위반되지 않는다'는 변형된 해석을 통하여 자위대를 유지하여 왔다. 1980년대에는 전후정치를 총결산한다는 명분으로 개헌을 시도하였으나 실패하였다.

이러한 개헌논의 정체에도 불구하고 자위대의 활동영역을 넓혀 헌법규범과 현실의 괴리를 확대하려는 책동은 계속되었다. 1992년에는 평화유지활동협력법(PKO법)이 제정되어 전쟁 종결 후 자위대파병의 길을 열었다. 1999년에는 주변사태법이 제정되어 전시 후방지원의 길을 열어 놓았다. 그리고 2003년에는 이라크파병특별법을 제정하여 전시중 분쟁지역 파견의 길을 열었다.

1990년대에 제정된 일련의 자위대 파병관련법은 해석개헌을 통하여 자위대를 현상유지하려는 1980년대까지의 소극적 태도를 벗어나 국제공헌을 명분으로 자위대를 적극적으로 파병하고 헌법규범과의 괴리를 확대함으로써 개헌을 유도하기 위한 것이다.

그러한 의미에서 중의원 헌법조사회보고서가 헌법현실과 헌법규범의 괴리를 화두로 삼아 개헌을 목적으로 하는 헌법조사회의 활동을 진행시킨 것; 국제공헌의 필요성을 들어 헌법조사의 필요성을 제창한 것은 개헌을 위한 거대프로젝트의 진행으로 판단하지 않을 수 없다. 이미 요미우리 신문(Daily Yomiuri)과 같은 보수언론에서는 독자의 민간 개헌초안을 마련하는 등 개헌을 위한 분위기 조성에 열심이다. 자민당과 같은 집권여당도 지난 2004년 11월 17일 개정안의 요지를 발표한 바 있다. 나아가 자민당 창당 50주년이 되는 2005년 11월 15일에는 자민당의 개헌안을 결정 발표하겠다고 한 바 있어 아시아 각국의 긴장감이 높아져 가고 있는 실정이다.

2. 헌법조사회보고서의 문제점 및 개헌논의의 전제

2-1 헌법조사회보고서의 문제점

중참의원의 헌법조사회는 헌법조사회보고서를 다수결로 의결하고 중의원의 경우 이를 최종보고서라 통칭하고 있다.

이 헌법조사회보고서라는 이름의 방대한 문서는 국회법 제102조 6에서 규정한 '일본국 헌법에 대한 광범하고 종합적인 조사'와는 거리가 먼 내용으로 채워져 있다. 헌법제정과정에서의 전쟁책임의 문제, 전후 헌법운용의 실태, 헌법운용과 관련된 국가기관의 태만과 책임, 헌법의식 등에 대한 조사보다는 사실상 조항별 논점별로 개헌의 타당성에 대한 논의로 일관함으로서 사실상 개헌심의를 하고 있고 보고서는 그 요약록이라고 할 수 있을 것이다.

특히 문제가 되고 있는 헌법 제9조의 경우, 전력폐기를 규정하고 있음에도 불구하고 1954년 이래 약50여년간 존재하고 있는 자위대의 운용실태를 헌법규범에 맞추어 조사하고 보고 있지 않는 것은 헌법조사회의 큰 임무방기이다. 나아가 전쟁책임자인 천황과 천황제도가 폐지되지 않고 상징화된 형태로나마 제도화된 것과 비무장평화주의를 규정한 제9조와의 상관관계, 비무장평화주의와 전쟁책임과의 관계 등에 대한 역사적 맥락이 도외시되고 있는 것은 큰 문제가 아닐 수 없다.

논점별 의견을 집약하는 방식도 의원의 수를 집계하는 방식을 취함으로서 헌법조사회에 청취된 다양한 의견을 심대하게 왜곡하고 있다. 중의원 헌법조사회의 구성을 보면 자민당이 전체 50명 가운데 과반수를 넘는 26명, 연립여당인 공명당이 4명을 차지함으로써 압도적 다수를 차지하고 있는데도 불구하고 논점에 대하여 다수결 방식을 취하고 2배 이상인 경우 다수 의견이라고 정리함으로써 마치 절대 다수의 의견인 것처럼 착각을 일으키고 있다. 제9조에 대하여 '자위권 및 자위대에 대한 모종의 헌법상의 조치를 취할 것을 부정하지 않는다'는 다수의견이 그 대표적인 예일 것이다.

2-2 개헌논의의 전제

개헌을 논의하기 위해서는 피침략국가인 아시아 각국의 신뢰를 얻기 위한 진정성있는 헌법조사가 전제되어야 한다.

이를 위해서는 첫째, 규범이 현실로부터 얼마나 멀어져 있는가를 강조하는 헌법조사가 아니라 현실이 규범으로부터 얼마나 멀어져 있고 그 원인은 무엇이고 그 원인을 제공한 것은 누구이고 누가 책임을 져야 하며 치유책은

무엇인가 하는 것이 광범위하고 종합적으로 우선 논의되어야 한다. 1954년 자위대가 창설되고 현재 일본은 장교 중심의 약19만명의 자위대를 유지하고 있으며 세계 2-3위의 방위비를 사용하고 있는 공룡집단이다. 나아가 1992년 PKP협력법을 기점으로 하여 자위대의 해외파병의 길이 열리고 있고 이라크파병특별법 이후로는 비록 전투업무에 직접 종사하지는 못한다고 하더라도 전시파병이 이루어지고 있는데 이러한 현실이 헌법규범과 얼마나 괴리되고 있는가에 대한 조사가 필요하다.

둘째, 일본국 헌법의 경우 제2차 세계 대전을 일으킨 전범국가가 패전 후 제정한 점이라는 것을 고려한다면 비군사화 비무장화(Disarmament)의 정신이 어디에서 비롯되었는가 하는 점을 좀더 명백히 하여야 한다. 연합국 최고사령부(GHQ/SCAP)가 헌법초안을 마련하여 강제하였는가가 문제가 아니라 왜 연합국최고사령부가 초안을 마련하지 않으면 안되었던가, 왜 연합국이 일본을 점령하지 않으면 안되었던가, 일본이 도대체 무슨 전쟁범죄를 저질렀기에 비군사화, 비무장화의 원칙이 세워져야만 했는가에 대한 역사적인 맥락에서의 조사도 병행되어야 한다. 전후보상은 충분하였는가하는 조사가 병행되어야 한다. 잘 알려져 있듯이 그간 가려져 있던 일본군 위안부 문제, 강제징용된 군인 군속 등의 피해보상문제 등이 이러한 헌법정신에 비추어 충분이 이루어지고 있는지 등 규범과 역사적 사실과의 괴리에 대한 조사가 필요하다 할 것이다.

셋째, 일본국 헌법 제9조를 중심으로 하는 비무장 평화주의의 보편성과 미래지향성에 대한 비교헌법적 조사가 이루어져야 한다.

헌법조사회의 헌법조사는 주로 현행 일본국 헌법이 제정된지 60년 동안 개정이 되지 않는 낡은 헌법이라는 암묵적 전제하에 현행 일본국 헌법에는 알권리 환경권 등 새로운 인권에 대한 규정이 없으며 이러한 사실을 해외조사를 통하여 확인하는 방식을 취하고 있다. 막대한 비용이 소모되는 21개국에 대한 해외조사를 통하여 얻어낸 것은 일본국 헌법 제9조의 보편성과 미래지향성에 대한 조사가 아니라 군대를 헌법에 규정하지 나라는 일본을 제외하고는 없지 않느냐를 확인시키는 과정이었다할 것이다. 또한 아시아의 정치후진국이라고 보았던 한국마저도 헌법재판소를 규정하고 있는데 일본은 헌법재판소도 없지 않느냐는 식이다.

인류의 항구적 평화를 위한 이념과 이상향으로 오랫동안 지적되어온 평화주의가 브리앙 켈로그 조약 이후 어떻게 헌법규범화하는지, 규범화하는 경우 군비철폐를 전제로 하는 비무장 평화주의 유형과 무장을 인정하되 문민통제를 강화하는 유형이 일반적인데, 이 경우 그 차이점이나 진정성에 대한 비교

헌법적 고찰은 찾아볼 수 없다.

3. 평화헌법 개악과 아시아의 평화

3-1 평화헌법 개악의 동인

이러한 전제조건이 충족되지 않은 채 개헌논의가 급물살을 타고 있는 것은 내재적인 요인과 외재적인 요인에서 비롯된다 할 것이다.

우선 내재적인 요인으로서는 일본이 자위대의 위헌상태를 해소하고 싶어 한다는 점이다. 전후 일본은 대미종속 하의 경무장 평화주의에 기초하여 상대적으로 적은 군사비용 지출에 힘입어 놀라운 경제발전을 이룰 수 있었다. 그리고 이러한 경제발전의 결과 많은 자본이 해외에 투자되어 있는 실정이다. 그런데 특히 아시아에 투자되어 있는 다국적 자본의 경우 아시아 각국의 민주화를 정국불안으로 여기고 투자의 안정성이 떨어지고 있다 보고 있다. 따라서 투자의 안정성을 높이기 위한 방편으로 군사력의 확보와 유사시 파병이 가능해야 한다. 이를 위해서는 우선 자위대의 위헌상태가 해소되지 않으면 안된다. 국제공헌을 위하여 자위대를 해외파병하여야 한다는 논리는 본질적으로 일본의 경제적 이익을 위하여 국제공헌을 명분으로 자위대의 해외파병의 길을 닦고 있는 셈이다. 일본의 경제계가 개헌논의에 적극적인 것을 보면 더욱 더 명확해 진다.

