

Farewell to Pacifism the Changing Facet of Japan's Constitutional Identity

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Abstract

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Abstract: The term ‘constitutional identity’ has gained increasing popularity in constitutional jurisprudence. However, it remains a contested concept that accommodates diverse approaches to both national and transnational constitutional issues. Drawing on Gary Jacobsohn’s work, the article will outline a theoretical framework to locate the identity of a constitution through a comparative law lens. To put it in perspective, the article argues that pacifism – lying at the heart of Japan’s postwar Constitution – may be considered a constitutional identity of Japan. On top of it, this identity is gradually changing. The article attempts to capture its dynamic by probing recent constitutional discourses on Japan’s self-defense stance.

Keywords: Constitutional theory; Constitutional law; Constitutional identity; Constitutional dialogue; Constitutional change; Comparative law; Pacifism; Japan’s Constitution.

I. Introduction

In South Asia, the *Kesavananda Bharati v. State of Kerala*¹ judgment is a landmark decision of the Supreme Court of India. The judgment is regarded as a lifesaver of Indian democracy by upholding the supremacy of the Constitution and fending off abusive constitutionalism.² In its ruling, the Supreme Court of India asserted that the Constitution possesses a basic structure of constitutional principles and values. Accordingly, constitutional amendments that tend to affect the “basic structure of the Constitution” shall be subject to judicial review and possibly be struck down by the Court if it found the amendments conflict with or seek to alter this basic structure. Interestingly, the case posed a thorny question on the constituent power to amend the Constitution. In a sharply divided judgment, the Court held that while the Parliament has “wide” powers, it did not have the power to dismantle or alter the basic elements or fundamental features of the Constitution. The Court reaffirmed that “[t]he Constitution is a precious heritage, [and, therefore, neither the executive nor legislature] can destroy its identity.”³ Those constitutional values which are deemed intrinsically fundamental cannot be upended under any circumstances.⁴

Ever since the doctrine has gained widespread acceptance and legitimacy in subsequent cases and judgments,⁵ one of the justices concluded: “The personality of the Constitution must remain unchanged.”⁶ In this light, it displays the idea of unconstitutional constitutional amendment that threatens the constitution’s particular identity.

In Europe, over the last few years, the concept of constitutional identity has gained momentum and attracted many European constitutional lawyers and stu-

1 His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., 4 SCC 225 (1973) (India).

2 See more <https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article4647800.ece>, (last visited May 24, 2020). Abusive constitutionalism indicates the use of mechanisms of constitutional change to erode the democratic order. Albeit not fully authoritarian, the resulting regimes, such as in Hungary, Colombia, Venezuela have become significantly less democratic than they were previously. For a discussion, see David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189, 260 (2013).

3 *Kesavananda Bharati*, *supra* note 1.

4 Bidyut Chakrabarty, *India’s Constitutional Identity: Ideological Beliefs and Preferences*, at 137 (Routledge 2019).

5 See generally Yaniz Roznai, *Unconstitutional Constitutional Amendments*, at 39-69 (Oxford Univ. Press 2019).

6 *Kesavananda Bharati*, *supra* note 1, para. 651.

dents of European law, especially after the Lisbon Ruling of 2009 by the German Constitutional Court.⁷ In this landmark decision, the German Constitutional Court developed its own old doctrine on German constitutional identity and established strong limits to the process of political integration in the European Union (EU). In effect, its identity was regarded as incompatible with further levels of political integration and additional transference of power from Germany to the EU. In the words of a prestigious scholar, “with its ruling, the Court has expressed its wish to prevent the European Union from developing its democratic legitimacy as the second pillar of a European compound system.”⁸ Since then, several EU member States have joined the fray in endorsing their constitutional identity to limit the interpretation of, and thus justify their departure from, EU norms.⁹ Suddenly this abstract idea - constitutional identity - became the highest political importance for all in Europe.

The Indian and German cases are merely a few examples to highlight the increasing popularity of constitutional identity in the contemporary constitutional jurisprudence. Comparative constitutional law shows that the use of constitutional identity language has recently been proliferated in the rulings of national courts around the world.¹⁰ For its purposes, constitutional identity may operate at two levels: national and supranational. At the national level, constitutional identity is resorted to by courts to limit the constituent power in making hostile amendments aiming to subvert the basic structure and foundational values of a constitution. At the supranational level, the concept is introduced to define the relations between the national and supranational legal orders.

Albeit its enticement, the search for constitutional identity through the court's eye is not helpful theoretically. Make no mistake, it remains a contested concept that accommodates diverse approaches to both national and transnational constitutional issues in the existing literature.¹¹ Michel Rosenfeld and Gary

7 BVerfGE *Lisbon 2* be 2/08 (Eng) (2009) (Ger).

8 Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10.8 German L. J. 1259, 1262 (2009).

9 Joel Rideau, *The Case-law of the Polish, Hungarian, and Czech Constitutional Courts on National Identity and the German Model*, at 243-261 (Alejandro Arnaiz & Carina Llivina eds.), *National Constitutional Identity and European Integration* (Intersentia Publishing 2013).

10 See Roznai, *supra* note 6, at 39-70.

11 See Gary Jacobsohn, *Constitutional Identity* (Harvard Univ. Press 2010); Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010); Michel Troper, *Behind the Constitution? The Principle of Constitutional Identity in France*, András Sajó & Renata Uitz eds., *Constitutional Topography: Values and Constitutions*, at 187 (Eleven International Publishing

Jacobsohn develop two variations of constitutional identity theory. While Rosenfeld – in his book *The Identity of Constitutional Subject*¹² – sheds light on the identity of the people, Jacobsohn – in his book *Constitutional Identity*¹³ – pays heed to the identity of a constitution *per se*. A commentator casts doubt on the former approach given its disparate – national, cultural, religious, and moral – identities, while the latter theory can sidestep confusing conceptual questions and is useful for empirical analysis.¹⁴

For the purposes of this article, Section II will zero in on Gary Jacobsohn’s work to flesh out a theoretical framework to locate the identity of a constitution. Some points will also be addressed and refined in Section III for a better understanding of other constitutional settings. To put the theory in perspective, Section IV will probe pacifism as an identity of Japan’s Constitution through a comprehensive reading of its constitutional text, historical and contextual narratives. At the same time, it will also describe and analyze the dynamics of this identity in Japan’s constitutional discourse to show its overstretch in scope. Finally, concluding remarks will be provided.

The case study of Japan is not a random, but mindful selection so as to demonstrate a possible extension of the constitutional identity theory. Comparative constitutional studies are densely informed by North American and European legal systems, leading constitutional comparatists to lament that insufficient attention has been paid to those outside the periphery of the West.¹⁵ As pointed out by Werner Menski, such neglect may result in intellectual and practical losses while studying comparative law and legal pluralism.¹⁶ More relevantly, Tom Ginsburg opines that Japan’s law and institutions are interestingly peculiar “in its own right and on its own terms,” urging scholars to “study Japanese law ... because it is there.”¹⁷

2010).

12 Rosenfeld, *Id.*

13 Jacobsohn, *supra* note 14.

14 See more Bui N. Son, *Globalization of Constitutional Identity*, 26 Wash. Int’l L. J. 463, 534 (2017).

15 See generally Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law*, at 212 (Oxford Univ. Press 2014); Domenico Amirante, *South Asian Constitutional Systems: An Overview*, (Domenico Amirente ed.), *South Asian Constitutional Systems*, at 1-6 (Eleven International Publishing 2020).

16 Werner Menski & Beyond Europe Comparative Law: A Handbook (Esin Örüücü & David Nelken eds., Hart Publishing 2007).

17 Tom Ginsburg, *Studying Japanese Law because It’s There*, U. Chi. Pub. L. & Legal Theory Working Paper No. 294, at 23-25 (2010).

II. Towards a Theory of Constitutional Identity

Constitutional identity is an elusive yet crucial concept in comparative constitutionalism. Constitutional identity refers to constitutional ideas, aspirations, and principles fundamental to a polity, which shapes the formulation of constitutional institutions and their practices.¹⁸ Following in the footsteps of Edmund Burke, the influential 18th-century British philosopher, Jacobsohn argues that the concept of constitutional identity should lie at the center of constitutional theory. Accordingly, a constitution acquires

“[A]n identity through experience, that its identity neither exists as a discrete object of invention nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Identity emerges dialogically and represents a mix of political aspirations and commitments ... expressive of a nation’s past, as well as the determination of those within the society who seek, in some ways, to transcend that past. It is changeable but resistant to its own destruction, and it may manifest itself differently in different settings.”¹⁹

As Jacobsohn suggests, constitutional text is a good starting point for anyone looking for the aspirations and commitments of a polity. This point of departure does not, however, tell the whole story why such a polity commits itself to those values and the environment in which they are sustained. While the text is fixed in a specific time and place, constitution is a living document. Therefore, contextualism is imperative to understand its fluidity. Yet constitutional identity is not fixed but mutable. For that reason, a dialogical approach is vital to shedding light on stakeholders characterized as pushing and pulling forces for an identity change.

A. Constitutional Text as a Starting Point

Fundamental goals, aspirations, and commitments that a political community pursues are typically codified in its basic law. Therefore, for Jacobsohn, “to establish the identity of a constitution, it obviously makes sense to scrutinize carefully the text itself. This provides us with a documentary transcript of how

18 Son, *supra* note 17.

19 Jacobsohn, *supra* note 14, at 3.

a particular group of framers provided for the governance of their polity, and it often includes their aspirations for its subsequent development.”²⁰

However, he also adds: “The constitutional text is usually a critical component of constitutional identity but not coterminous with it.”²¹ Jacobsohn’s Burkean approach suggests constitutional identity only matters if the text and its experience are congruent as the identity “emerges from day-to-day practice and is consequently the opposite of an abstract theoretical concept.”²² Therefore, we need to withhold judgments about constitutional identity until after confirming that the codified rules and principles of the document are actually embraced in the practices and culture of the body politic. In the similar vein, the theory of constitutional identity echoes the approach that labels the “big-C” and “small-c” versions of the word “constitution,” in which the proper noun *Constitution* is reserved for the text and the lower-case spelling – *constitution* – refers to the broader constitutional order.²³ This functionalist approach portrays a broad picture of the constitutional order in which the Constitution constitutes one –but central– element.

Constitutions may be viewed as instruments through which “a nation goes about defining itself.”²⁴ “We the people” has become the common language in the preambles of almost every constitution in the world. Mark Tushnet rightly points out that preambles to constitutions are exceptionally informative in conveying the underlying meaning of the collective enterprise that is the constitution.²⁵ In this sense, they constitute autobiographical narratives, legitimating specific local actions, historical moments, and organizations.²⁶ Even though most constitutional preambles do not have binding legal force,²⁷ they are read as expressions of the

20 *Id.* at 348.

21 *Id.* at 27-28.

22 *Id.* at 374.

23 Geoffrey Brennan & Jose Casas Pardo, *A Reading of the Spanish Constitution* (1978), 2(1) *Constitutional Political Economy*, at 53–79 (1991); Frank Michelman, *Constitutional Authorship*, *Constitutionalism: Philosophical Foundations* (Larry Alexander ed. Cambridge Univ. Press 1998); Matthew Palmer, *What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders*, 17 *Pub. L. Rev.* 133, 162 (2006).

