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The meaning of “Kaken” or Adding New Articles to the Present Constitution of Japan

By OGATA Rintaro

In the discussions on the constitutional amendment in Japan, the idea of “Kaken” or adding new articles to the present Constitution has been proposed. While I can see the point of it, the idea requires a little attention since it contradicts what many would envisage. We first need to consider what articles to add. There are three conceivable patterns, namely; (1) to add articles which are approved by the current interpretation of the Constitution, (2) to add articles which are restricted by the current interpretation of the Constitution, and (3) to add articles which are (neither approved or restricted) beyond the scope of the assumption of the Constitution.

Most matters subject to constitutional amendment would fall into the pattern (1), which needs much attention. When adding new articles which are approved by the current interpretation of the Constitution, two patterns could be conceived as follows: (4) we redefine the newly added articles by understanding that they have in fact not been approved by the present Constitution and then create new rights and obligations within the context of the newly added articles, and (5) as the newly added articles create no new rights and obligations we simply confirm them “just in case.”

Logically speaking, there should be only these two patterns, that is, either reinterpreting the Constitution or “confirmation just in case.” This is because the present Constitution has a history. As we have long managed with making full use of interpretation within the framework of the present Constitution, “Kaken” can only draw conclusions as above. Then, what about patterns (2) and (3)? These patterns are close to “Kaken” in its true sense. However, let us, for example, look at “state of emergency clause.” Since this clause indeed could pose risks to human right of each individual, it seems to me that it should press for major review of the current interpretations of the constitutional system. Intrinsically, there can hardly be a case in which “Kaken” does exert no influence on the system of rights and obligations within the current constitutional system.

If we are to draft freely a new constitution going beyond “Kaken,” we can gain greater degree of freedom. However, if we push the idea of “Kaken” forward, we cannot evade problems as above. It would be preposterous if constitutional amendment with emphasis on “Kaken” should be bound with the bunch of reinterpretations of the present constitution system. On the other hand, if we seek “confirmation just in case (especially as in pattern (1)),” the significance of it would be just about nil. It is quite doubtful if it is worth any huge effort. Hence, when it comes to constitutional amendment, we had better not take the trouble of seeking the “Kaken” approach. While the sincerity of those advocates of “Kaken” is understandable, pushing for an approach that may lead to such conclusions would only generate confusion in the discussion of constitutional amendment. If we do it at all, we should take a front-door approach to “constitutional amendment (with revision of the current relations of rights and obligations).” Lastly, let me add that I am in favour of constitutional amendment (including Article 9).

(This is an English translation of the article written by OGATA Rintaro, Member of the House of Representatives (The Democratic Party), which originally appeared on the e-forum “Giron-Hyakushutsu (Hundred Views in Full Perspective)” of GFJ on June 29, 2017.)