경제논리뿐만이 아니라 최근 들어서는 야스쿠니 신사참배나 역사교과서 왜곡문제 등을 국가간 대립으로 내모는가 하면 일본도 무력을 가지고 당당히 맞서야 한다는 극우논리가 일반잡지에 등장하는 등 가파른 우경화 현상이 헌법개정이라는 종착적을 향해 일어나고 있다. .

한편 외재적 요인으로서는 미국의 지역동맹군화 전략을 들 수 있다. 미국은 탈냉 후 세계의 유일한 초강대국으로서의 지위를 누리고 있으며 21세기에도 패권국가의 지위를 유지하기 위한 정책과 전략을 추진하고 있다. 미국의 패권주의는 개입주의 정책이라는 명제아래 미국대외정책의 뚜렷한 특징을 형성하고 있다. 21세기 미국의 대외정책 및 군사안보정책이 이처럼 패권주의를 지향하고 있음은 일련의 문서들을 통하여 더욱 명확히 드러나고 있다. 미국의 21세기 정책의 방향과 성격을 엿볼 수 있는 대표적인 문서인 조인트 비전(Joint Vision)2020과 4개년 국방검토 보고서(Quadrennial Defense Review Report)에 따르면 미국의 새로운 국방정책은 4가지 기본방향을 제시하고 있다. 미 국방정책의 전략중심축을 아시아로 옮기고, 해외

기지를 포함한 전방배치 전력의 의존도를 낮추는 대신 전력투사능력을 강화하고, 정보시스템의 절대적 우위를 유지하며, 과학기술의 급속한 발전에 따라 군사전력의 기동성을 높이고 경량화한다는 것이다. 한편 미국은 소련이 해체되고 공산주의 진영이 붕괴된 상황에서 패권주의 정책을 위해 이른바 깡패국가(Rouge State)의 대량파괴무기로부터의 위협과 테러리즘을 들고 있다. 이러한 위협에 대처하기 위해서라는 구실로 핵무기를 비롯한 군사력의 선제사용전략을 정당화시키고 있다. 이를 위한 지역동맹군화 전략의 일환으로 강조되고 있는 것이 한미일 군사동맹의 강화이다.

이러한 내외의 동인에도 불구하고 일본국 헌법은 설령 제9조 1항에서 개별적 자위권을 금지하고 있거나 인정하고 있다고 하더라도 제2항에서 전력을 금지하고 있으므로 군대를 가질 수 없다. 무력에 의한 개별적 자위권이 인정되지 않으므로 미일안보조약은 편무적인 성격의 방위조약에 그치고 있다. 한미안보조약이 상호방위조약인 것처럼 미일안보조약이 상호방위조약이 되기 위해서는 일본국 헌법 제9조의 개정이 필요한 것이다.

3-2 평화헌법 개악과 평화지형

3-2-1 아시아의 군비경쟁 촉발

만일의 경우 일본의 평화헌법이 개정되어 자위대가 국군으로 격상되면 동북아를 비롯한 아시아의 평화안보지형은 크게 변할 것으로 예상된다.

첫째, 비무장 평화주의를 규정한 헌법규범의 억제력으로 인하여 자위대(Self-Defense Force) 정도의 경무장(light Armed)에 그쳤던 일본이 미국의 지역동맹군화 전략에 편승하여 대미종속하의 중무장주의로 변신을 꾀하게 된다는 것을 의미한다. 세계2-3위의 방위비를 쓰는 일본의 자위대의 국군으로의 재편은 동아시아 각국의 안보불안감을 고조시킬 것이다. 더군다나 과거의 침략사에 대한 진상규명과 진정한 사과없는 일본의 대아시아 외교와 야스쿠니 신사참배, 교과서 왜곡 문제로 인한 불신의 골이 깊은 동북아의 전후사를 돌이켜 보면 군사패권국가화 또는 군국주의화를 우려하는 목소리는 더욱 더 고조될 것이다.

중국의 경우 미국의 전략중심축이 아시아로 옮겨오는 것은 곧바로 중국을 겨냥한 것이어서 이러한 대중국 견제정책의 일환으로서의 한미일 군사동맹의 강화 및 이를 위한 기반작업으로서의 일본 헌법 개정에 자극받아 중국의 군비증강을 가속화시킬 것이다.

한반도의 경우 깡패국가로 지목되고 있는 북한의 경우도 대남 대일 군사적 견제력을 유지하기 위하여 강성대국노선이 더욱 강화될 것이다.

3-2-2 평화 군축운동의 후퇴

2000년대 들어 한국의 평화운동은 괄목할 만한 성장을 거듭하고 있다. 한국의 평화운동은 그간 통일운동의 일환으로 주장되거나 반미운동의 속임수라는 오명을 써 왔다. 그러나 아이러니칼하게도 전쟁 위기가 고조되면서 통일운동의 종속변수가 아니라 독립변수로 자리잡기 시작하였다. 반기지운동, 비핵화운동, 양심적 병역거부운동이 그 대표적 예이다.

이는 2000년 6.15 남북정상회담을 비롯한 남북교류의 활성화에 터잡고 있다할 것이다. 북미관계의 경색, 북일관계의 정체에도 불구하고 평화와 군축운동이 자리를 잡아가고 있는 것은 이러한 남북간의 긴장완화와 밀접한 관련이 있다할 것이다.

그러나 일본의 중무장화는 대일 견제력으로서의 군사력에 대한 필요성을 강화시켜 군축운동의 커다란 장애가 될 것이다.

3-2-3 과거사 인식의 후퇴

일본의 평화헌법은 역사인식의 문제라는 측면을 가지고 있다. 헌법제정의 원인이 일본 군국주의 침략에 대한 징벌과 반성적 의미를 동시에 지니고 있다는 점이다. 특히 아시아침략에 대한 최소한의 반성과 징벌의 의미를 고려해야 한다. 그렇지 않다면 전쟁책임의 당사자인 천황이 명맥을 유지할 논리적 근거가 없다. 비무장평화주의와 연계된 상징천황제는 전쟁책임의 최소한이라고 할 것이다. 그런데도 이에 대한 진지한 재검토 없이 이루어지는 중무장은 과거사인식에 있어서의 후퇴를 의미한다 할 것이다.

4. 평화헌법개악에 대한 아시아의 공동행동

4-1 평화헌법의 한계와 성과에 대한 공동인식의 확산

일본의 평화헌법은 비무장 평화주의를 규정했다는 점에서 비교헌법사상 대단히 주목할 만한 것이기는 하지만, 몇가지 점에서 한계를 가지고 있다할 것이다. 첫째, 명치헌법 하의 군통수권자인 천황의 전쟁책임에도 불구하고 천황제가 유지되고 있다는 점이다. 이는 점령군인 미군이 천황을 점령통치에 활용하고자 하였던 측면도 있지만, 일본 내의 전쟁책임에 추궁의 노력이 없었기 때문이다.

둘째, 기본권의 향유주체가 국민으로 되어 있다는 점이다. GHQ헌법초안에 따르면 기본권의 향유주체가 인민(peple)로 되어 있었으나 일본정부의 끈질

긴 책략에 의하여 국민(nation)으로 바뀌었다. 그것은 일본 내에 체류하고 있던 재일한국 조선인, 재일 중국인들을 배제하기 위한 의도였다. 그 결과 전쟁에 동원하기 위하여 필요에 따라 신민임을 강요받고 강제연행되었던 많은 외국인들이 전후보상에서 제외되었으며, 현재에도 권리면에서 많은 차별을 당하고 있다.

셋째, 평화헌법에 기초하여 일본은 평화주의가 가장 중요한 헌법이념으로 자리잡고 있으며 평화주의를 떠나서는 민주주의를 말할 수 없을 정도로 평화주의가 공론영역을 지배하고 있다. 그러나 이러한 평화주의는 대체로 일본이 히로시마 나가사키에 원자폭탄을 맞는 등 전쟁의 참화를 다시금 겪지 않기 위한 의미에서의 반전평화주의로서의 성격이 강하다. 따라서 전쟁에 대한 참화의 기억이 엷어져가면 갈 수록 평화주의 이념의 지지력이 떨어져가고 있는 실정이다.

그러나 이러한 문제점에도 불구하고 일본 헌법의 평화주의는 일본의 경제발전뿐만 아니라 민주주의발전과 인권보장에 많은 기여를 하였다. 일본 헌법 제9조로 인하여 비록 자위대와 같은 사실상의 군대가 존재함에도 불구하고 그 자위대가 군대로 합헌화될 수 없었으며, 비록 해외파병의 길을 열었다고는 하지만 전투업무에 종사할 수 없는 상황에 있다. 제9조가 존재하기 때문에 국가안보를 위한 기본권 제약이 논리적으로 명분을 가질 수 없었다. 1967년에는 비핵3원칙과 무기술출금지 3원칙을 사토내각에서 확인한 바 있다.