24 Mark Tushnet, *Some Reflections on Method in Comparative Constitutional Law*, at 79 in *The Migration of Constitutional Ideas* (Sujit Choudhry ed. Cambridge Univ. Press 2006).

25 *Id.* at 82.

26 Tom Ginsburg, Daniel Rockmore, Nick Foti, *We the Peoples: The Global Origins of Constitutional Preambles*, 46 *Geo. Wash. Int’l L. Rev.* at 104 (2013).

27 *Id.*

fundamental values and aspirations of the people, and bind them together as a nation.²⁸ They can be regarded as “mission statements,”²⁹ articulating the ends of the constitutional project and can therefore be powerful motivators.³⁰

Besides the preamble, other parts of a constitution also play an important role in constructing its identity. For example, German constitutional identity is found in the eternity clause (Article 79) of its Basic Law, which reads: “Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”³¹ This provision indicates that there are principles of law that are so compelling that a statute, even a constitutional amendment, in conflict with them is devoid of validity. The German courts interpreted the provision as setting limits to European integration in order to protect the constitutional cores to which it refers.³²

Constitutional identity, however, does not necessarily have to be confined to the presence and scope of an eternity clause. Article 9(2) of the Czech Constitution provides: “Any change of fundamental attributes of the democratic state governed by the rule of law is inadmissible.” Kosař and Vyhnánek submit that the effect of Article 9(2) should be taken in the spirit of foundational values codified under Article 1(1) of the Czech Constitution, namely sovereign, unitary, and democratic state, the rule of law, and human rights.³³ Hence, the eternity clause is a crucial, but not exclusive factor to comprehend constitutional identity. Constitutional identity can be found outside or in the absence of Constitutions. The United Kingdom is an example of “the conceptual connection between ‘constitutional

28 See Gordon Wood, *The Creation of the American Republic, 1776-1787* (U. North Carolina Press 1969) (tracing history of popular sovereignty in early America); Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W. W. Norton & Company 1989) (discussing the concept of popular sovereignty as a fiction).

29 Jeff King, *Constitutions as Mission Statements*, at 73 in *The Social and Political Foundations of Constitutions* (Denis Galligan, Mila Versteeg eds. Cambridge Univ. Press 2013).

30 Sanford Levinson, *Do Constitutions Have a Point? Reflections on “Parchment Barriers” and Preambles*, at 150-178 in *What Should Constitutions Do?* (Ellen Paul, Fred Miller, Jeffrey Paul eds. Cambridge Univ. Press 2011) (arguing that constitutional preambles should receive greater attention).

31 Christian Calliess, *Constitutional Identity in Germany*, at 182-200 in *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Christian Calliess & Gerhard van der Schyff eds., Cambridge Univ. Press 2019).

32 *Id.*; See also Ernst von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 *Natural Law Forum* 106, 114 (1959).

33 David Kosař & Ladislav Vyhnánek, *Constitutional Identity in the Czech Republic*, in Christian Calliess, Gerhard van der Schyff, *supra* note 34, at 85-113.

statutes' in that country and its constitutional identity."³⁴ Such statutes are acts of the U.K. Parliament that cannot be amended or repealed by means of implied repeal.

The constitutional text may be declarative and expressive. However, its content is fixed in a specific time and place, whereas the constitution is a living document. In other words, constitutional assertions of self-definition are part of an ongoing process entailing adaptation and adjustment as circumstances dictate. To this end, a more fluid concept of identity may be required.

B. "Bounded Fluidity" – A Contextual Reading

As much as the textual analysis, a contextual understanding of the constitution is crucial to locate its identity. A constitutional identity may not carry the same meaning when it is detached from the context and environment in which it is situated and nurtured. Tushnet contends that "contextualism" is a prerequisite methodology for studying constitutional law, while warning that "we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists."³⁵

Historical context is essential in describing and understanding national constitutional identity. For Jacobsohn, the future of constitutional identity is inscribed in its past.³⁶ This suggests a more general point about the past as a source of legitimation in constitutional founding. A constitution is like a human being, and "personal identity can[not] be abstracted from the larger historical narrative of which it is a part," as Alasdair MacIntyre has canvassed, "I am born with a past; and to try to cut myself off from that past . . . is to deform my present relationships. The possession of an historical identity and the possession of a social identity coincide."³⁷ To understand who we are is to embrace the conflicts of the past, which "do not dissipate with the inception of a new constitutional experiment, even one that culminates in a seemingly coherent document."³⁸ In this

34 Paul Craig, *Constitutional Identity in the United Kingdom*, in Christian Calliess, Gerhard van der Schyff, *supra* note 34, at 284-302.

35 Tushnet, *supra* note 27, at 76.

36 Gary Jacobsohn, *The Formation of Constitutional Identities*, in Tom Ginsburg, Rosalind Dixon, *Comparative Constitutional Law – Research Handbooks on Comparative Law*, at 132 (Edward Elgar Publishing 2011).

37 Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, at 199 (U. Notre Dame Press 1981).

38 Jacobsohn, *supra* note 40, at 131.

respect, Patrick Glenn suggests the notion of “pastness” as a means for people to fathom and relate to “what we call the present, or the future.”³⁹

Formal constitutions display varying measures of defiance and compliance towards the legacies inherited from the founding generation.⁴⁰

For some people, “some core of shared belief, constitutive of allegiance to the tradition, has to survive every rupture.”⁴¹ That is the case of India, where “the Constitution is a precious heritage; therefore, you cannot destroy its identity.” In contrast, others might make a turn and abandon their allegiance to the founding generation completely. To them it is the constitution’s deplorable heritage that stands in the way, in which case its identity perhaps should be destroyed and re-constituted. Radical slavery abolitionists in the U.S. could be said to have reached such a conclusion.⁴²

Contextualism is also informed by culture. In this sense, as noted by Robert Post, “Constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.”⁴³ An identity should arise as the constitutional aspirations and commitments permeate into the people’s way of life, otherwise it remains a “paper tiger” sitting meaninglessly in a document, so-called constitution. This point is well captured in Nidhi Eosewong’s observation on “The Thai Cultural Constitution” :

“The constitution is said to be the supreme law, but only because foreigners said this already. We copied their textbook and memorized it like a parrot. It has no real meaning in Thai culture. If it had real meaning, the constitution could not be torn up often, and laws, ministerial orders, regulations, and so on could not contravene the constitution. But in Thailand the constitution is torn up often, and more easily than the various rules and regulations of ministries and departments. Besides, there are many laws, ministerial orders, regulations, and so on, which contravene the constitution. Yet neither those enforcing these rules, nor those subject to them, feel any resentment at all.”⁴⁴

39 Patrick Glenn, *Legal Traditions of the World Sustainable Diversity in Law*, at 5 (Oxford Univ. Press 2010).

40 Jacobsohn, *supra* note 14, at 213.

41 Alasdair MacIntyre, *Whose Justice? Which Rationality?*, at 356 (U. Notre Dame Press 1988).

42 See generally Jacobsohn, *supra* note 14.

43 Robert Post, *The Supreme Court, 2002 Term - Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harv. L. Rev.* 8 (2003).

44 This is a translated version of an article in Thai, which first appeared in *Sinlapa wathanatham* 11, no. 1,

Disharmony within the constitution can be a source for much of the mutability of constitutional identity, but the strands that constitute the tension in this disharmony also set limits on the nature of the change engendered.

C. Constitutional Disharmony and Dialogical Articulation

Constitutional identity is not fixed, but changeable. Constitutional identity emerges dialogically as the product of contradictory commitments and aspirations in society, or “disharmony” in Jacobsohn’s words. “[T]he ‘disharmonic constitution’ does not refer to the incoherence of constitutions – though that may indeed be the condition of some – but to the dissonance within and around the constitution that is key to understand its identity.”⁴⁵ In this sense, constitutions are a lot like music: Their disharmonies are intrinsic to their nature, conditioned by local circumstance and tradition, and necessary for the realization of the enterprise.⁴⁶

The dynamics of constitutional identity are intensified by “the universal constitutional condition, which is that in one way or another all constitutions confront or embody the problem of disharmony.”⁴⁷ On the one hand, the globalization of constitutional law induces countries to adhere to specific goals and principles that are shared by other nations. On the other, such norms need to be harmonized with the idiosyncratic commitments of local traditions and practices; the contours of constitutional identity will to a large extent reflect how these disharmonies get resolved. In this light, external and local forces engage simultaneously in shaping the identity of a constitution. That does not mean, however, that the two sides contribute equally to the creation of constitutional identity. In some cases, external influence may be decisive and even overwhelming, eclipsing local initiatives. In others, it may be very subtle and indirect, providing the general backdrop against which the locals take on a more active role.

The dialogical approach functions in the constitutional arena in interpretive and political activity occurring in courts, legislatures, and other places public

November 1991. It was translated by Chris Baker and reprinted in 3 *Kyoto Review of Southeast Asia* (Mar. 2003), available at <https://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution/> (last visited May 24, 2020).

45 Jacobsohn, *supra* note 14, at 15.

46 *Id.* at 355.

47 *Id.* at 86-87.

and private. Courts are the principal, but not exclusive, shapers, and articulators of constitutional identity. A wide range of actors (legislature, executive, and the people) engage in constitutional dialogue in the determination and clarification of substantial constitutional meanings and constitutional identity.

Dialogue is also informed by comparison. Courts have shown increasing willingness to engage in comparative constitutional analysis and make use of foreign jurisprudence.⁴⁸ For example, the courts of the U.K., Poland, Hungary have drawn on German case law in informing their thought on the relationship between interpreting supranational laws and preserving national constitutional identities.⁴⁹ In this regard, comparison is useful in a way that it “opens for discussion and contestation those characteristics which had remained invisible to domestic eyes.”⁵⁰ It may also bring out “possibilities that might otherwise be overlooked or thought too utopian to be considered as part of a real-world constitution... [and] help us rid ourselves of ideas of ‘false necessity,’ the sense we might have – grounded in our own experience because that is the only experience we have – that the institutions and doctrines we have are the only ones that could possibly be appropriate for our circumstances.”⁵¹

Take Vietnam as an example, Bui Ngoc Son shines a light on Vietnam’s 1992 Constitution and its disharmonies.⁵² Constitutional globalization has induced adaption to the constitutional identity of the country, which is shaped by the pragmatic incorporation of fundamental ideas of global constitutionalism and local values.⁵³ According to Bui, at the end of the day, the essence of the socialist constitutional identity remains, but is modified and stretched to reconcile tensions between different strands of values and aspirations.⁵⁴ The case of Vietnam also shows a deficit in Jacobsohn’s analysis, which will be brought to the fore in the next section.

48 *Kesavananda Bharati*, *supra* note 1.

49 *See generally* Christian Calliess & Gerhard van der Schyff (eds), *supra* note 34.

50 Sujit Choudhry, Migration as a New Metaphor in Comparative Constitutional Law, Sujit Choudhry ed., *supra* note 27, at 23.

