

レーヴェンシュタイン教授への書翰

田 畑 忍

(一)

京都大学法学部での比較憲法の講義に在洛中であつたレーヴェンシュタイン教授の第九条改憲論を、憲法問題研究会で直接に聞く機会を得た私は、その改憲論の政治性について若干の疑問をもつた。しかも、その会合のさい、教授の都合で時間がなく、そのため、疑義を明らかにすることを得なかつた。そこで私は、直接に書翰を教授に郵送した。

しかし私は、その書翰で、教授の具体的な九条改定案には触れず、九条改悪の違法性と不合理性を原理的に指摘するにとどめたのであつた。教授の返信が、^(註一)この点について、単に象徴的な繰返しをしているのは、或いは私の手紙が、具体的にその点を衝かなかつたためであつたのかも知れないが、戦前戦中の日本の政治事情を知つてをられない教授としては、おそらくは、国会による軍統制の米国と同様の可能性を、日本の場合にも、過信されていることが大きな原因であろう。もちろん、それだけではなく、教授が改正改悪峻別の理論を理解されていないの

と、さらにまた、米国の或る立場ということもあるのではなからうか、と推測されるのである。

(註一) 教授は、第九条第一項はそのままにしてをいて、第二項を削除し、その代りに、「国防軍を置くことができる。ただし国会に設置する国会議員二十四名(中、十四名は衆議院議員、十名は参議院議員)より成る国防軍統制委員会の下に置く」という趣旨の条項を設ければよろしい、と言うのである。

(註二) 教授の返信中に左の一節があつた。

I fully agree with your remarkably well phrased thesis that the facts should adjust themselves to the constitutional document and not the constitution to the contrary facts. But here the facts of political reality intervene. The abolition of the so called self defense forces is impossible, for obvious reasons Japan cannot afford at this time to gravely alienate the United States and the entire western world. To

save the constitution, therefore, it seems to me better to accept also legally the existence of the armed forces, but, at the same time to bring them under Parliamentary control and according to the proposal submitted to your group this would give the opposition a hold on them which at the present time they do not possess. But unfortunately there is little hope that either the ruling party or the opposition will be inclined to budge from their present positions.

II

ノーナンニタイン教授の書翰は左の如くである (英語は松本泰雄修士の筆蹟である。ハリビ回書は表の下の綴紙や中の上をいれよう)。

Dear Professor Loewenstein :

I was one of the listeners to your speech delivered at the "Kempo-Mondai-Kenkuyukai" held at the Rakuyukan of Kyoto University on May 16, and also one of the readers of your discussion with prof. Sato in the "Himitsujiho", Apr., No. 389. Your opinion on the revision of the Japanese Constitution, I am sure, exert so far-reaching an influence upon Japanese people, including political and scholastic circles, that I was prompted to

write to you and to take a liberty to express my own opinion.

I do not refrain from praising for your excellent opinions on the Constitution of Japan. I am quite agree with your opinion that all the articles concerned with the governmental institution and fundamental human rights should not be revised reactionarily. Legally and scientifically speaking, your opinion is a right one, which is progressive and, at the same time, conservative in the true sense of the word; that is to say, your opinion should be highly appreciated as constitutional conservatism.

Frankly speaking, however, I cannot agree to your opinion that we should revise the peace clause of Art. 9 to match with the present situation in which Japan already has the Defense Army. You have admitted that your proposition is not legal but a political one. Indeed, it is too badly political, I should say. Because the attempt to make the present situation that Japan has already the unconstitutional war potential, constitutional by the reactionary revision of the Japanese constitution, will make the present situation all the more unconstitutional. The Security Treaty between Japan and U. S. A. pres-

cribes the military alliance between the two countries and obligates Japan to reinforce her war potential. And in accordance with this unconstitutional Treaty, the Japanese Government is strengthening the Defense Army. All are caused by the Security Treaty. But as you rightly said, this treaty can not suspend or void Art. 9 of the Japanese Constitution. In this connection, your interpretations clear and lucid.

But your political opinion that we should revise Art. 9 to match with the present unconstitutional fact as a political issue of Japan herself, will lead you directly to a fallacy of unconstitutional. And there is no salvation in this fallacy no matter how hard you may try to justify it by the illegal reasons; we can not avoid "acting unconstitutionally." It is regrettable that at the "Kempo-chosakai", the opinion of the reactionary revision of Art. 9 occupies a large majority. By such a reactionary revision, we can not avoid the unconstitutional fact, the coordination of the Constitution according to the fact. On the contrary, the unconstitutional situation should be amended according to the Constitution; but never the Constitution according to the unconstitutional fact.

As you know, there have often been a number of

unconstitutional governments actions in the history of Japan, whether they are caused by politician's misjudgment or one state egoism making no difference. Under the peace constitution, the maintenance of war potential and the existence of military alliance are the most notorious examples. We should say that this is the fact to betray all the peace-loving peoples of the world and also do harm to the Japanese people. Such fallacies should be corrected according to the constitution. I should say that the Japanese people are obligated to declare everlasting peace and neutrality in the presence of the world. And for the first time when we do this, the high ideal of the peace clause of the Japanese Constitution and our national honour will be kept safe and sound. But these could never be maintained whatever means we may resort to match the Constitution with the unconstitutional Treaty and the unconstitutional fact.

The most important thing is that the peace clause first provided in the Japanese Constitution is not only the spirit of the Constitution, but also the universal principle expressing the earnest wishes of mankind who are anxious to be saved from ruin by H. & A. bombs. And it is the article which prescribes the ideal and

wishes of long of earning of mankind, according to the initiative of the then prime minister, Kijuro Shidehara. And this article was accepted by all the Japanese people as the sincere expression of our earnest wishes. I may as well and here that this is not the article that was forced by the request of G. H. Q. on the Japanese people. Indeed we owe very much to Gen. MacArthur, because he agreed with this peace clause and endeavoured to establish this Constitution. We should say that we are full of hearty appreciation for what he has done for us, which you Americans might as well be proud of.

In conclusion I hope you will give up your political insistence on the reactionary revision of Art. 9 for mankind's sake. And I feel nothing will make me happier if you pray and endeavour to make all nations prescribe the everlasting peace clause in their constitution as it is provided for in the Constitution of Japan.

Asking for your pardon for my acting in this way.

Sincerely Yours,

Shinobu Tabata



これを改悪すべきではない、とするワイザンスキー判事のごとき意見のあることを知って、私は些か嬉しく思った。しかし、それだけにいっそう、既述(註二)の如くに、レーヴェンシュタイン教授の九条改悪論の変更されていないことを、私は寂寥に感ぜざるを得ないのである。

その後、米国の学識者中にも、第九条は理想規定であるから、