그러나 지금까지 일본을 비롯한 아시아 각국의 일본 헌법에 대한 태도는 성과보다는 한계에 치우쳐 있었다고 해도 과언이 아니다. 왜냐하면 한계를 지적함으로써 현실을 헌법규범에 접근시키는 것이 헌법운동론적으로도 유효한 측면이 강했기 때문이다. 그러나 개헌세력이 의회의 다수를 차지하고 헌법규범과 현실의 괴리를 이유로 개헌을 주장하는 정세에 있어서는 오히려 평화헌법의 성과를 강조하고 그간의 평화운동을 재평가하는 운동론이 필요하다 할 것이다.

4-2 평화헌법의 역사성과 아시아성에 대한 인식의 확산

상징천황제가 전쟁책임 문제에 대한 일본국 헌법의 한계를 드러내는 것이라면 일본국 제9조는 아시아침략에 대한 최소한의 반성의 표현이다. 과거의 군국주의를 부정하고 평화주의를 기조로 하는 민주국가로 재탄생할 것을 다

짐하는 것이며 특히 아시아 태평양전쟁과 식민지 지배로 피해를 입은 아시아 국가에 대하여 일본은 두 번다시 전쟁을 일으키지 않는 국가가 되겠다고 선언하는 의미를 가진다.

그런데 최근 역사교과서 왜곡문제에서 보듯 평화헌법 개악세력들은 역사문제를 국가간의 대립으로 치환하여 개헌세력의 결집을 꾀하고 있다. 따라서 평화헌법의 역사성과 아시아성에 대한 일본내 호헌세력의 강도 높은 자각과 각성이 그 어느때보다도 중요하다할 것이다. 그것은 피해자로서의 평화주의로부터 가해자로부터의 평화주의로의 인식의 확산을 의미한다. 이러한 인식에 터잡게 되면 일본국 헌법 제9조는 개헌세력이 주장하는 것처럼 비정상국가를 상징하는 심볼에 불과한 것이 아니라 전쟁책임에 대한 역사인식의 심볼로 적절하게 자리매김할 수 있을 것이다.

4-3 동북아의 평화공동체 형성과 평화헌법의 미래성에 대한 공동인식의 확산

평화헌법의 성과에 대한 인식의 지평을 확대하는 것은 평화헌법의 미래성에 대한 인식의 확산과 동반되어야 한다. 일본 헌법의 평화주의를 일국적인 것으로만 볼 것이 아니라 동북아의 안전보장과 공동체 건설을 위한 향도이념으로서의 측면에 대해서도 검토할 필요가 있다할 것이다.

일본 내의 안보불안의 고조에도 불구하고 한반도를 비롯한 아시아 각국의 움직임을 보면 대결보다는 화해, 전쟁보다는 평화의 움직임이 확산되고 있다. 한국의 경우 다양한 형태의 평화운동이 확산되고 있는 대표적인 예라고 할 것이다.

나아가 동북아를 비롯한 아시아 지역의 공동체에 대한 필요성이 제고되면서 군사안보보다는 인간안보가 강조되고, 군사력 또는 경제 중심의 공동체보다는 평화공동체에 대한 인식이 확산되고 있다. 또한 GGPAC(Global Partnership for Prevent Armed Conflict)의 사례에서 보는 바와 같이, 분쟁을 평화적인 방법에 의해 예방하기 위한 분쟁예방프로그램의 적극적인 계발이 병행되어야 할 것이다.

이러한 과정에서 비무장평화주의를 규정한 일본국 헌법 제9조는 일본만의 일국평화주의 이념이 아니라 동북아 평화공동체 형성의 향도이념으로 자리잡을 수 있을 것이다.

4-3 아시아 시민사회의 실천적 공동행동

평화헌법의 미래성에 대한 공동인식의 확산은 아시아 각국이 자국의 군비에 대한 성찰적 사고와 병행될 때 힘을 가질 수 있다. 특히 한국을 비롯한 필리핀 등 아시아 각국이 군비일변도의 안보관에서 탈피하여 평화에 대한 사고가 확산되고 있다는 점은 아시아 시민사회의 공동대응의 토대가 될 것이다.

나아가 종래의 전통적인 호헌운동이 주로 일본 국내에서 전쟁과 평화의 문제로서 접근하는 '일국적 호헌운동'이었다면 현재의 호헌운동은 아시아에 눈을 돌리고 있는 것도 고무적인 일이 아닐 수 없다. 그것은 우선 일본내의 평화운동만으로는 힘이 부칠 만큼 호헌운동의 힘이 상대적으로 약화되었다는 것을 의미하는 측면과 피해자로서의 평화운동의 한계에 대한 성찰의 표현으로 보여진다.

개헌 책동이 가속화되면서 일본의 많은 호헌운동 세력이 한국 러쉬라고 할만큼 발걸음이 잦아진 것은 이와같은 현상의 표현이라고 생각된다. 그러나 이러한 교류는 개별적인 교류와 친선 그리고 알리바이로 그칠 것은 아니고 초당파적인 연대의 모습으로 재정립될 필요가 있다할 것이다. 그래야만 정국을 반전시키는 실천적인 힘으로 작용할 수 있을 것이다.

Financial Reforms after the 1997 Korean Financial Crisis

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I. Introduction

The 1997 financial crisis in Korea has brought many changes in various areas, including the economic and financial fields as well as in politics and society. As consideration for financial support from the International Monetary Fund (the "IMF"), the IMF requested that the Korean government implement various financial reforms aimed at financial and corporate restructuring, recognizing that some of the main causes of the financial crisis were weak financial and corporate structures, as well as a weak governance system. Further, the IMF urged the Korean government to take more proactive measures to open the Korean financial markets. Mainly due to such financial reforms, including financial and corporate restructuring and improvement of corporate governance in general corporations and financial institutions, Korea is now showing great developments in the financial and corporate sectors.

This article intends to introduce the various financial reforms taken after the 1997 financial crisis that were spurred by the IMF support program, analyzing these reforms from a legal aspect and examining the prospects and recommendations for future financial reforms. In Part II, various financial reform programs are introduced and reviewed, including the establishment of a consolidated financial supervisory agency, enhancement of the independence of the Korean central bank, improvement of management corporate governance systems in financial institutions (focusing on banks), introduction of a financial holding company system, implementation of an asset-backed securitization system, recent implementation of a securities-related class action system, and recent introduction of a private equity fund under a new law. Part III discusses the prospects and recommendations for financial reforms.

II. Review of Financial Reforms

This Part reviews the various financial reform programs implemented after the 1997 financial crisis, including, among others, (i) the establishment of a consolidated financial supervisory agency, (ii) enhancement of the independence of the Korean central bank, (iii) improvement of management corporate governance systems in financial institutions such as banks, (iv) introduction of a financial holding company system, (v) implementation of an asset-backed securitization system, (vi) implementation of a securities-related class action system, and (vii) introduction of a private equity fund.

1. Establishment of Consolidated Financial Supervisory Agency

One of the significant financial reforms following the financial crisis was the establishment of a consolidated financial supervisory authority, which had been discussed before the financial crisis and steered by the government-led financial reform committee. The 1997 financial crisis spurred this financial reform, despite the fact that this agenda had been delayed because of deep conflicts among the relevant interested groups. Finally, on December 31, 1997, immediately following the 1997 financial crisis, a new law entitled the "Act on Establishment of Financial Supervisory Organizations" was enacted, and became effective on April 1, 1998. This Act established the consolidated financial supervisory agencies, consisting of the Financial Supervisory Commission (the "FSC"), the decision-making body, and the Financial Supervisory Service (the "FSS"), the execution body. These agencies integrated previous financial supervisory institutions such as the Office of Banking Supervision of the Bank of Korea, a banking supervisory authority, the Securities Supervisory Board, a securities company supervisory agency, the Insurance Supervisory Board, an insurance company supervisory authority, and the Credit Administration Fund, a non-banking supervisory authority for merchant banks and savings banks.