51 Tushnet, *supra* note 27, at 81.

52 *See more* Son, *supra* note 17, at 478-517.

53 *Id.*

54 *Id.*

III. Critical Reflection on the Constitutional Identity Theory

Flawless constitutional theory is a fiction. It is to say that Jacobsohn's take on constitutional identity is not grappled without critics. This section will lay out certain important critics on constitutional identity theory to be addressed and refined for a better understanding of other constitutional settings.

A. National Identity and Constitutional Identity

Some constitutional theorists have expressed skepticism concerning the concept of constitutional identity. Martín Nanclares views that the “notions of ‘constitutional identity’ and ‘national identity’ can be considered synonymous.”⁵⁵ In parallel, Anita Schnettger posits that constitutional identity is the product of a particular national identity, understood as comprising a state's political community.⁵⁶

Constitutional identity, as a set of values and principles, is essentially the product of a dialogical process creating or interpreting constitutional sources. The search for constitutional identity is not necessarily synonymous with an inquiry into national identity.⁵⁷ National identity characteristics – drawn from indicators including history, language, religion, culture, sociology, economics, philosophy, politics, and law – can only be relevant to the extent that they inform an order in a fundamental constitutional sense.⁵⁸ A case in point is India's secularism as its constitutional identity, albeit 80 percent of Indian population identifying themselves as Hindus, has been upheld passionately through thick and thin.

Yet if constitutional identity is understood as the identity of the constitution, not of the people as constitutional authors, some scholars argue that even authoritarian polities can also acquire constitutional identity.⁵⁹ This critic is valid

55 Nanclares, *supra* note 37, at 268-83

56 Anita Schnettger, Article 4(2) TEU as a Vehicle for National Constitutional Identity in the Shared European Legal System in Christian Calliess, Gerhard van der Schyff eds., *supra* note 34, at 9-48.

57 Gerhard van der Schyff, Member States of the European Union, Constitutions, and Identity A Comparative Perspective, Christian Calliess, Gerhard van der Schyff eds., *supra* note 34, at 328-329; Michel Rosenfeld, Constitutional identity in Michel Rosenfeld, András Sajó eds., *The Oxford Handbook of Comparative Constitutional Law*, at 758 (Oxford Univ. Press 2012); Michel Rosenfeld, *supra* note 14, at 29, that the two identities are separate, although not necessarily mutually exclusive.

58 Van der Schyff, *Id.* at 328-329.

59 Tommaso Pavone, Constitutional Identity: An Overview and Some Conceptual Concerns, *available at* https://scholar.princeton.edu/sites/default/files/tpavone/files/jacobsohn-constitutional_identity_critical_

since authoritarian polities are also committed to fundamental aspirations codified in their constitutions, which inform constitutional politics and citizens' activities. Some concrete constitutional principles may be irrelevant to the practice of the authoritarian systems and the daily lives of the citizens. However, the operation of the whole polity is inevitably driven by the constitutionally entrenched aspirations, although they may be imposed by authoritarian leaders. Since its inception in 1947, *Nihonkoku Kenpō* (The Constitution of Japan) has yet to be amended even once, a record unmatched by any other constitution currently in force.⁶⁰ Its longevity becomes even harder to fathom, however, if one accepts the conventional narrative that the *Kenpō* was imposed on an unwilling nation by force. It is commonly held that Japan offers the "classic," and most successful, example of imposed constitutionalism that the world has seen in the last century.⁶¹ Japanese conservatives, meanwhile, have self-serving reasons to perpetuate the view that the *Kenpō* was imposed: characterization of the document as a foreign imposition is a strategy for depriving the document of legitimacy and undermining public support for the provisions that formally limit the country's military capabilities.⁶² The myth of imposed constitution poses an interesting question to constitutional theory and law, which will be probed further in section four.

B. Beyond the Juri-centric Mindset

Jacobsohn is certainly mindful that pursuing identity along dialogical paths requires reconsideration of the juri-centric model that has long dominated contemporary constitutional theory, in which "the judge is guardian and expositor of the moral principles that structure and guide the nation's constitutional development."⁶³ By the same token, one example of judicial review skepticism can be found in Tushnet's challenge to the assumption that the U.S. Supreme Court is the driving force in protecting fundamental constitutional values. A legal victory is not a complete victory as it "takes work, in our culture, to connect ideological victories to material outcomes."⁶⁴ Different voices should be heeded in order to

review.pdf, (last visited May 24, 2020); Son, *supra* note 17.

60 Comparatively up to now Germany has amended its Basic Law 62 times.

61 Frederick Schauer, On the Migration of Constitutional Ideas, 37 Conn. L. Rev. 907, 919 (2005).

62 Lawrence Beer & John Maki, From Imperial Myth to Democracy: Japan's Two Constitutions - 1889–2002, at 216 (U. Press Colo. 2002).

63 Gary Jacobsohn, *The Disharmonic Constitution*, at 55 in *The Limits of Constitutional Democracy* (Jeffery K. Tulis & Stephen Macedo eds. Princeton U. Press 2010).

64 For example, although the 1954 *Brown v Board of Education* decision of the U.S. Supreme Court marked

translate into meaningful gains. However, judicial decisions remain at the core of Jacobsohn's analysis.⁶⁵ Jacobsohn's theory is informed by constitutional experience in stable, liberal polities where judicial review operates as the mechanism of constitutional change. As a result, he has not yet accounted for the possibility of a non-judicial dialogical device for constitutional identity change.

In other constitutional settings where judicial review is absent, for example, in Vietnam, as illustrated by Bui, constitutional dialogue and change are possibly triggered through formal constitution-making.⁶⁶ Constitutional dialogue may carry some weight even in a non-liberal polity, as Kellogg has observed, it illustrates the ways "in which authoritarian regimes use constitutions and constitutionalism to enhance their own political legitimacy."⁶⁷ The theory of the disharmonic constitution should, therefore, enshrine constitutional dialogue outside the judicial channel to paint the broad picture of constitutional changes.

This point is highly relevant to the case of Japan because of judicial passivism. The Supreme Court of Japan has often shied away from constitutional questions. Since 1947, there are only ten times where the Court has struck down statutes as unconstitutional.⁶⁸ The conservatism of Japan's courts seems to be the result of their longtime and ongoing immersion in a conservative political environment.⁶⁹ The Court is further constrained by the predominantly strong government. Political branches have always found their way to go around or even ignore the Court's rulings.⁷⁰ Judicial efforts to strike down government policy

an important progressive advance to end racial segregation in schools formally, Tushnet contends that in the long term, the ideological victory represented by such decisions does not always or directly translate into material gains. In fact, the decision was "so widely disregarded in the deep South that only a tiny number of schools there were desegregated by 1964." *See more* Mark Tushnet, *Taking the Constitution Away from the Courts*, at 136-141 (Princeton U. Press 1999).

65 Heinz Kluge, *Constitutional Identity and Change*, 47 *Tulsa L. Rev.* 41, 45 (2011).

66 Son, *supra* note 17.

67 Thomas Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the Urgency of Political Reform*, 11 *U. Penn. Asian L. Rev.* 344 (2016).

68 Yasuo Hasebe, *The Supreme Court of Japan - A Judicial Court, Not Necessarily a Constitutional Court*, in *CONSTITUTIONAL COURTS IN ASIA - A COMPARATIVE PERSPECTIVE* 289 (Albert Chen & Tom Ginsburg ed., Cambridge Univ. Press 2018). To put it in a comparative perspective, Germany's Constitutional Court, created at roughly the same time, has struck down more than 600 laws; the U.S. Supreme Court's tally over the same period is roughly 900. *See more* David Law, *The Myth of the Imposed Constitution*, in Denis Galligan, Mila Versteeg (eds.), *supra* note 32, at 239-268.

69 *See more* David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *Tex. L. Rev.* 1545 (2009).

70 *See* Ray Moore & Donald Robinson, *Partners for Democracy: Crafting the New Japanese State Under MacArthur*, at 320 (Oxford Univ. Press 2004); Patrick Boyd, Richard Samuels, *Nine Lives?: The Politics of*

may therefore fail or even backfire.

IV. Pacifism as an Identity of Japan's Constitution

Japan represents a peculiar case study for constitutional identity theory for two reasons. First, deeply dissatisfied with the *Nihonkoku Kenpō*, the Japanese conservatives claim that it is an imposed product by force on their people. At least on a theoretical plane, it is safe to say that an imposed constitution lacks legitimacy because the ultimate constituent power – the people – did not give their consent to this document. If that was true, it should not have been in force at all, let alone an identity arising from it. Second, the Supreme Court of Japan has been reticent on constitutional questions before it, especially with regards to the pacifism provision and related Government policies. Constitutional scholars accustomed to studying judicial decisions may thus feel put off on account of Japan's judicial passivism.

The primary objective of this section is to demonstrate the dynamics of the pacifist identity in Japan's Constitution. Subsection A will probe the historical drafting and the text of the pacifism provision (Article 9) under Japan's 1947 Constitution. There was ostensibly a great deal of influence of external agents during the drafting process, raising the concern on the legitimacy of the document. However, it begs another question *upon whom* the postwar Constitution is imposed.⁷¹ Subsection B will contextualize Article 9 to show that while the conservative leaders fought tooth and nail for the revisionist stance, the war-weary people of Japan quickly embraced and practiced pacifism as their postwar identity. Yet this identity has been changing, even overstretching, to keep up with the changing circumstances. The dialogical approach is used to shed light on stake-holders' voices in balancing constitutional disharmonies.

Constitutional Reform in Japan, at 17–26 (2005), available at <https://www.eastwestcenter.org/publications/nine-lives-politics-constitutional-reform-japan> (describing early efforts by the Liberal Democratic Party (LDP) to amend Article 9) (last visited May 24, 2020); Craig Martin, The Case Against Revising Interpretations of the Japanese Constitution, available at <https://apjif.org/-Craig-Martin/2434/article.pdf>, (last visited May 24, 2020).

71 This argument is advanced by David Law, *supra* note 88. Japan seems to be the case in point, I however remain leery of extending this line of reasoning in other cases because it assumes “the people” as the beneficiaries, rather than the true owners, of the document expressing their wills. Moreover, it may open the floodgate for unduly external interference. For more discussion, see Hans Agné, Democratic Founding: We the People and the Others, 10 Int'l J. Const. L. 836, 861 (2012).

A. Article 9 and Its Original Intent

For postwar Japan, the externalities that influenced the constitutional founding of its democracy took roots in the two global wars of the 20th century. Its Constitution was written during the short span of time between the end of World War II and the beginning of the Cold War. Throughout this period, the U.S. hegemony had high stakes in determining Japan's constitutional founding in line with its interests and policy choices in East Asia.⁷²

At the outset, Japan's new constitutional order loomed large on the aftermath of World War II as a vanquished nation. This meant that for Japan, the birthmark left by external influence would be the provision on renunciation of war and permanent disarmament. This constitutional principle is regarded peculiar since it does not touch upon the structure of the government, the power of its people, nor the relationship between the two, which normally are primary constitutional concerns. John Maki contends that pacifism, together with popular sovereignty and the guarantee of fundamental human rights, are three principles lie at the heart of Japan's constitutionalism and democracy.⁷³

The Preamble and Article 9 of the *Nihonkoku Kenpō* (Japan Constitution) read:

“... We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.