The FSC, consisting of nine members, is an organ under the Prime Minister,[1] but is not subject to the direction or control of the Prime Minister.[2] The Chairman of the FSC is appointed for a three-year term by the President through review of the Cabinet Council.[3] The functions of the FSC are reviewing and deciding the following matters: (i) enactment or amendments of the regulations relating to supervision of financial institutions,[4] (ii) authorizations or permits of establishment, merger, conversion, business transfer and assumption of financial institutions, (iii) authorizations or permits relating to the management of financial institutions, (iv) major matters relating to inspection of and sanctions on financial institutions, and (v) major matters relating to the administration, supervision and monitoring of securities and futures markets.[5] In addition, the FSC has power to direct and supervise the business, operations and administration of the FSS.[6]

The FSS is an executory organ supervising and examining financial institutions under the

[1] The Act on Establishment of Financial Supervisory Organizations, art. 3(1), Law No. 5490 (Dec. 31, 1997), *recently amended by* Law No. 6987 (Oct. 4, 2003) [hereinafter AEFSO].
[2] *Id.* art. 3(2).
[3] *Id.* arts. 4(2), 6(1).
[4] 'Financial institutions' include, among others, banks, securities companies, insurance companies, savings banks, asset management companies, merchant banks, trust companies, futures companies, and investment advisory companies. *Id.* art. 38.
[5] *Id.* art. 17.
[6] *Id.* art. 18.

direction of the FSC.[7] The FSS is a special juridical entity without any capital,[8] which means that it is not a government department. The Chairman of the FSC serves concurrently as the Governor of the FSS.[9] The functions of the FSS include the following: (i) examination of financial institutions, (ii) sanctions on financial institutions as a result of the inspection, and (iii) supporting the business of the FSC.[10]

2. Enhancement of Independence of the Central Bank

Another conspicuous financial reform was the enactment of legislation to enhance the independence of the Bank of Korea (the "BOK"), the Korean central bank. The issue of guaranteeing the independence of the BOK had been a controversial agenda since the late 1980s because the BOK's monetary policy had been heavily influenced by the government, particularly the Ministry of Finance and Economy (then Ministry of Finance). For example, the Chairman of the Monetary Board of the BOK, the decision-making body, had been served by the then Minister of Finance. Following the 1997 financial crisis, one of the measures for financial reform was the securing of independence for the BOK. The Chairman of the Monetary Board of the BOK is now served by the Governor of the BOK,[11] and a new provision providing that the BOK's monetary policy should be neutrally established and executed autonomously and that the independence of the BOK should be respected[12] was added to the amendments of the Bank of Korea Act.

The Monetary Board consists of the Governor of the BOK and six other members who serve as standing full-time members (previously non-standing members) and are appointed for a four-year term by the President through the recommendation of the relevant government agencies (e.g. the Ministry of Finance and Economy and the FSC) or institutions.[13] The Governor of the BOK is appointed for a four-year term by the President through a review process of the Cabinet Council[14] (previously appointed by the President through the recommendation of the Minster of Finance and Economy, which allows for a high possibility that the government heavily influences the BOK's monetary policy). Since then, there has been no case in which the Governor of the BOK resigned or was dismissed during the term, whereas previously, the BOK Governor had often been dismissed or resigned before the expiration of the term.

Another feature of the reform of the central bank was to divest the function of banking supervision from the BOK to the FSC and the FSS as these new consolidated financial supervisory

[7] *Id.* art. 24(1).
[8] *Id.* art. 24(2).
[9] *Id.* art. 29(2).
[10] *Id.* art. 37.
[11] The Bank of Korea Act, art. 13(2), Law No. 138 (May 5, 1950), *recently amended by* Law No. 6971 (Sep. 3, 2003) [hereinafter BOKA].
[12] *Id.* art. 3.
[13] *Id.* arts. 13(1), (3), 15.
[14] *Id.* art. 13(2), 33(2).

agencies were introduced. However, the BOK has retained limited and indirect banking supervision powers such as requesting that the FSS examine the relevant banks, demanding that the FSS co-inspect the relevant banks with the BOK staff, and requesting that the relevant banks submit materials and documents, if deemed necessary for implementing monetary policy.[15]

In addition, the amended Bank of Korea Act expressly stipulated that the BOK is responsible for operating and administering a payment and settlement system in Korea.[16] Further, in order to enhance the accountability of the National Assembly, the BOK was required to submit a report annually regarding the performance of monetary policy. Since October 2003, this report must be submitted semiannually.[17]

3. Improvement of Corporate Governance Systems in Financial Institutions

Another strong impact of 1997 financial crisis on financial institutions was to enhance management corporate governance systems by introducing the advanced corporate governance systems utilized in the United States. This measure stemmed from the realization that one of the main reasons for the financial crisis was due to ineffective corporate governance systems in financial institutions such as banks and securities companies. As a result, various measures have been taken to improve the corporate governance structure of financial institutions. For example, in the case of most banks,[18] an outside director system was introduced; in other words, most financial institutions, including banks, securities and insurance companies, were required to select no less than three outside directors whose number should be no less than 50% of the total number of the directors.[19] The outside directors must be selected at the shareholders meeting through the recommendation of the Outside Director Candidate Recommendation Committee, at least half of which consists of outside directors.[20] In addition, replacing the previous auditor system, the audit committee system was introduced, which is composed of no less than three members, at least two-thirds of whom must be outside directors.[21] The members of the audit committee are selected through the recommendation of the Audit Committee Member Candidate Recommendation Committee composed entirely of outside directors.[22] A compliance officer is also required to be selected at the board of directors meeting. The main function of a compliance officer is to check and monitor whether all officers and employers comply with the internal control standards required to be set up in

[15] *Id.* arts. 87, 88(1).
[16] *Id.* art. 81.
[17] *Id.* art. 96(1).
[18] In this paper, the case of banks will be discussed because there are substantial similarities in cases of other type of financial institutions, such as securities companies and insurance companies.
[19] The Bank Act, art. 22(2), Law No. 139 (May 5, 1950), *recently amended by* Law No. 6691 (April 27, 2003) [hereinafter BA].
[20] *Id.* art. 22(3).
[21] *Id.* art. 23-2(1), (2).
[22] *Id.* art. 24.

financial institutions and also must report to the audit committee in case non-compliance is found.[23] The relevant laws specify the qualifications for such compliance officers (e.g. must have served at least ten years at financial institutions, and at least five years at supervisory authorities, etc.).[24] In this regard, there is criticism that the difference in terms of functions between a compliance officer and the audit department is somewhat vague, although the regulators argue that the role of a compliance officer is to check and monitor the compliance in advance, while that of an audit department is to inspect and examine the business afterwards.

4. Introduction of Financial Holding Company System

In October 2000, the Financial Holding Company Act ("FHCA") was enacted to permit the establishment of a financial holding company, reflecting the recent financial industry trend toward financial innovation, specialization and diversification. Under the FHCA, a financial holding company is defined as a company which controls other finance-related companies by holding shares. For example, a financial holding company should be the largest shareholder of a subsidiary, and the total evaluation amount of all subsidiary shares held by a financial holding company should be 50% or more of the total asset amount of a financial holding company.[25] Establishment of a financial holding company requires the approval of the FSC.[26] Further, a financial holding company is also subject to the Monopoly Regulation and Fair Trade Act ("MRFTA") (because the MRFTA regulates a holding company) and the Commercial Code (because a financial holding company is a corporate entity) as well as the FHCA.[27] Under the MRFTA, a financial holding company is required to hold 50% or more of the total shares of a non-listed subsidiary company and 30% or more of the outstanding shares of an exchange-listed company or a KOSDAQ listed company, with certain exceptions.[28] Further, under the MRFTA, the debt service ratio of a financial holding company should be no more than 100%, with certain exceptions.[29] Moreover, under the FHCA, a financial holding company is allowed to have sub-subsidiaries whose business is similar to those of a subsidiary company (e.g. in case of a subsidiary bank, sub-subsidiary companies are limited to credit card companies, trust companies, investment advisory companies or futures companies, etc.).[30]

[23] *Id.* art. 23-3(1), (2).
[24] *Id.* art. 23-3(3).
[25] Financial Holding Company Act, art. 2(1), Law No. 6274 (Oct. 23, 2000), *recently amended by* Law No. 7428 (Mar. 31, 2005) [hereinafter FHCA].
[26] *Id.* art. 4(1).
[27] *Id.* art. 62(1).
[28] Monopoly Regulation and Fair Trade Act, art. 8-2(2) item 2, Law 3320 (Dec. 31, 1980), *recently amended by* Law No. 7492 (Mar. 31, 2005) [hereinafter MRFTA].
[29] *Id.* art. 8-2(2) item 1.
[30] FHCA, art. 19(1), Enforcement Decree of the FHCA, art. 15(1) item 3.

5. Implementation of an Asset-Backed Securitization System

A new asset-backed securitization system was introduced in September 1998 under the Asset-Backed Securitization Act (the "ABSA"), which is aimed at enhancing financial soundness by disposing of the non-performing loans of financial institutions. The ABSA intends to promote asset-backed securitization by offering benefits to financial institutions and corporations that purport to engage in the securitization business. Article 1 of the ABSA expressly provides that "[it] purports to establish the asset-backed securitization system in order to enhance the financial soundness of financial institutions and corporations by procuring cash flow using the securitization and to secure a foundation for housing finance through the funding of long-term housing finance. . ."