...

72 John Ikenberry, *American Hegemony and East Asian Order*, 58 *Austl. J. Int'l Aff.* 353,367 (2004); Misato Matsuoka, *Postwar U.S. Hegemony and the U.S.-Japan Alliance*, available at https://www.jpff.go.jp/j/project/intel/exchange/organize/ceeja/report/13/pdf/13_03.pdf (last visited May 24, 2020).

73 John Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 *L. & Contemp. Prob.* 73 (1990).

Chapter II: Renunciation of War

Article 9. 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.”⁷⁴

Albeit vaguely worded, Article 9 appears to comprise three prohibitions – no war, no armed forces, and no right of belligerency. A no-war provision in its first paragraph is not a novelty. Before World War II, there had been attempts to regulate states’ belligerency and renounce war as a national policy, materialized in the 1928 Kellogg-Briand Pact ratified by Japan along with fifteen other nations.⁷⁵ Subsequently, the constitutions of Spain (1931), the Philippines (1935), Burma (1947), Italy (1947), Cambodia (1993) had outlawed war, and the United Nations Charter (1945) as the organization came into existence. Many scholars have opined that what made Article 9 truly stand out was rather its second paragraph precluding the establishment and maintenance of armed forces.⁷⁶ It is famously claimed that for the first time in history, a nation forsakes its right of self-defense, even in the face of foreign invasion, which is legally recognized under international law. However, the tracing of the legislative history of Article 9 shows a more nuanced and fuzzy meaning of this provision, indicating an internal disharmony in the constitutional text.

In fact, the meaning of “peace” has been followed by numerous debates since the promulgation of Article 9. Controversies have intensified on three main points: scope of the outlawry of war, level of (dis)armament, and the right of

74 *Nihonkoku Kenpō* [Constitution of Japan], Article 9, translation available at https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html, (last visited May 24, 2020).

75 Theodore McNelly, *The Origins of Japan’s Democratic Constitution*, at 148 (U. Press of America 2000).

76 See generally Derek van Hoften, *Declaring War on the Japanese Constitution: Japan’s Right to Military Sovereignty and the United States’ Right to Military Presence in Japan*, 26 *Hastings Int’l & Comp. L. Rev.* (2003); Lawrence Beer, *Peace in Theory and Practice Under Article 9 of Japan’s Constitution*, 81 *Marquette L. Rev.* (1998); James Auer, *Article Nine of Japan’s Constitution: From Renunciation of Armed Force “Forever” to the Third Largest Defense Budget in the World*, 53 *L. & Contemp. Prob.* (1990).

collective security or “armed alliance.”⁷⁷ On top of that, Japanese conservatives have thrown relentless accusations that Article 9 was a victors’ punitive measure imposed on helpless, vanquished Japan after the War. In this light, it is not difficult to comprehend their attempts in debasing the *Kenpō* on account of a lack of the Japanese people’s will. Understanding how it came to emblemize Japan’s constitutional identity thus requires revisiting its original legislative process as well as the historic twists and turns of subsequent events prompted by the onset of the Cold War and Japan’s response to it.

The history of Article 9 is dated back to the postwar period with the predominant presence of Allied Powers. It appeared that General Douglas MacArthur, Supreme Commander for the Allied Powers (SCAP) in Japan, was the first to call to Prime Minister Shidehara Kijūrō for an overhaul of Japan’s prewar Constitution.⁷⁸ The idea for constitutionalizing pacifism was, however, first raised by Shidehara and enthusiastically endorsed by MacArthur during their historic meeting on 24 January 1946.⁷⁹ This event should be seen in the light of the “whole situation.” There was a hidden, yet coincided, agenda on the minds of both sides, that was to save Emperor Hirohito from being indicted as a war criminal before the Tokyo War Crimes Tribunal.⁸⁰ For the Japanese leaders, the Emperor remained the worship symbol from whom the country could not afford to depart. For MacArthur, saving Hirohito was expected to ensure a more efficient implementation of the occupation policies. From this perspective of the “whole situation,” the pacifism provision may be more properly described as a result of “tacit agreement” (*anmoku no itchi*),⁸¹ or a collaboration between the Japanese and occupation authorities.⁸² Miyazawa Toshiyoshi, a constitutional scholar who was himself intimately involved in the constitution-making process, also views that Article 9 was a “joint venture” (*gassaku*).⁸³

77 Chaihark Hahm & Sung Ho Kim, *Making We the People Democratic Constitutional Founding in Postwar Japan and South Korea*, at 70 (Cambridge Univ. Press 2015).

78 Auer, *supra* note 101, at 172.

79 *Id.*

80 Chaihark Hahm & Sung Ho Kim, *supra* note 102, at 75-80; *See more* Herbert Bix, *Hirohito and the Making of Modern Japan*, at 546 (Harper Collins 2009).

81 The expression comes from Miyazawa’s successor at Tokyo University, Kobayashi Naoki in his *Kenpo Daikyūjo [Constitution Article 9]* (Tokyo: Iwanami Shinsho, 1982), at 35, cited in Chaihark Hahm, Sung Ho Kim, *supra* note 102, at 73.

82 *Id.*

83 Miyazawa Toshiyoshi, *Kenpo Kowa [Lectures on Constitutional Law]* (Tokyo: Iwanami Shoten, 1967), at 20, cited in Chaihark Hahm & Sung Ho Kim, *supra* note 102, at 72.

In order to persuade the international community that Japanese aggression would be kept at bay once and for all, MacArthur was determined that the pacifism provision must be robust and radical enough to go beyond the conventional prohibition on war as provided for under the Kellog-Briand Pact and the UN Charter.⁸⁴ At first, pacifism was incorporated in the Preamble; however, it was later deemed not legally vehement enough, therefore deserved its own place in the Constitution. According to General Courtney Whitney, SCAP's right-hand man and the powerful Government Section chief, "the enunciation of this principle should be unusual and dramatic."⁸⁵ Nothing less would suffice to convince the international community and to achieve the ultimate goal that the General Headquarters (GHQ) of SCAP and the Japanese government had in common, that was to preserve Japan's prewar constitutional identity, namely, the emperor system.

A committee of scholars under Minister of State Matsumoto was formed to consider the necessity of revision. In early February 1946, the first draft of the constitution was submitted to the GHQ of SCAP. With merely cosmetic changes to the Imperial Constitution, this draft was criticized "far behind even the most conservative of the unofficial drafts."⁸⁶ Given that this was very likely to provoke severe punitive responses from the Allies, MacArthur preemptively made three points to be constitutionally entrenched, one of which was total non-military provision.⁸⁷

The Shidehara Cabinet was standing between a rock and a hard place. Their initial suggestion was confided to "temporary non-possession of weapons."⁸⁸ A complete farewell-to-arms Japan must have been inconceivable. Yet Japanese Government must have gauged quickly that, in order to protect the Emperor (and themselves), they would have to accept the pacifist principle. After intense deliberation,⁸⁹ the Shidehara Cabinet took pains to endorse the GHQ draft on 22

84 *Id.* at 79.

85 RM203. Matsumoto and Yoshida meet with SCAP. RM203.4.SP7.P1, cited in Chaihark Hahm & Sung Ho Kim, *supra* note 102, at 80.

86 Supreme Commander for the Allied Powers, Report of Government Section, The Political Reorientation of Japan, September 1945 to September 1948 (1949), cited in James Auer, *supra* note 101, at 173.

87 Osamu Nishi, The Constitution and the National Defense Law System in Japan, at 73 (Seibundo Pub. Co, 1987).

88 Bix, *supra* note 105, at 546-550.

89 Hando Kazutoshi, Showashi: Sengohen 1945-1989 (Heibonsha 2009), at 195-196, cited in Chaihark Hahm & Sung Ho Kim, *supra* note 102, at 84.

February. According to one account, it was “like swallowing boiling water.”⁹⁰

However, the Japanese leaders also maneuvered to insert their own agenda. During interpellations in the Imperial Diet, two amendments to Article 9 were introduced based on suggestions of Ashida Hitoshi, the chair of the House of Representatives Committee on the Bill for Revision of the Imperial Constitution. First, the words “*aspiring sincerely to an international peace based on justice and order*” were added to the beginning of the first sentence. Second, the words “*in order to accomplish the aim of the preceding paragraph*” were added to the beginning of the second sentence. This additional verbiage would later become the source of controversy regarding whether Article 9 was intended to ban wars for self-defense purposes. Ashida would later claim in 1951 that the new insertions were intended to prohibit only “aggressive war” and to allow the government to maintain the military for the purpose of self-defense.⁹¹

For sure, the Ashida Amendment did not go unnoticed. The Far Eastern Commission (FEC)⁹², which was by this time closely monitoring the process of constitutional revision, was suspicious of Japan’s hidden aspiration for remilitarization and pointed out that this might allow the government to maintain military forces under the pretext of self-defense. This, in turn, led to the demand that a new provision (Article 66) be included, which required all cabinet ministers to be civilians.⁹³

The inclusion of Article 66 might, however, seem superfluous if Article 9 had really meant that no military forces could ever be maintained. In other words, the reading of the *Kenpo* as a whole might suggest a way for Japan’s limited capacity to keep the military only for the purpose of self-defense. This view is supported further that during interpellations in the Imperial Diet, Prime Minister Yoshida, and the Minister in charge of constitutional affairs, Tokujiro Kanamori did not explicitly state that Japan would renounce the right of *individual* self-defense. On the contrary, Kanamori said, “while Article 9 prohibits the government from maintaining *war potential*, there may be other ways to defend ourselves.”⁹⁴

90 *Id.* at 81.

91 Tatsuo Sato, *The Origin and Development of the Draft Constitution of Japan*, 24 *Contemp. Japan* 4, 9 (1956).

92 FEC was the highest decision-making body in matters of Japan’s political reconstruction, including supervision of Japan’s constitutional reform, *See more* Far Eastern Commission, 3 *Int’l Org.* 180, 182 (1949).

93 Chaihark Hahm & Sung Ho Kim, *supra* note 102, at 86.

94 Shin Shimizu (ed), *The Records of the 90th Imperial Diet on the Constitution of Japan* (Hara Shobo, 1976),

Together with the promulgation of the Constitution of Japan in November 1946, the Government issued a booklet entitled “An Introduction to the New Constitution,” which was authored by members of the Cabinet Legislation Bureau and with forewords written by Yoshida and Kanamori, and in which the Government explained that there is no reason to worry over repel attacks from abroad, because Japan will join the United Nations soon after becoming independent, and the UN Charter clearly recognizes the right to self-defense for its member states.⁹⁵ In this light, Article 9 might be understood as a constitutional expression of international law norms, including the 1928 Kellogg-Briand Pact and the UN Charter,⁹⁶ which allow the use of force for self-defense.

In the interest of clarity, Japan’s constitutional right of self-defense should be understood in a very limited sense. In its statement submitted to the National Diet, the Government held that: “The current constitution, which is based on pacifist principles, cannot be understood to tolerate the unlimited exercise of the right of self-defense. The Constitution recognizes the use of this right only in cases where it is essential to protect the Japanese people’s rights to life, liberty, and the pursuit of happiness if these rights are jeopardized by foreign military attack.”⁹⁷ Since the right of *collective* self-defense is to be invoked when foreign states are under military attack and request support from Japan, such use of force is unconstitutional. In concrete terms, the government may use force only when (1) Japan itself is under ongoing or imminent, unlawful armed attack emanating from abroad; (2) use of force is necessary to terminate the attack; and (3) the extent of the force used is proportionate to the end to be achieved. These three conditions should be co-existent.⁹⁸ However, what may be deemed “necessary” is an open-ended question, thus creates “fluidity” for different stakeholders to engage in dialogues to carve out their own understandings of Article 9.

vol. 2, at 72, cited in Yasuo Hasebe, Book Review on Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea by Chaihark Hahm & Sung Ho Kim, *Asian J. Comp. L.* at 329, 334 (2016).

95 *Id.*

96 Craig Martin, Binding the Dogs of War: Japan and the Constitutionalizing of *Jus Ad Bellum*, 30 *U. Penn. J. Int'l L.* 306, 319 (2008).

97 Yasuo Hasebe, The End of Constitutional Pacifism?, 26 *Wash. L. Rev.* 126 (2017).

98 *Id.*

B. Article 9 in Context and Its Dialogical Dynamics

Evidently, the formation of Article 9 was densely informed by Japan's tragic past. It was written primarily to deal with the perceived evils of Japan's aggression past, addressing to the international audience.⁹⁹ The "dark years" had to be scrutinized and criticized, but the emphasis was more on severing the past from the present so as to make a new beginning – to build an entirely new Japan from scratch.¹⁰⁰ Thus, the 1947 Constitution is often regarded as a symbol of Japan's determination to create a new nation and a new identity by decoupling itself from the past. As John Dower has written, "the Japanese ransacked their national history for precedents pertinent to their 'new' circumstances" with a view to "finding – inventing, if need be – something familiar to hold on to."¹⁰¹ Perhaps it was a way of making the present more bearable, in the words of Emperor Hirohito, a way of "enduring the unendurable and suffering the insufferable."¹⁰² Promulgated only two and a half years later in 1949, by contrast, the Basic Law (*Grundgesetz*) of West Germany was inked after the Cold War had gathered momentum in Europe. As a result, it reflected a forward-looking sentiment toward anti-communism and its militant liberalism in comparison with which Japan's postwar Constitution seemed backward-looking toward the anti-fascist war that had already come to an end. One key consequence was the different attitudes of the two documents toward armed forces; that is, unlike the Japanese counterpart, the Basic Law reserved a more active rearmament stance.¹⁰³

After the promulgation of the *Kenpo*, however, the fate of Article 9 was quickly called into question as two constitutional disharmonies were embodied. First, the Japanese conservatives were deeply upset with the 'un-Japanese' nature of the document, and aimed to infuse a sense of national pride with emphasis on Japan's traditions as a divine "military state" (*gunkoku*) in a revised constitution.

99 Hideo Otake, Two Contrasting Constitutions in the Postwar World: The Making of the Japanese and the West German Constitutions, in Yoichi Higuchi (ed.), *Five Decades of Constitutionalism in Japanese Society*, at 59 (U. Tokyo Press 2001).

100 Carol Gluck, The Idea of Showa, at 3 in *Showa: The Japan of Hirohito* (Carol Gluck & Stephen R. Graubard eds. W.W. Norton & Co. 1990).

101 John Dower, *Embracing Defeat: Japan in the Wake of World War II*, at 30 (W. W. Norton & Company 2000).

102 Japan surrenders (Aug 14, 1945) Emperor Hirohito: Imperial Rescript, available at <https://www.theatlantic.com/international/archive/2015/08/emperor-hirohito-surrender-japan-hiroshima/400328/> (last visited May 24, 2020).

103 Otake, *supra* note 124.

In this sense, there is a dissonance between the text and cultural ideology. Second, external security threats also widen the disharmonic gap between the text and the environment in which it is situated. This dissonance is widened in the post-Cold-War era as there is mounting pressure on the revision of the Constitution to keep up with the changing circumstance. It thus puts Japan's commitment to pacifism to the test.

1. The Postwar Era

As the world began to feel the heat of the Cold War, the U.S. had to make major modifications to put Japan in the central position for its containment policy in East Asia. The turning point came in 1950 when the Korean War broke out. The war that took millions of Korean lives was a blessing in disguise for Japan – “a gift of the Gods” in Yoshida's own words.¹⁰⁴ Ironically, the war was the catalyst that built up, albeit partial, peace sentiment in Japan.

The process for restoring Japan's sovereignty was accelerated in 1951 with the conclusion of the San Francisco Peace Treaty and the U.S. – Japan Security Treaty.¹⁰⁵ The Yoshida Cabinet was nevertheless under the unrelenting pressure of the U.S. to “increasingly assume responsibility for its own defense” in the wake of the full-blown wars,¹⁰⁶ of which the establishment of Japan's National Police Reserve (the predecessor of the Self-defense Forces) was the result. Given the original intent for minimum individual self-defense, Article 9 was clearly being stretched to the limit as the U.S. – Japan Security Treaty explicitly pushed for “an inherent right of individual and *collective* self-defense.”¹⁰⁷ Vice President Richard Nixon, visiting Tokyo in 1953, would openly press for rearmament, even admitted in public that “the United States did make a mistake in 1946.”¹⁰⁸ The Japanese conservatives also attempted to capitalize on these events to push for a more ‘Japanese’ document.

For the Yoshida Cabinet, despite their initial lack of faith in Article 9, it

104 John Dower, *Empire and Aftermath: Yoshida Shigeru and the Japanese Experience, 1878–1954*, at 316 (Harvard Univ. Press 1979).

105 See more John Dower, *Peace and Democracy in Two Systems: External Policy and Internal Conflict*, in *Postwar Japan as History* (Andrew Gordon ed. U. Calif. Press 1993).

106 The Preamble, Bilateral Security Treaty between the United States of America and Japan, available at http://afe.easia.columbia.edu/ps/japan/bilateral_treaty.pdf (last visited May 24, 2020).

107 *Id* (emphasis added).

108 See more <https://www.nixonfoundation.org/2015/06/1953-vp-nixon-in-japan/> (last visited May 24, 2020).

was evidently not in Japan's best interest to re-direct scarce resources for rearmament.¹⁰⁹ They were predetermined that the security of war-torn Japan would be entrusted to the U.S. so that it could focus exclusively on economic recovery; this later became the so-called Yoshida Doctrine.¹¹⁰ In fact, MacArthur did give Yoshida an opportunity to reconsider the Constitution, but eventually, he decided not to revise the document.¹¹¹ Thus to keep the rearmament as low-cost as possible, Yoshida was compelled to embrace Article 9 firmly. In a Diet session, Yoshida once stated:

“Rearmament is something that Japan in no position to do right now at all. Moreover, the public is not supportive of it. ... While it might seem cunning, for the time being, we should let America [be responsible for Japan's defense]. The Constitution's forbidding a military is a true blessing. If America says anything, we just show the Constitution. Politicians calling for its revision are complete fools.”¹¹²

Popular opinion toward the *Kenpo* tended to confirm Yoshida's statement. Shortly after the proposed constitution became public in 1946, the poll conducted by the Mainichi Shimbun revealed immediate and robust support for its essential features. A whopping 72 percent deemed Article 9 “necessary.”¹¹³ From the late-1950s to the 1980s, public opinion polls showed that a clear majority of the Japanese people did not favor amendment of the Constitution, including Article 9.¹¹⁴

Hence, the Government actively defended the Constitution and made every effort to praise and publicize it after enactment. At the same time, the Yoshida Cabinet did merely enough to meet the U.S. demands on rearmament. Since the 1950s, Japan has gradually developed a military capacity; although the costs are high, the Self-defense Forces (SDF) are quite modest compared to those of neighboring countries. It should be noted that, pursuant to the original intent of

109 Miyazawa Kiichi, *Secret Talks Between Tokyo and Washington: The Memoirs of Miyazawa Kiichi, 1949–1954*, at 31 (Robert D. Eldridge trans. Lexington Books 2007).

110 For a full account of the Yoshida Doctrine and its impact on postwar Japan, see Kenneth B. Pyle, *Japan Rising: The Resurgence of Japanese Power and Purpose*, at 241–277 (The Century Foundation 2007).

111 Shigenori Matsui, *Fundamental Human Rights and ‘Traditional Japanese Values’: Constitutional Amendment and Vision of the Japanese Society*, 13 *Asian J. Comp. L.* 59, 86 (2018).

112 Kiichi, *supra* note 134, at 76.

113 Lawrence Beer & John Maki, *From Imperial Myth to Democracy: Japan's Two Constitutions, 1889–2002*, at 81-2 (U. Press Colo. 2002).

114 Susumu Wada, *available at* <http://www.jca.apc.org/~kenpoweb/articles/wada041202b.html> (last visited May 24, 2020).

Article 9, the establishment of SDF in 1954 was constitutional. In the same year, the Cabinet Legislation Bureau (CLB), a highly prestigious advisory organ of the Government with a *de facto* monopoly on interpreting the Constitution, stated that since the purpose of the SDF is homeland security, it could not contradict the “war potential” explicitly banned by Article 9.¹¹⁵ This view was later reaffirmed by the Supreme Court of Japan in the *Sunakawa* case. The CLB also specified the conditions under which Japan could exercise self-defense: Japan could respond with “minimum necessary force” (*jiei no tame no hitsuyō no jitsuryoku*) when invaded; But it could not send forces abroad (*kaigai hahei*), nor could Japan participate in any collective defense arrangements (*shudanteki bōei*).¹¹⁶ Different terms, such as “quasi-pacifism,” “relative pacifism,” or “passive pacifism,” are coined by scholars to capture Japan’s restrained self-defense stance.¹¹⁷ In this sense, it signifies that the SDF is more restricted than the armed forces of other countries. These early legal restrictions have become collectively known in Japan as “exclusively defensive defense” (*senshu bōei*).¹¹⁸ As noted by James Auer, Japan has done its best to “live up to the ideals of the Constitution to the degree that the other signatories of the Kellogg-Briand pact never have.”¹¹⁹

The military restraint found its way into various state policies during 1960s-70s. In 1967, Prime Minister Sato Eisaku Sato pointed out that Japan was the only country to experience nuclear war, he thus vowed, “[m]y responsibility is to achieve and maintain safety in Japan under the Three Non-Nuclear principles of not possessing, not producing and not permitting the introduction of nuclear weapons, in line with Japan’s Peace Constitution.”¹²⁰ In 1976, it was decided that arms exports would be “restrained in conformity with Japan’s position as a peace-loving nation.”¹²¹ In the same year, it became official government policy to keep national defense spending below one percent of gross domestic product (GDP), formalizing the legacy of the 1965–1975 period. The one percent cap has

115 See more <http://www.jpri.org/publications/workingpapers/wp99.html> (last visited May 24, 2020).

116 *Id.*

117 Beer, *supra* note 101; Karl Gustafsson, Linus Hagström, Ulv Hanssen, Japan’s Pacifism Is Dead, 60 *Survival* 137, 158 (2018).