Under the ABSA, originators are limited to the following categories: (i) financial institutions such as banks, merchant banks, securities companies, insurance companies, asset management companies, savings banks, credit specialization financing companies (e.g. credit card companies or leasing companies), (ii) government invested institutions, such as the Korea Asset Management Corporation ("KAMCO"), Korea Land Corporation ("KLC"), Korea National Housing Corporation ("KNHC"), (iii) corporate restructuring investment companies under the Corporate Restructuring Investment Company Act, (iv) a private company, i.e. a juridical person with a good credit rating which is recognized by the FSC for the necessity of securitization for its assets, and (v) other entities prescribed by the Enforcement Decree of the ABSA, such as the Korea Deposit Insurance Corporation, trust companies, mortgage-backed securitization companies under the Mortgaged-Backed Securitization Company Act, the Korea Credit Guarantee Fund, and the Korea Housing Finance Corporation established under the Korea Housing Finance Corporation Act.[31]

Further, the ABSA provides for the following four types of securitization: (i) the type which uses a special purpose company ("SPC") which issues asset-backed securities based on securitization assets (such as bonds, real property and other property)[32] transferred from an original holder of those assets and pays principal amounts and interest or dividends of such securities out of profits acquired from operation or disposition of such securitization assets; (ii) the type which uses a trust company (usually banks with a trust business license), which issues asset-backed securities based on securitization assets which are entrusted to the trust company by an original holder of such assets and pays proceeds of asset-backed securities with profits arising out of the operation or disposition of underlying assets or borrowings; (iii) the type which uses a trust company which purchases securitization assets from an original holder using entrusted money from investors (i.e. holders of securitization securities issued) and

[31] Asset-Backed Securitization Act, art. 2 item 2, Law No. 5555 (Sep. 16, 1998), *recently amended by* Law No. 6916 (May 29, 2003) [hereinafter ABSA].
[32] *Id.* art. 2 item 3.

pays proceeds of asset-backed securities with profits arising out of the operation or disposition of underlying assets or borrowings; (iv) the two-tier securitization type (i.e., an SPC or a trust company may securitize assets or issue asset-backed securities transferred from or issued by another SPC or a trust company.).[33]

The most important feature of asset-backed securitization is a "principle of bankruptcy remoteness," which means that securitized assets should be remote from the originator's bankruptcy risks. Reflecting this principle, Article 13 of the ABSA expressly stipulates that transfer of securitized assets should be a "true sale," which shall satisfy the following four conditions: (i) the transfer should be in the form of sale or exchange; (ii) a transferee (i.e., the SPC or a trust company) should have disposal rights to the securitized assets; (iii) a transferor (i.e., originator) should not have the right to claim back securitization assets, and a transferee should not have the right to claim back the price paid for securitization assets; and (iv) a transferee should accept all risks of loss related to securitization assets, *provided that* a transferor may bear risks or have warranty liability for a specified period.

In addition, the ABSA requires the following registration process for issuing securitized securities: if an SPC or a trust company intends to be governed by the ABSA, it should register an ABS plan (which includes the scope of securitized assets, type of securitization securities, and manner of administration of securitized assets) and subsequent changes, if any, with the FSC, a financial regulator.[34] An SPC (excluding a trust company) may register only one ABS plan.[35] Moreover, the parties relating to securitization such as an SPC, a trust company, a servicer, etc., are subject to the oversight of the FSS, which has power to request such parties to submit relevant materials or documents or investigate the business or property of such parties.[36]

6. Implementation of a Securities-Related Class Action System

As a measure for enhancing transparency in the securities market, the Securities-Related Class Action Act ("SRCAA") was enacted in January 2004, and became effective on January 1, 2005, but certain accounting frauds committed before January 1, 2005 will be exempt from such application until December 31, 2006.[37] The main purpose of the SRCAA is to protect investors damaged by accounting frauds, false audits, fraud disclosures, stock price manipulation or insider trading, etc., of certain listed companies or KOSDAQ listed companies, and also to enhance transparency in corporate management.[38]

[33] *Id.* art. 2 item 1.
[34] *Id.* art. 3(1).
[35] *Id.* art. 3(2).
[36] *Id.* art. 34.
[37] This exemption was adopted by the amendment to the Securities-Related Class Action Act in March 2005.
[38] Securities-Related Class Action Act, arts. 1, 3(1)(2), Law No. 7074 (Jan. 20, 2004), *recently amended by* Law No. 7387 (Mar. 10, 2005) [hereinafter SRCAA].

The SRCAA stipulates various provisions that are exceptions to the Civil Procedure Act. The investors who qualify as plaintiffs are those holding 0.01% or more of outstanding issued shares of an exchange-listed company or a KOSDAQ-listed company, and such investors should be 50 or more as plaintiffs.[39] Considering the specialization and complexity of such actions, the SRCAA requires plaintiffs to retain legal counsel.[40] The final decisions will become effective as to all relevant parties, including investors who do not participate in such class actions, *provided that* the investors who do not want the final decision to be applicable to themselves may file a written notification in advance to the relevant court.[41]

Certain companies whose total assets are less than 2 trillion Won as of December 31, 2004 will be exempt until December 31, 2006 except in cases of damages arising from stock price manipulation.[42] In particular, taking account of complaints from companies having accounting fraud problems, as mentioned above, accounting frauds performed before January 1, 2005 are also exempt until December 31, 2006.[43]

7. Introduction of a Private Equity Fund

As a measure for enhancing the asset management industry and for easier funding for the implementation of restructuring of corporate and financial institutions, a private equity fund ("PEF") was allowed to be established effective December 2004, as an amendment to the Indirect Investment Asset Management Business Act ("IIAMBA"), which was enacted in October 2003, and which consolidated the previous asset management-related laws, such as the Securities Investment Trust Business Act and the Securities Investment Company Act. The main function of the PEF -- on which fewer restrictions on asset management, etc. are imposed compared to a public offering equity fund under the IIAMBA -- is to invest in companies and pursue profits by enhancing their value through management control or the improvement of corporate governance, etc. for targeted companies.[44]

The PEF under the IIAMBA should be a legally-recognized corporate entity, called *Hapja Hoesa* in the Commercial Code.[45] The PEF consists of at least one member with limited liability (limited partners in the American type of limited partnership), and one or more members with unlimited liability (general partners in the American type of limited partnership), who have the rights and responsibility to

[39] *Id.* art. 12(1).
[40] *Id.* art. 5(1).
[41] *Id.* arts. 28, 37.
[42] *Id.* addendum paragraph 3.
[43] *Id.* addendum paragraph 4.
[44] Indirect Investment Asset Management Business Act, art. 2 item 4-2, Law No. 6987 (Oct. 4, 2003), recently amended by Law No. 7428 (Mar. 31, 2005) [hereinafter IIAMBA].
[45] *Id.*

conduct the business of the PEF, the total number of whom should not exceed 30.[46] The term of existence of the PEF should not exceed 15 years.[47] In addition, each of the partners of the PEF should make a capital contribution either in cash (including checks) or securities in a limited condition.[48] Further, the IIAMBA provides for specific provisions exempting the PEF from application of the FHCA for ten years after the establishment of the PEF as well as from application of the relevant provisions regarding a holding company prescribed under the MRFTA,[49] since the PEF may become a financial holding company or a holding company in which case it will be subject to more rigorous requirements and tighter regulations under the FHCA or MRFTA. In addition, the IIAMBA has a provision prohibiting large-sized non-financial companies (so called *chaebol*) from owning banks through the PEF.[50]

III. Prospects and Recommendations for Financial Reforms

Although Korea has achieved great momentum in implementing financial reforms after 1997 financial crisis, certain measures still remain to be performed to further financial reform geared towards facilitating a more advanced financial industry. This Part suggests certain measures for achieving that goal. First, with respect to financial supervisory agencies, currently, the FSC and the FSS are separate institutions; more specifically, the FSC is a government division which has a sub-organization which is a secretariat organization and whose employees are government officials, while the FSS is a non-governmental organization, which is a 'special juridical person' without capital and whose employees are not civil servants. It is also noted that the organizational structure of the FSC's secretariat has a similar structure to the FSS organization, for example, both the FSC's secretariat and the FSS have banking supervision divisions. Therefore, the functions of these two agencies overlap, which often leads to conflicts in terms of financial supervision policy decision matters, and thus leads to inefficiency in the supervision process. In addition, due to such business division, financial institutions are confused about which agency they have to contact when they have queries in executing or following the supervision regulations or in interpreting the relevant supervision regulations. Another problem is lack of ability to guarantee independence of financial supervision, which is the supreme goal of financial supervision policies. For example, although the term of the Chairman of the FSC is legally guaranteed, all of the previous heads of the FSC resigned before their term of office expired; in addition, since the FSC's secretariat, which in practice greatly affects financial supervision policy decision is a government organization, there is a high possibility that financial supervision policy will be largely affected by the government. Moreover, it is generally thought that employees of the FSC and the FSS lack specialization

[46] *Id.* art. 144-3(1).
[47] *Id.* art. 144-5(1) item 5.
[48] *Id.* art. 144-4(1).
[49] *Id.* art. 144-7(1), (3).
[50] *Id.* art. 144-16.

in financial matters. Therefore, rectifying such problems, it is recommended that (i) the FSC and the FSS should be consolidated so that the FSC becomes an internal body of the FSS, which will remain a non-governmental organization, in order to pursue the independence of the financial supervisory agency, (ii) the term of the FSC's Chairman should be absolutely guaranteed and he/she should be appointed by the consent of the National Assembly, (iii) the specialization of the FSS's employees should be further pursued by implementing an internal education program or recruiting external finance specialists.

Second, the independence of the BOK should be strengthened further. For example, the Governor of the BOK should be appointed by the consent of the National Assembly, rather than the current method of review by the Cabinet Council, and more authorities should be assigned to the BOK's supervision of banks or other financial institutions subject to the jurisdiction of the BOK, in particular, in the areas of the payment and settlement systems. In addition, responsibility for financial stability should be one of the functions of the BOK.

Third, to further enhance corporate management transparency and the competitiveness of financial institutions, the outside-director concentrated board system should be strengthened further by expanding the number of outside-directors from the current 50% or more of the total number and reinforcing the outside-director qualification requirements, for example, only allowing candidates who have experience in the financial field, etc. In addition, the qualification requirements for the position of compliance officer should be lessened. Moreover, the independence of the audit committee's function should be furthered.

Fourth, with respect to asset-backed securitization transactions, the scope of eligible securitization assets should be more expanded to include areas such as intellectual property (e.g. copyrights or patents), and flexible legislation regarding the definition of 'true sale" is suggested (that is, rather than the current method of stipulated forms of transfer, defining factors of true sale transfer).

Finally, restrictions on the operation of a PEF should be more relaxed for activating the PEF markets, considering that there are almost no regulations of the PEF in other countries.

IV. Concluding Remarks

As the Korean government pursues a role as a 'East-North Asia Financial Hub,' it is very essential to further financial reforms and deregulate various unreasonable regulations imposed on financial institutions' business operations, for example, entry into the financial industry and the development of diversified financial products. In order to achieve this, the most important factor is the attitude of the government and financial supervisors toward such a goal, i.e. deregulations. Still many areas are yet to be rectified in terms of regulation. In parallel with this, financial institutions themselves should make every effort to enhance their competitiveness and try to expand into the overseas financial market, particularly in developing East Asian countries such as Vietnam and Indonesia, taking advantage

of their own valuable experiences from the 1997 financial crisis. The lessons from the Korean financial crisis will definitely be valuable in dealing with other countries that are in similar situations.

[COLAP 4 발표 논문 요약, 2005. 9. 2]

1997년 한국의 금융위기 이후의 금융개혁

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한국에서의 1997년 금융위기는 정치·사회면 뿐만 아니라 경제·금융면에서도 많은 변화를 가져왔다. 긴급 금융 지원을 한 IMF는 한국에 대하여 기업 및 금융 구조조정을 실시하기 위한 여러 가지 경제·금융개혁을 실시할 것을 강력히 요구하였다. 이는 금융위기가 그 동안의 투명하지 못한 기업지배구조의 문제점 등 기업 및 금융기관의 여러 가지 구조적인 문제점에 기인한 것이라고 판단하였기 때문이다. 이러한 개혁 조치 이후 한국은 기업 및 금융 부문에서 큰 발전이 이루어진 것으로 평가된다. 이런 측면에서 이 글은 금융위기 이후 취해진 금융개혁 조치 내용에 대하여 살펴보고, 앞으로 더 추구해야 할 개혁 조치 및 개선 방향에 대하여 고찰해보는데 있다.

그 동안의 금융개혁 조치를 보면, 우선 '금융감독기구의설치등에관한법률'이 제정되어 통합금융감독기구가 1998년 4월 출범하였다. 즉 그 동안 나누어져 있던 은행, 증권, 보험 등의 금융감독기관을 통합하여 금융감독위원회 및 금융감독원을 설립하였다. 둘째, 중앙은행인 한국은행이 독립성이 많이 강화되었다. 비록 종전의 은행감독권이 없어졌지만 통화정책의 최고 의사결정기관인 금융통화위원회 위원장이 종전의 재정경제부장관에서 한국은행총재로 변경되고, 한국은행법에 통화신용정책이 중립적으로 수립되고 자율적으로 집행되어야 한다는 조항이 명시적으로 들어가는 등의 독립성 강화를 위한 조치가 취해졌다. 셋째, 은행 등 금융기관의 경영지배구조 개선을 위한 여러 가지 조치가 취해졌다. 사외이사 중심의 이사회제도가 도입되었으며, 감사위원회의 설치 및 준법감시인 제도가 도입되었다. 넷째, 금융의 겸업화·대형화 추세에 따라 2000년 10월 금융지주회사 제도를 도입하였다. 즉 은행, 증권회사, 보험회사 등 금융업을 영위하는 회사를 자회사로 두어 겸업화를 할 수 있도록 허용하였다. 다섯째, 부실채권 등을 효율적으로 처리하기 위한 자산유동화제도가 1998년 9월 '자산유동화에관한법률'이 제정되면서 시행되었다. 여섯째, 증권시장의 투명성 제고 및 상장회사 및 코스닥상장회사의 부실회계, 부실공시, 내부자거래, 시세조종 등에 의한 증권 투자자들의 피해를 막기 위하여 '증권관련집단소송법'이 2004년 1월 제정되어 2005년

1월부터 시행되고 있다. 마지막으로 자산운용업을 육성하고 기업구조조정의 촉진을 도모하기 위하여 사모투자펀드인 사모투자전문회사(Private Equity Fund)제도가 '간접투자자산운용업법'의 개정에 의하여 2004년 12월 도입되었다.

한편 앞으로의 금융개혁 조치 개선 방향으로서는 다음과 같은 것을 추진할 필요할 필요가 있다고 본다. 첫째, 금융감독정책 결정기관과 집행기관으로 분리되어 운용되어 비효율성을 낳고 있는 금융감독위원회와 금융감독원을 통합하여 금융감독위원회를 금융감독원의 내부 의사결정기관으로 만들어 민간기구화하는 것이 필요하며 이와 더불어 금융감독의 독립성 및 전문성을 확보하여야 한다. 둘째, 한국은행의 독립성은 더 강화되어야 한다. 예를 들어, 한국은행총재는 현행 국무회의 심의에 의한 대통령 임명에서 국회 동의에 의한 대통령 임명제로 변경되어야 한다. 또한 한국은행에 지급결제제도와 관련한 금융기관에 대한 검사 및 감독 권한을 부여하고 금융안정을 위한 한국은행의 역할을 강화해야 할 필요가 있다. 셋째, 금융기관의 경영지배구조 개선을 위한 조치로는 현행 사외이사 비중을 높이고(현행 50%이상에서 70%로 상향 조정) 사외이사의 전문성을 높여 사외이사의 독립성을 강화하고 충분한 경영진 및 대주주를 견제할 수 있는 역할을 할 수 있도록 할 필요가 있다. 이외에도 준법감시인 자격 요건을 폐지하여 금융기관이 자율적으로 선임하도록 할 필요가 있다고 본다. 넷째, 자산유동화 거래와 관련하여서는 유동화 대상 자산의 범위를 지적재산권 등으로 확대할 필요가 있다고 본다. 다섯째, 선진국에서는 사모투자펀드에 대한 제한이 거의 없다는 점을 감안하여 사모투자전문회사의 운용 대상 제한의 완화 등 현행 규제를 크게 완화하여 사모투자펀드제도를 활성화시킬 필요가 있다.

특히 현 정부의 동북아 금융허브 국가 추진 방침에 비추어볼 때 금융 규제의 완화는 필수적인 지향점이라고 할 수 있다. 따라서 정부 및 감독당국은 규제 완화를 위한 조치를 계속 추진하여야 하고, 국내 금융기관도 자체 경쟁력 향상을 위한 나름대로의 노력을 하는 것이 필요하다. 이런 점에서 국내 금융기관들도 지난 금융위기 이후의 경험을 바탕으로 해외 진출 활성화 전략을 추진할 필요가 있다고 본다. 끝.

Against Shareholder Value Maximization Principle

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One of the key issues that have drawn keen attention since the East Asian currency crisis of 1997 is how to tackle speculative financial capital. Allegedly, speculative financial capital was significantly involved at the instigation of the East Asian currency crisis. Hedge funds, for example, utilized 'high leverage' tactics to overturn pegged exchange rate regime of Thailand's Baht and Malaysia's Ringgit. Most recently, speculative attack is exerted against China's Yuan by expecting unavoidable its deep appreciation under increasing international pressures.

After the crisis, many Asian countries seriously considered exchange control measures to defend their economies, but the Washington Consensus between the IMF and the US Treasury strongly objected that such defensive measures are not compatible with IMF conditionality. Anyhow, Malaysia's former Prime Minister, Mr Mahatir, bravely took the initiative of imposing exchange control and tided over the crisis very successfully. As a result, Malaysia's case proved that exchange control must be considered as temporary safety measures of last resort when facing currency crisis.

In addition, Asian crisis awakened Asians for the impending needs to collaborate at the regional level. The formation of the Asian Monetary Fund, initially suggested by Japan, was wholeheartedly welcome by most Asian countries, but it did not move ahead due to China's passive reaction in concert with the US objection. Its failure was painful but subsequently arranged Changmai Initiative led to extensive bilateral swap agreements between central banks of Asian countries.

Most recently, discussions are also extended to the establishment of Asian Bond Market. As we know, sizeable foreign exchange reserves of around two trillion US dolloars have been accumulated by Asian countries. Unfortunately, however, they are recycled mostly to the US financial markets to help the US to finance twin deficits. It is purely a nonsense that Asian countries borrow expensively US dollar for their economic development while pouring cheaply surplus dollars of the region into the US to help it relax its own problems. Therefore, Asian countries should work hard to set up the region's bond market, but it will not come true until Asian economies reduce their heavy reliance on the US market for their export performance. Asia's excessive trade dependance on the US will give an edge to the US in its negotiation with Asia, and will deter further the creation of a common regional currency of Asia. It is a very stimulating idea but requires substantive increase in intra-regional trade and investment as a pre-

condition.