118 Gustafsson, Hagström, Hanssen, *Id.*

119 Beer, *supra* note 101, at 820.

120 Statement by Prime Minister Eisaku Sato at the Budget Committee in the House of Representative (Dec. 11, 1967), available at <https://www.mofa.go.jp/policy/un/disarmament/nnp/> (last visited May 24, 2020).

121 Ministry of Foreign Affairs of Japan, available at <https://www.mofa.go.jp/policy/un/disarmament/policy/index.html> (last visited May 24, 2020).

prevented radical budget hikes.¹²² Throughout the 1970s, Japan's political leaders proudly proclaimed that an "economic great power" (*keizai taikoku*) would not necessarily mean a "military great power" (*gunji taikoku*) for Japan – a stance that was said to be uniquely Japanese as every other economic great power had translated its economic prowess into military strength. This theme of exceptionalism through military moderation was repeated in successive versions of the Diplomatic Bluebook and the Defense White Paper, and in foreign-office and prime-ministerial speeches.¹²³

In the postwar era, pacifism has been cultivated and practiced in the Japanese people's lives through social groups and movements. Pacifist movements often garner unwavering support of the pacifist and anti-traditionalist groups. The pacifists include intellectuals, members of the Japan Socialist Party (JSP), and labor unions, as well as Japanese communists. Members of this group have played a leading role in opposing the adoption of an active security policy. They hold to a strict interpretation of Article 9 of the Japanese Constitution and oppose any policy initiative that seems to enhance Japan's military profile. The anti-traditionalists also have their share in upholding Article 9 in circumstances where Japan's democracy is on the line. For anti-traditionalists, the primary concern is to prevent the traditionalists from undermining Japan's nascent democracy, including efforts to revising the postwar Constitution. Anti-traditionalists often cooperate with pacifists on security issues, although their core mission is to protect and strengthen Japanese democracy.

In 1960 the pacifists and anti-traditionalists successfully orchestrated the *Anpo Toso* movement to safeguard the pacifism identity. Conservative Prime Minister Nobusuke Kishi at the time had envisioned a rearmed Japan. To achieve his goal, revision of the U.S.-Japan Security Treaty and Article 9 was the first step. On 19 January 1960, the U.S. and Japanese governments signed the revised U.S.-Japan Security Treaty.

The pacifists succeeded in calling the public's attention to the revised treaty by propagating the idea that the treaty clauses would increase the risk of entrapping Japan into unwanted military conflicts and repeatedly questioned Kishi

122 World Bank Data, *available at* <https://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=JP>, (last visited May 24, 2020).

123 Gustafsson, Hagström, Hanssen, *supra* note 142.

on the legitimacy of the revision during Diet sessions.¹²⁴ According to an Asahi Shimbun poll conducted in January 1960, 38 percent of the respondents agreed that the revised treaty increased the possibility of Japan becoming involved in a war, while 27 percent did not.¹²⁵ Another poll shows that the percentage of Japanese who had become concerned about the risk of entrapment stemming from the U.S.-Japan alliance jumped from 15 percent in 1959 to 38 percent in 1960.¹²⁶ The tipping point was Kishi's authoritarian moves that triggered Japan's anti-traditionalist sentiment.¹²⁷ On 19 May, the Kishi Cabinet decided to force the ratification of the revised treaty in the Diet by ordering the police to block opposition party members who were trying to filibuster the deliberations. As public demonstrations broke out, Kishi availed himself of the SDF to quell them. The authoritarian measures that Kishi relied on to secure ratification of the revised treaty angered Japanese people, many of whom joined by far the largest demonstration in postwar Japan. One estimate indicates that as many as 330,000 people participated in a rally around the Diet on 18 June, the day before the treaty took effect.¹²⁸ Despite having secured ratification of the revised treaty, Kishi took full responsibility for the turmoil and had to step down. After the incident, Liberal Democratic Party (LDP), the conservative party in power, showed much restraint in their ideological and military agendas.¹²⁹

Peace education has played a central role in institutionalizing Japan's pacifism, just as it has been relevant to an explanation of why military establishments in many other countries are so rarely questioned.¹³⁰ Hagström and Isaksson opine that if collective identities are negotiated and emerge through discourse, then textbook narratives are one crucial form of discourse that reaches all the citizens of a polity.¹³¹ Since the latter 1940s, Japan's mass media and its educational system at each level have taught the young to respect pacifism, human rights, and

124 Yasuhiro Izumikawa, *Explaining Japanese Antimilitarism - Normative and Realist Constraints on Japan's Security Policy*, 35 *Int'l Sec.* 123, 160 (2010).

125 Asahi Shimbun Yoronchosashitsu, *Mini Yonjunen no Nagare* [Forty years of public opinion], at 112 (Asahi Shimbunsha 1986).

126 NHK Hoso Yoron Chosasho, ed., *Zusetu Sengo Yoronshi* [Graphic explanations of postwar public opinion], at 169 (NHK Shuppan 1982).

127 Izumikawa, *supra* note 149.

128 Masumi Ishikawa, *Sengo Seijishi* [Postwar political history], at 93 (Iwanami Shoten 1995).

129 Izumikawa, *supra* note 149, at 138.

130 Beer, *supra* note 101, at 828.

131 Linus Hagström & Erik Isaksson, *Pacifist Identity, Civics Textbooks, and the Opposition to Japan's Security Legislation*, 45 *J. Japanese Studies* 52, 55 (2019).

popular sovereignty. Teachers have displayed the value of peace to generations of Japanese and have often arranged school trips to peace museums in Hiroshima, Nagasaki and Okinawa. While depictions of Japanese aggression are limited in such exhibitions, they nonetheless represent war as an inherently bad and horrific endeavor with no heroes.¹³² After an extensive study of Japan's civics textbooks of 1990-2012, Hagström and Isaksson conclude that the public outcry against remilitarization and the support for pacifism in Japan can be interpreted as a product of the way in which most civics textbooks continue to characterize the Japanese self as pacifist and democratic in contrast to Japan's belligerent and authoritarian past.¹³³ For instance, only 11 percent of Japanese respondents to a 2015 survey stated that they would be willing to fight for their country.¹³⁴

It is worth mentioning that from the outset Japan's courts have effectively relinquished responsibility for interpreting or enforcing Article 9 by erecting onerous jurisdictional barriers. The 1953 *Sunakawa* case before Japan's Supreme Court affirmed the political aspect of Article 9 without, however, establishing any standards for defining its legal parameters. The Court unanimously held that Japan's right of self-defense was constitutional. It also added that unless the policies or actions constituted an unmistakable or "clear" violation of Article 9, the lower courts were to defer to the judgment of the political branches.¹³⁵ Since the *Sunakawa* case, the issue has been resolved as a political decision by the Government in power.¹³⁶ Yet as Craig Martin observes, the recourse to the judicial branch is not so much an attempt to secure the enforcement of Article 9 as a legal norm, but rather to attract popular attention to the contested nature of the action, and to trigger "the powerful norm in Japan against overriding minority political views in a majoritarian fashion."¹³⁷ In this sense, litigation is a means of reinforcing and highlighting the constitutive social norms inherent in and associated with Article

132 See generally Miki Ishikida, *Toward Peace: War Responsibility, Postwar Compensation, and Peace Movements and Education in Japan* (iUniverse Pub 2005); Takashi Yoshida, *From Cultures of War to Cultures of Peace: War and Peace Museums in Japan, China, and South Korea* (MerwinAsia 2014); See more Karl Gustafsson, *Narratives and Bilateral Relations: Rethinking the "History Issue" in Sino-Japanese Relations*, Ph.D. thesis, Dept. Pol. Sci. (Stockholm Univ. 2011).

133 Hagström & Isaksson, *supra* note 156, at 50-58.

134 Giulio Pugliese & Aurelio Insisa, *Sino-Japanese Power Politics: Might, Money and Minds*, at 131 (Palgrave Macmillan 2017).

135 Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, no. 27660683, 13 Keishū 3225 (Japan), translated with commentary in John Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions 1948-60*, at 298 (U. Wash. Press 1964).

136 John Haley, *Waging War: Japan's Constitutional Constraints*, 14 Const. F. 18 (2005).

137 Martin, *supra* note 121, at 341-342.

9 to influence policy-making.

To be fair, albeit the limited role in dictating the pacifist principle, Japan's courts have done their part to nurturing the peace sentiment in the country. In 1997, the Supreme Court held that the Ministry of Education could not bar the mention of the notorious Unit 731 in Japanese textbooks. Unit 731 used Chinese citizens in cruel biological weapon experiments during World War II.¹³⁸ Concerning human rights, a Tokyo High Court decision held that in peacetime, there is not a higher public interest in the activities of the Defense Agency than in those of civilian airports or other government agencies. The Court found that noise pollution is a general public concern, and noise pollution from military aircraft, which violates the personal rights of citizens, is not permissible.¹³⁹

2. The Post-Cold-War Era

In the post-Cold-War Japan, attitudes and sentiments towards pacifism have been gradually changing. All major Japanese newspapers' polls found that, since 1993, more people have favored the amendment of the Constitution than opposed it.¹⁴⁰ Many factors contribute to this change, including growing disharmonies between the text and the fast-changing world.¹⁴¹

As the imminent threats faded away, the anti-pacifists have portrayed Japan in another dystopian narrative, that pacifism would make Japan an "irresponsible" second-tier state. The anti-pacifists capitalized on the 1991 Gulf War and Japan's apparent reluctance to take military action in Iraq to attack Article 9 supporters. Japan's enormous financial contribution was famously characterized as "too little too late,"¹⁴² or "chequebook diplomacy," and U.S. officials stated that Japan would face continued criticism "unless Japanese flags fly in the Gulf."¹⁴³ An influential Japanese politician Ichirō Ozawa added fuel to the fire,

138 See more Sheldon Harris, *Factories of Death, Japan's Secret Biological Warfare Projects in Manchuria and China, 1932-1945*, (Routledge 2002).

139 Tokyo High Court, *Asahi Shimbun* (evening ed.) Jul. 15, 1987.

140 Susumu Wada, *Shimbunsha no seron chōsa o yomu* [Reading public opinion polls by newspapers] (Oct. 30, 2000), available at <http://www.jca.apc.org/~kenpoweb/articles/wada103000.html>, (last visited May 24, 2020).

141 See more <https://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf>, (last visited May 24, 2020).

142 Ministry of Foreign Affairs, *Diplomatic Bluebook* (1991), available at <https://www.mofa.go.jp/policy/other/bluebook/1991/1991-2-2.htm> (last visited May 24, 2020).