In the above I talked about the currency crisis and speculative financial capital's role in it. Of course the best way to contain speculative attack is to regulate speculative capital at its origination. Various measures can be taken including the introduction of Tabin tax, abolishment of tax havens, strict disclosure requirement on hedge fund operations, etc. But it is hard to expect that international society reaches a concensus to adopt such regulatory measures. As we all know, advanced economies in the West are living on finance. They don't make money by hard labour as they used to do during the industrial era. They are relying more and more on high yield of finance to feed their aging poplution as the deindustrialization of the economy deepens. So my suggestion is not to rely too much on international agreement to adopt bold regulations but on regional cooperation to defend our economies from speculative attacks.

When we talk about speculative capital issue, we usually think of its connection with currency crisis, which takes place all around the world repeatedly. But today I want to draw your attention to another dimension of speculation, of which the impacts are much severer. That is the speculation undergoing very forcefully in capital markets worldwide in the name of shareholder principle. With Anglo-Saxon approaches dominating in the world today, we take it for granted that shareholders are ultimate, undeniable owners of business corporations and they exercise sovereign rights to appropriate corporate profits the way they want to. However, I have a fundamental doubt about this point by observing what has happened in Korea's stock market after the crisis. Let me tell you about Korea's painful experience with shareholder value maximization principle..

After the crisis, Korea was forced to fully open its capital markets, and thereby foreign capital inflows into Korea drastically changed their form of entry. Before the crisis they arrived mainly in the form of 'credit capital' but today they come in the form of 'equity capital'. Currently, foreign equity capital accounts for more than 40 percent of Korea's stock market capitalization. Obviously, their portion is less than half, but considering that cross-shareholdings among Chaebol affiliates effectively reduce tradable equities in Korea's stock market, foreign capital's total shareholdiing position must be equivalent to more than 60 percent of the whole tradable equities. This is exceptionally high one even among OECD member countries, next only to Mexico and Finland.

What is noticeable at the same time is that foreign equity capital is not evenly distributed across many listed companies. They are concentrated very narrowly over 30 companies out of 670 listed ones. Those 30 target companies are with no exception

major producers in industries they belong to and regarded in the market as meeting global standard by being cash-rich. In other words, foreign capital is drawn into those companies which least require external financing.

Then the question is why we must be concerned about the rush of foreign equity capital. The main vehicles to get them into Korea are various investment organizations such as pension funds, mutual funds, private equity funds, hedge funds, etc. These funds are in general seeking mobility and liquidity first of all. It means they do not have long-term time-horizon in their investment management. They are not patient, committed long-term capital but financially motivated short-term capital. Such prime characteristics of foreign equity capital constrain, however, recipient companies' long-term investment, since they are interested in immediate return instead of staying long until corporate investment pays off .

Such a gap in time horizon between foreign investors and recipient Korean companies is a big threat against Korean economy. Apparently, Korea must boost its investment aggressively to transform itself from a low-cost producer to value-added producer, but shareholders coming from abroad are not supportive of such critical move .

Samsung Electronics' case is really disillusioning. In the year 2003, for example, SE's shareholders enjoyed exponentially high profitability: market capitalization increased by $20 billion; dividend paid out in $2 billion; and stock purchase program amounted to $4 billion. It means foreign shareholders, composing roughly 60% of outstanding stocks. enjoyed appraised(but not fully realized) profits of $15.6 billion. Contrastingly, however, SE's contribution to the national economy was incomparably poor: aggregate compensation to employees was $1 billion; and tax payment to government was $1 billion. This dismal picture is not a unique case of Samsung Electronics, but broadly observable among those Korean companies, in which foreign equity capital have grabbed influencing power. In a sense these companies are meeting successfully so-called global standard to the satisfaction of foreign shareholders, but are not meeting minimum requirement of the national economy. This is sadly called 'the Paradox of Global Standard'.

Korea's banking sector is not an exception. After admitting huge foreign equity participation, banking activity is fully driven by market logics. Banks are arguing unanimously that they are shareholder-owned and must be run solely by commercial principles. They reduced corporate financing activities by half and keep expanding retail business at the cost of four million people's bankruptcy. They even exhibited free riding behaviour even at the sign of market failure. From a theoretical point of view, banking

sector's special distinction of information asymmetry and innate systemic risk require that it must be regulated in due course for the public interest. But such fundamental principle is not observed at all. What prevails in Korea's banking sector is solely the principle of shareholder value maximization.

To make matters worse, shareholder value principle legitimizes destructive speculative behaviours. In some companies, major foreign shareholders demand unusually high dividend payout, sometimes over 10 times of the yearly net income. In some others, they demand liquidation of corporate assets for their exit strategy. Such behaviors are definitely conflicting against the going-concern principle, but they cannot be stopped unless the legitimacy of shareholder value principle is questioned..

At this juncture, we must think hard how to counter the rush of 'shareholder value maximization principle'. During the industrialization stage of the Western capitalism, shareholders were usually providers of committed, patient capital, but today as financialization of the world economy deepens, they are degraded into extremely short-term minded, harvest-only capital. Once these financial shareholders' aggregate voice becomes very powerful in corporate governance structure, 'retain-reinvest' logics falter while 'downsize-harvest' logics strengthens.

Then the issue is how to minimize destructive effects of shareholder principle. I don't think reguation is a panacea. Under Asia's strong dependence upon the US in many respects, we cannot regulate unilaterally our capital markets. More viable solution is to recapture control powers over our important companies and financial institutions by organizing indigenous capital. One way to achieve it is to install cross-shareholding shemes among important companies, and the other is to strategically use investment funds available from our national pension system. I believe ownership still matters even in this era of borderless world since ownership is equal to strategic freedom for less sufficiently industrialized countries in Asia to climb up the ladder of economic development. .

대한민국의 사법개혁의 과정과 현황

정미화

1. 사법개혁의 과정

대한민국은 32년간의 군사독재가 철폐되고 1993년에 문민정부가 들어선 이래 정치와 사회의 많은 분야에서 민주적인 개혁이 이루어졌으나 법원과 검찰 등 사법분야의 개혁에는 많은 어려움이 있었다. 사법분야는 정치와 사회분야와는 달리 행정부나 입법부와 독립된 사법부의 영역이었고, 실무를 담당하는 소수의 법조인들은 일제시대 이후 큰 변동이 없는 선발제도를 통하여 선발되어 양성되었으므로 이들의 의식변화나 자발적 협력없이 정부나 외부의 힘으로 사법분야의 개혁업무를 제대로 수행할 수 없었다. 그리하여 정부는 1995년 이후 계속하여 사법개혁을 주요 정책과제로 제시하고 사법분야의 개혁과업을 수행하기 위한 많은 노력을 기울였는데, 그간의 개혁과정은 다음과 같다.

가. 1995년도 세계화추진위원회

김영삼 행정부는 군사독재의 잔재를 일소하고 정치적 민주화와 함께 사법부의 민주적개혁을 이룩하기 위하여 세계화추진위원회라는 정책자문기구를 설치하고 사법개혁의 과제를 논의하였다. 당시 선정되었던 사법개혁의 주요과제는 소수의 법조인에 의하여 운영되는 사법시스템의 개선을 위한 사법시험 합격자의 증원, 법학전문대학원 도입, 변호사보수의 적정화, 공익법무관제도 및 공공변호사제도 등을 통한 법률복지의 확충, 법관임용방법의 개선 및 전문화, 법조인의 직역확대, 법률시장개방 등이었다. 사법개혁추진위원회가 채택한 주요의제 중 사법시험의 합격자수를 연간 300명에서 연간 1000명으로 순차적으로 증원하게 된 것을 제외하고는 별다른 성과를 얻지 못하였다.

나. 1999년의 사법개혁추진위원회

김대중 행정부 역시 사법개혁을 정책의 주요과제의 하나로 선정하고 대통령 자문기구인 사법개혁추진위원회를 구성하여 사법개혁의 과제와 방안을 연구하였다. 동 위원회가 연구하고 검토한 내용은 공정하고 신속한 권리구제제

도, 법률서비스의 질적향상, 법조의 합리화·전문화·현대화, 법조인 양성제도의 개선, 법조비리의 근절, 세계화조류에의 대응 등 6개 부분에 걸친 34개의 안건이었다. 그러나, 동 행정부는 당시 대한민국의 유동성위기사태를 수습하기 위한 경제분야의 구조조정업무에 집중하고 있었으므로 사법개혁추진위원회의 안건을 구체화하고 입법을 통하여 제도를 완성시킬 후속 추진기구를 구성하지 못하였기 때문에 구체적인 사법개혁의 성과를 거둘 수 없었다.