143 Amy Catalinac, *Identity Theory and Foreign Policy: Explaining Japan's Responses to the 1991 Gulf War*

“[h]ow much of the cost of maintaining peace and freedom has postwar Japan borne? Hardly any. Yet Japan has reaped the harvest of peace and free world markets more than any other nation.”¹⁴⁴ Anti-pacifists also jumped on the recent assertiveness of China and North Korea to play to people’s fears. In the words of ultra-conservative pundit Sakurai Yoshiko, “[h]ow would these people, who maintain that Article 9 has safeguarded the peace and security of Japan, explain the North Korean abductions of Japanese citizens, or the alarming realities of the East and South China Seas where China boisterously is endeavoring to change the existing order?”¹⁴⁵

Article 9 supporters have been depicted as “peace idiots” (*heiwa baka*) or “irresponsible optimists” sitting in an ivory tower.¹⁴⁶ As the U.S. pundit Jason Morgan wrote in a book published in Japanese, “The Japanese people should be ashamed of the Japanese constitution.”¹⁴⁷ “Japan has not been protected by Article 9 of the Constitution ... What has really protected Japan’s peace are the Self-defense Forces and the U.S. troops stationed in Japan.”¹⁴⁸ Pacifism has thus transformed “from an object of pride to one of shame.”¹⁴⁹

After the 9/11 terrorist attacks, the Koizumi Cabinet dispatched the SDF to support the U.S. military in the Indian Ocean. The Air SDF also provided transportation for U.S. forces in Iraq from December 2003 to December 2008. This was the first time that the SDF had been dispatched to a war zone since national independence, although the Japanese government refused to admit it.¹⁵⁰ In 2008, the Nagoya High Court dismissed a case due to the plaintiff’s lack of standing. That said, in its analysis, the Court opined that the Iraq airlifts violated Article 9 of the Constitution because the Air SDF was operating around Baghdad airport –

and the 2003 U.S. War in Iraq, 35 Pol. & Pol’y 58, 61 (2007).

144 See generally Ichiro Ozawa, *A Blueprint for a New Japan: The Rethinking of a Nation* (Kodansha 1994).

145 Yoshiko Sakurai, Abe Explains Japan Needs New “Peace Legislation” Now (Yoshiko Sakurai Official Website 2015), available at <https://en.yoshiko-sakurai.jp/2015/09/25/6893> (last visited May 24, 2020).

146 Karl Gustafsson, Linus Hagström, Ulv Hanssen, Long Live Pacifism! Narrative Power and Japan’s Pacifist Model, 32 Camb. Rev. Int’l Aff. 502, 520 (2019).

147 Mogan & Jeison, *Nihon koku kenpo wa nihonjin no haji de aru* [The Japanese constitution is the shame of the Japanese people], at 187 (Goku shuppan 2018), cited in Karl Gustafsson, Linus Hagström, Ulv Hanssen, *Id.*, at 510.

148 *Id.* at 195-196.

149 Gustafsson, Hagström, Hanssen, *supra* note 171, at 510-512.

150 Judgment of H18 (ne) No. 499 Nagoya High Ct., Apr. 17, 2008, available at <http://www.loc.gov/law/foreign-news/article/japan-high-court-calls-air-self-defense-force-activities-in-iraq-unconstitutional/> (last visited May 24, 2020).

a combat region – where airplanes were often subject to attack by militants and the Air SDF activities were in too close proximity to combat activities so that they were regarded as a part of them.¹⁵¹ Since the case was dismissed, the Government could not do anything about the Court's opinion. This move confirms the observation that recourse to the judiciary aims to draw attention to the contested nature of government military action, rather than legally enforcing Article 9. Japanese courts' legitimacy may be at risk if they dictate the nature of Article 9, the Government may go around the decisions and move ahead with its agenda. Therefore, the courts opt for giving an opinion as a legitimate source for other claimants to rally public movements.

Since assuming prime-ministership in 2012, Shinzo Abe, the grandson of the former Prime Minister Nobusuke Kishi, has never distanced himself from revisionist goals.¹⁵² In terms of history education, he pushed for a revision of the history education by establishing the Council for the Implementation of Education Rebuilding to spearhead the reform on moral and patriotic education. A plan was announced to revise the textbook screening process for elementary, junior, and high schools in line with the educational objectives of the revised Fundamental Law of Education, including the promotion of patriotism.¹⁵³

On top of that, in 2012, Abe consulted the then-chief of the Cabinet Legislation Bureau, Tsuneyuki Yamamoto, on the constitutional interpretation of Article 9. Yamamoto duly repeated the view that the use of the right of collective self-defense is unconstitutional. He strongly contends that a constitutional amendment is needed if Japan wants to embark on that path.¹⁵⁴ In August 2013, Abe appointed Yamamoto as an Associate Justice of the Supreme Court.¹⁵⁵ Unsurprisingly, the next chief, former diplomat Ichirō Komatsu made a substantial

151 *Id.*

152 Yuka Hayashi, For Japan's Shinzo Abe, Unfinished Family Business, *Wall Street Journal* (Dec. 11, 2014), available at www.wsj.com/articles/for-japans-shinzo-abe-unfinished-familybusiness-1418354470 (last visited May 24, 2020); Reiji Yoshida, Formed in Childhood, Roots of Abe's Conservatism Go Deep, *Japan Times* (Dec. 26, 2012), available at www.japantimes.co.jp/news/2012/12/26/national/formed-in-childhood-roots-of-abes-conservatism-go-deep (last visited May 24, 2020).

153 Michal Kolmaš, Identity Change and Societal Pressures in Japan: The Constraints on Abe Shinzo's Educational and Constitutional Reform, 33 *Pac. Rev.* 185, 215 (2020).

154 See more <https://www.japantimes.co.jp/news/2013/08/21/national/amendment-needed-for-shift-on-self-defense/#.XsQLLWgzY2w> (last visited May 24, 2020).

155 Colin James, For "No War" Article 9, Any Reinterpretation Will Do, available at <https://www.japantimes.co.jp/community/2013/11/20/issues/for-no-war-article-9-any-reinterpretation-will-do/#.XsTmJGgzY2w> (last visited May 24, 2020).

change of the interpretation, which had been deemed inalterable by the predecessors.¹⁵⁶ Under this new interpretation, self-defense is no longer limited to when “an armed attack against Japan occurs,” and Japan may thus be allowed to engage in collective self-defense abroad.

In 2014, the Abe Cabinet revised the ban on arms exports according to the guidelines of the National Security Strategy adopted in 2013. The revision permits arms exports as follows: 1. Do not violate UN resolutions or international agreements that Japan has entered into; 2. Serve to promote peace and international cooperation, or enhance Japan’s own security; and 3. Involve full transparency by the recipient country. As long as transparency is assured, Japan can in principle export weapons and weapons technology to any country not under UN sanctions. As noted by many scholars, the provision that arms exports must serve the promotion of peace or enhance Japan’s own security is so vague that it is hard to imagine how it could ever function as a restraint if the other two conditions are met.¹⁵⁷ Since most countries have adopted similar principles on transparency and UN sanctions, the arms export principles have ceased to meaningfully differentiate Japan from other countries.

In 2015, despite the opposition, the constitutional reinterpretation still cleared the way for the National Diet of Japan, controlled by the LDP led by Prime Minister Abe and its coalition partner, Komeito, to enact eleven bills which enable the government to exercise the right of collective self-defense. The bills allow the SDF, among other things, to take charge of logistics for foreign military forces waging wars, even use force in collective self-defense. To this day, no SDF member has fired a shot against an enemy while abroad. That track record may soon be reversed since the SDF’s rules of engagement are loosened. In 2017, referring to the new security environment, Abe announced to scrap Japan’s one percent GDP defense spending cap.¹⁵⁸

It should be noted that along his campaign trail, Prime Minister Shinzo Abe has claimed that the new security policy, so-called “proactive pacifism” (*sekkyokuteki heiwashugi*), is a continuity, not break from Japan’s long-standing pacifism. Abe constantly uses familiar words such as ‘pacifism’ (*hiwashugi*) and

¹⁵⁶ Hasebe, *supra* note 122, at 125.

¹⁵⁷ Gustafsson, Hagström, Hanssen, *supra* note 142, at 145-147.

¹⁵⁸ John Wright, Abe Scraps Japan’s 1 Percent GDP Defense Spending Cap (Mar. 29, 2017), *available at* <https://thediplomat.com/2017/03/abe-scraps-japans-1-percent-gdp-defense-spending-cap/> (last visited May 24, 2020).

‘peace state’ (*heiwa kokka*) during deliberations in the Diet, apparently in a bid to signal that the new policy still lives up to the Peace Constitution. However, taken all the recent developments together, it rather symbolizes a rupture with the long-held understanding of Japan’s constitutional identity.

In terms of the informal amendment of Article 9 through reinterpretation, as remarked by Rosalind Dixon and Guy Baldwin, there was an inadequate political competition to secure the legitimacy of such informal changes.¹⁵⁹ Crucially, the dominant position of the LDP in the Diet rendered opposition to the relevant bills almost entirely ineffective. In the lower house, the LDP–Komeito coalition, with its comfortable majority, pushed the bills through with ease. It is also suggested that the LDP won Diet elections despite a lack of popular support for the Article 9 reform. The LDP won the lower house election in 2014, but polls found that 65 percent thought the party was reelected because it was “less unsatisfactory” than other options.¹⁶⁰ Turnout was significantly lower than usual, at 52.66 percent, suggesting a disengaged public. These figures showed that the LDP’s victory was largely thanks to voters’ disappointment with opposition parties. In the upper house election in 2016, polls showed only 41 percent supported the Abe Cabinet, and turnout was low at 54.70 percent, with turnout among voters under twenty a particularly poor 45.45 percent.¹⁶¹ Such a result in both elections makes plain that the public, lacking confidence in the opposition, voted for Abe not because of their view towards Article 9.¹⁶²

The re-pivoting of Japan’s self-defense stance has been received in doubt by Japanese people. An Asahi Shimbun poll conducted in June 2014 (prior to the Cabinet decision) and presenting a binary choice on whether to exercise collective self-defense, found 56% opposed, with only 28% in favor.¹⁶³ However, particularly unpopular was the method of reform: in the same poll, 67% opposed

159 Rosalind Dixon, Guy Baldwin, Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate, 67 *Amer. J. Comp. L.* 145, 176 (2019).

160 See Low Voter Turnout Mars Abe’s Claim of Election Triumph (Dec. 17, 2014), available at www.japantimes.co.jp/news/2014/12/17/national/politics-diplomacy/low-voter-turnout-mars-abes-claim-election-triumph/ (last visited May 24, 2020).

161 See Turnout Rate Among New Teen Voters Was a Meager 45%, Survey Shows (Jul. 12, 2016), available at www.japantimes.co.jp/news/2016/07/12/national/politics-diplomacy/turnout-rate-among-new-teen-voters-meager-45-survey-shows/ (last visited May 24, 2020).

162 Dixon & Baldwin, *supra* note 184, at 170–171.

163 Mataka Kamiya, Japanese Public Opinions About the Exercise of the Right of Collective Self-Defense (Sep. 25, 2014), available at www.japanpolicyforum.jp/archives/politics/pt20140925231907.html (last visited May 24, 2020).