다. 2003년도의 사법개혁위원회

2003. 8. 22. 노무현 대통령과 최종영 대법원장은 사법분야의 개혁을 원하는 강력한 국민들의 여망을 담아 사법개혁과업을 공동으로 추진하기로 합의하였다. 대법원장은 이 합의에 따라 2003. 10. 28. 법조계, 법학계, 행정부, 언론계, 경제계, 노동계, 시민단체, 여성계 등 사회의 주요 분야의 대표자 21명으로 구성된 사법개혁위원회를 대법원 내에 설치하여 사법개혁의 구체적인 과제와 방안을 선정하기 위한 논의를 하였다. 사법개혁위원회가 논의한 개혁의 주제는 대법원의 기능과 구성, 법조일원화, 법조인의 양성 및 선발, 국민의 사법참여, 사법서비스 및 형사사법의 개선 등의 5개로 구성되었으며, 총 27회에 걸친 전체회의, 25회의 분과위원회, 2회의 공청회, 1회의 모의재판 2회의 소위원회를 개최하여 사법개혁안을 논의한 다음 2004. 12. 사법개혁을 위한 건의문을 작성하여 대법원장에게 제출하였고, 대법원장은 이를 대통령에게 제출하여 사법개혁의 추진을 건의하였다. 사법개혁위원회는 건의문을 채택하면서 과거의 사법개혁논의가 구체적으로 실행되지 못하였던 전철이 되풀이 되지 않도록 동 위원회가 채택한 건의문을 구체적이고 체계적으로 점검하여 추진해 나갈 단일하고도 강력한 추진기구를 대통령 산하에 설치할 것도 함께 결의하여 대통령에게 건의하도록 하였고, 대통령은 이 건의에 따라 2004. 12. 15. 정부조직법 제4조에 근거하여 대통령령으로 '사법제도개혁추진위원회규정'을 제정한 후 2005. 1. 18. 사법제도개혁추진위원회를 구성하여 대법원장이 건의한 건의내용을 제도화시키기 위한 후속추진업무를 수행하도록 하였다.

라. 사법제도개혁추진위원회

사법제도개혁추진위원회는 국무총리와 대통령이 위촉하는 민간위원 1인 등 2인의 공동위원장과 교육부장관, 법무부장관, 국방부장관, 행자부장관, 노동

부장관, 기획예산처장관, 국무조정실장, 법제처장 등 행정각부의 장관과 대통령 민정수석, 법원행정처장 및 대통령이 위촉하는 8인의 민간위원 등 18인의 위원으로 구성되어 있다. 동 위원회는 산하에 국무조정실장이 위원장으로 하는 실무위원회를 두어 구체적인 안건을 선정·의결하도록 하며, 사법개혁추진을 전담하는 대통령의 비서관을 단장으로 하는 기획추진단을 통하여 대법원장의 건의사항을 제도화하기 위한 연구검토 업무를 수행하도록 하고 있다. 기획추진단은 법원, 검찰, 대한변협, 학계의 주요 실무자들로 구성되어 있고, 법원의 개혁과제를 주로 다루는 실무1팀, 형사사법 중 국민의 사법참여와 인신구속, 군사법개혁 등을 주로 다루는 실무2팀, 공판중심주의, 신속처리절차, 법률구조제도, 노동법원, 공익소송, ADR 등을 주로 다루는 실무3팀 및 운영팀으로 나누어 효율적으로 업무를 수행하고 있다. 동 위원회는 대법원장의 건의문의 내용을 분석하고 현행 제도에 대응하는 개선방안을 연구하고 현황조사업무를 시행한 다음 법원과 검찰, 행정부처, 학계의 전문가들과 연석회의 등을 통하여 의견조정을 하고, 공청회를 개최하여 국민의 여론을 청취하며 실무위원회의 의결과 본위원회의 의결을 거쳐 구체적인 입법안이나 법률개정안을 확정하고 있다. 현재까지 확정된 입법 및 개정안은 법학전문대학원 도입, 국민의 형사재판참여, 공판중심주의적 법정심리절차 도입, 군사법제도 개혁, 고등법원 상고부제 도입, 범죄피해자보호, 국선변호제도 확대, 재정신청확대 등 총 8건이고, 향후 논의하여 확정될 안건은 법조윤리확립, 인신구속제도의 개선, 신속처리절차의 신설, 법무담당관제도 개선, 판결문 및 재판기록 공개, 양형제도의 개선 등 6건이며, 장기적으로 도입여부를 검토할 안건은 ADR, 하급심강화, 노동법원의 신설, 징벌적손해배상, 공익소송의 활성화, 법률구조의 확대, 형법체계의 합리적 조정 등 7개 항목이다. 사법제도개혁추진위원회는 본회의에서 의결된 안건이 국회에서 입법화될 때까지의 구체적인 지원업무와 국민에 대한 홍보업무도 아울러 수행하고 있다.

2. 확정된 사법개혁추진방안의 구체적인 내용

가. 국선변호제도의 개선

형사소송법 제33조와 제282조는 농아자, 미성년자, 중죄사건 등 일정한 법정사유가 있거나 피고인의 빈곤 등의 사유로 변호인을 선임할 수 없을 때 법원이 국선변호인을 선정하도록 함으로써 피고인의 변호인의 조력을 받을 권리를 보장하고 있으나, 수사과정에 있어서는 동 권리를 보장하고 있지 아니

하다. 사법제도개혁추진위원회는 이를 개선하기 위하여 다음과 같이 국선변호제도를 획기적으로 확대하는 내용으로 형사소송법개정안을 마련하였다.

- 구속영장이 청구된 피의자가 영장실질심사를 받음에 있어 사선변호인을 선임하지 아니한 경우 법원은 반드시 국선변호인을 선정해 주어야 하며, 구속영장이 발부된 경우 제1심까지 국선변호업무를 계속하여 수행하도록 함.

- 피고인이 구속되면 반드시 국선변호인을 선정하도록 함.

- 법원은 피고인의 연령, 지능, 교육정도 등을 참작하여 피고인의 권리보호를 위하여 필요하다고 인정하는 때에는 피고인이 국선변호선정을 신청하지 않더라도 국선변호인을 선정하도록 함.

나. 범죄피해자 보호방안

범죄피해자는 수사나 재판절차에서 2차적 피해를 받지 않도록 해야 하며, 국가로부터 피해구조를 받을 수 있도록 해야 하고, 형사재판절차에서 자신의 의견을 개진할 기회를 부여받아야 한다. 이러한 점을 감안하여 마련한 범죄피해자의 보호 및 지원을 위한 법률안의 주요 내용은 다음과 같다.

- 범죄피해자가 수사나 증언시 현저하게 불안 또는 긴장을 느낄 우려가 있는 경우 신뢰관계가 있는 자와 동석한 상태에서 조사 및 증언을 할 수 있도록 허용함

- 범죄피해자가 증언을 할 때 사생활의 비밀이나 신변보호를 위하여 필요한 경우 심리를 비공개로 할 수 있음

- 범죄피해자가 국가로부터 피해구조를 받을 수 있는 요건을 확대하고, 구조금지급신청 시한을 범죄를 안 날로부터 1년에서 2년으로 연장하도록 함

- 형사소송법의 개정을 통하여 피고인 등과 대면하여 진술할 경우 심리적으로 부담이 예상되는 범죄피해자에 대해서는 비디오 중계장치 등에 의하여 심문을 하도록 함으로써 피해자의 심리안정과 2차 피해 방지를 도모함

- 범죄 피해자에 게 형사절차의 진행상황을 통지해 줌으로써 범죄 피해자가 당해사건의 기소여부, 공판기일, 재판결과, 신병관련사항을 확인하고 사법처리절차에 관한 신뢰를 갖도록 함
- 형사재판에 있어 법정진술권의 신청주체를 피해자와 법정대리인으로 확대하고 피해자가 증인으로서 피해의 정도와 결과, 피고인의 처벌에 관한 의견, 기타 당해 사건에 관한 의견을 진술할 수 있도록 함

- 범죄피해자를 지원하기 위한 단체를 육성하여 피해자지원활동을 강화하도록 함

다. 재정신청의 전면확대

검사의 불기소결정에 대한 재정신청의 대상을 직권남용 등 일부범죄에서 모든 범죄로 전면확대하고, 그 남용을 방지하기 위하여 검찰항고전치제도를 도입하였으며, 불기소결정에 대한 고소인등의 재항고제도는 폐지하였다.

라. 국민의 형사재판참여제도

그동안 재판의 사실판단과 법률판단을 모두 법관이 전담한 관계로 재판과정에 관한 국민의 의사가 제대로 반영되지 아니하였고, 소수의 직업법률가가 사법과정을 독점함에 따른 폐해와 국민의 사법에 대한 불신이 증가하였으므로 이를 개선하기 위하여 국민이 형사재판과정에 참여하여 사실에 관한 판단을 할 수 있는 제도를 마련하였다. 다만, 국민의 형사재판참여제도를 전면적으로 시행하는 경우 제도의 정착과정에서 상당한 혼란이 올 수 있고, 재판의 진행도 지연될 것이므로 일부 중요한 범죄에 한하여 5년 동안 시험적으로 제도를 운용해 본 후 이 제도를 본격적으로 도입할 수 있도록 예정하였다.

- 재판에 참여하는 시민의 명칭을 배심원으로, 배심원이 참여하는 형사재판의 명칭을 국민참여재판으로 정함

- 대상사건의 숫자를 연간 100건 내지 200건 정도로 예상하고 대상사건을 고의로 사망의 결과를 야기한 범죄, 강도와 강간이 결합된 범죄, 부패범죄, 합의부 사건 중 대법원규칙이 정하는 범죄 등으로 제한함.