“changing the interpretation of rather than amending the Constitution,” with only 17% in favor.¹⁶⁴ A long-running poll on constitutional revision in the Yomiuri Shimbun indicated support for “reinterpretation” of Article 9 hovered around 40% throughout the relevant period from 2012 to 2016, with most respondents rejecting reinterpretation in favor of either formal revision or no change.¹⁶⁵

The informal changes generated renewal waves of social movements, with one protest in 2015, outside the National Diet Building in Tokyo attended by as many as 120,000 people, with about 200 protest rallies held nationwide.¹⁶⁶ It was reported that 50,000 demonstrators took to the street at the Rinkai Disaster Prevention Park in Tokyo,¹⁶⁷ and a protest in Okinawa in June 2016 was said to be attended by more than 65,000 people.¹⁶⁸ Protesters expressed their passionate opposition with signs read, “Abandon the war bill!” and “We won’t be fooled again. We won’t go to war again,” worrying that Japan is “becoming like America.”¹⁶⁹ It was reported that over 9 thousand scholars signed up in an appeal issued by an association of scholars opposing the security bills as unconstitutional. The appeal reads:

“The Abe administration has submitted an International Peace Support Bill and an omnibus Peace and Security Legislation Consolidation Bill amending 10 war-related laws for the worse to the Diet, where they are currently being deliberated. Violating Article 9 of the Constitution, these bills would provide for Japan’s Self-Defense Forces to cooperate actively with U.S. and other foreign military operations overseas. We very strongly appeal for the Diet to consider them most carefully and to defeat them in keeping with the

164 Major Security Shift: 9% Satisfied with Collective Self-Defense Debate; Cabinet Support Falls to 43%, Asahi Shimbun (Jun. 23, 2014), *available at* https://web.archive.org/web/20140626033643/http://ajw.asahi.com/article/behind_news/politics/AJ201406230028 (last visited May 24, 2020).

165 Within this period, support for reinterpretation reached a high of 43% in 2014, and a low of 38% in 2016: See Masatoshi Asaoka, Ayumi Teraoka, Japanese Public Opinion on Constitutional Revision in 2016, Council on Foreign Relations (Aug. 1, 2016), *available at* <https://www.cfr.org/blog/japanese-public-opinion-constitutional-revision-2016> (last visited May 24, 2020).

166 See *more* <https://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.XsU3kmgzY2w> (last visited May 24, 2020).

167 See *also* <https://www.rt.com/news/341719-japan-article-constitution-protest/> (last visited May 24, 2020).

168 See *also* <https://www.voanews.com/east-asia-pacific/anti-american-protests-japan-reflect-opposition-abe-ruling-party> (last visited May 24, 2020).

169 Jake Adelstein, In Japan, Protests Intensify as Vote Nears on “War Bills,” LA Times (Sep. 15, 2015), *available at* <https://www.latimes.com/world/asia/la-fg-japan-protests-20150915-story.html> (last visited May 24, 2020).

Constitution.”¹⁷⁰

Social groups also strongly opposed the bills as unconstitutional. Grass-roots organizations like Mothers Against War appeared, bearing antiwar posters with a message for the government: “We won’t let you kill anyone’s child.”¹⁷¹ The Movement to Save Article 9 is sustained by a range of organizations and networks, including the Article 9 Association, comprising over 7 thousand affiliated subgroups nationwide; the “Students Emergency Action for Liberal Democracy”; the “Do Not Let Japan Wage War, Do Not Destroy Article 9” groups; and the Combined Action Committee.¹⁷² Movement actors have engaged in a series of activities regarding Article 9, such as organizing talks, seminars, and large-scale conferences; distributing pamphlets; collecting supporting signatures; lobbying local assemblies; and holding both small and large-scale demonstrations. And yet the outcome of these interactions remains to be seen.

V. Concluding Remarks

This article has fleshed out the theoretical framework to locate the identity of a constitution. Drawing on Jacobsohn’s work, it refines certain points to extend constitutional identity theory for a better understanding of other constitutional settings. Putting the theory in perspective, it probes pacifism as an identity of Japan’s Constitution through a comprehensive reading of its constitutional text, historical and contextual narratives. At the same time, it also describes and analyzes the dynamic of this identity in Japan’s constitutional discourses to show its overstretch in scope.

From the outset, Japan’s pacifism as constitutional birthmark is the result of a series of complex interactions and negotiations between external influence and local actors. The legislative process of Article 9 is telling in the way that both sides of the Pacific could hardly be regarded as “pacifist” in the strict sense. For pragmatic purposes, the pacifist principle was a must-have to allay the international community’s concerns. The Japanese leaders, on the other hand, maneuvered to “Japanize” the provision to not only soften the “imposed” language

170 See also http://anti-security-related-bill.jp/index_en.html (last visited May 24, 2020).

171 Dixon & Baldwin, *supra* note 184.

172 Daiki Shibuichi, The Article 9 Association, Leftist Elites, and the Movement to Save Article 9 of Japan’s Postwar Constitution, 34 *East Asia* 153, 158 (2017).

but also serve as an alternative strategy. In this light, Article 9 reflects less a unilateral imposition than a collaboration between the Japanese and occupation authorities.¹⁷³ Regardless of the original motives, pacifism was fast becoming the cornerstone of postwar Japan's constitutional identity.

Evidently, Japan's peace environment should not be taken for granted. In the postwar era, one of the important actors that helped sustain the environment was the U.S. Without the U.S. military backing, together with the volatility of the Cold War, Japan might have not had the choice to focus exclusively on economic recovery, but come back to the militarist path that had anchored them down.

However, it is the Japanese people who have passionately translated pacifism from the text into the practice. This identity has been cultivated in the structuring of Japanese constitutional way of life. It has been embedded in state policies as the peace-loving country, social movements, and social groups as the peace-loving people in the eyes of the world. In the words of Edwin Reischauer, the U.S. Ambassador to Japan, "today no people surpass the Japanese in their devotion to pacifism. It is their great ideal, supported by both their emotions and their intellects."¹⁷⁴

For sure, Article 9 has never been designed with the intention to relinquish the right of self-defense. In other words, Japan's pacifism was never absolute, as the country has possessed military capacity since 1950. Instead, it has been relative in the sense that Japan's security policies should be more constrained than those of other countries.¹⁷⁵ A Japanese identity was constructed based on the imposed text has naturally turned into national pride. While these security policy restrictions did not make Japan pacifist in the absolute sense, as Karl Gustafsson *et al.* observe, the Japanese are able to identify themselves as uniquely peaceful and different from both great powers and Japan's own militarist past.¹⁷⁶ Article 9 has successfully withstood the test of time despite having been battered and bent to permit an increasingly expansive interpretation, providing the most enduring platform for the postwar constitutional identity of Japan.

As constitutional disharmonies have intensified, the long-held understanding of pacifism is changing. In the post-Cold-War era, there has been a lack of

173 Hahm & Kim, *supra* note 102, at 80-89.

174 Edwin Reischauer, *The Japanese Today: Change and Continuity*, at 352 (Belknap Press Harv. U. 1988).

175 Gustafsson, Hagström, Hanssen (2019), *supra* note 171, at 502-520.

176 *Id.*

meaningful dialogue and political competition to keep the conservative ideology in check. Hence, the powerful LDP and its coalition have been able to forge ahead of their agendas. To safeguard or amend pacifism, many stakeholders have participated in constitutional dialogue in one way or another. Anti-pacifists argue the fast-changing world has caught Japan off guard, and amendments are thus needed to adapt to the new environment. In contrast, movement actors draw on the aspirations of Article 9 and the long-held identity as a peace-loving country to frame their counter-arguments. To borrow the words of the Indian Supreme Court, “the Constitution is a precious heritage; therefore, you cannot destroy its identity.” The story of constitutional changes and constitutional mobilization in Japan is far from settled, and its outcome remains to be seen.

Bibliography

Constitutions

Nihonkoku Kenpō [The Constitution of Japan]

Grundgesetz [The Basic Law of Germany]

Case laws

His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., 4 SCC 225 (1973).

BVerfGE *Lisbon* 2 be 2/08 (Eng) (2009).

Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, no. 27660683, 13 Keishū 3225 (Japan), translated with commentary in John Maki, *Court and Constitution in Japan: Selected Supreme Court Decisions 1948-60*, at 298 (University of Washington Press 1964).

Judgment of H18 (ne) No. 499 Nagoya High Ct., 17 Apr 2008, *available at* <http://www.loc.gov/law/foreign-news/article/japan-high-court-calls-air-self-defense-force-activities-in-iraq-unconstitutional/> (last visited May 24, 2020).

Secondary Literature

Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press 1981).

Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press 1988).

Alejandro Arnaiz, Carina Llivina (eds), *National Constitutional Identity and European Integration* (Intersentia Publishing, 2013).

Amy Catalinac, *Identity Theory and Foreign Policy: Explaining Japan's Responses to the 1991 Gulf War and the 2003 US War in Iraq*, 35 *Politics and Policy* (2007).

András Sajó & Renata Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing, 2010).

Bidyut Chakrabarty, *India's Constitutional Identity: Ideological Beliefs and Preferences* (Routledge 2019).

- Bui N. Son, *Globalization of Constitutional Identity*, 26 *Washington International Law Journal* (2017).
- Carol Gluck, *The Idea of Showa*, in Carol Gluck, Stephen R. Graubard (eds.), *Showa: The Japan of Hirohito* (W.W. Norton & Co., 1990).
- Chaihark Hahm, Sung Ho Kim, *Making We the People Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge University Press 2015).
- Christian Calliess, Gerhard van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019).
- Christian Tomuschat, *The Ruling of the German Constitutional Court on the Treaty of Lisbon*, 10(8) *German Law Journal*, at 1262 (2009).
- Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 *University of Pennsylvania Journal of International Law* (2008).
- Craig Martin, *The Case Against Revising Interpretations of the Japanese Constitution*, available at <https://apjjf.org/-Craig-Martin/2434/article.pdf>, (last visited May 24, 2020).
- Daiki Shibuichi, *The Article 9 Association, Leftist Elites, and the Movement to Save Article 9 of Japan's Postwar Constitution*, 34 *East Asia* (2017).
- David Landau (2013), *Abusive Constitutionalism*, 47 *UC Davis Law Review*.
- David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 *Texas Law Review* (2009).
- Denis Galligan, Mila Versteeg (eds.), *The Social and Political Foundations of Constitutions* (Cambridge University Press 2013).
- Derek van Hoften, *Declaring War on the Japanese Constitution: Japan's Right to Military Sovereignty and the United States' Right to Military Presence in Japan*, 26 *Hastings International and Comparative Law Review* (2003).
- Domenico Amirente (ed.), *South Asian Constitutional Systems*, at 1-6 (Eleven International Publishing 2020).
- Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (W. W. Norton & Company 1989).
- Edwin Reischauer, *The Japanese Today: Change and Continuity* (Belknap Press of Harvard University 1988).

- Ellen Paul, Fred Miller, Jeffrey Paul (eds.), *What Should Constitutions Do?* (Cambridge University Press 2011).
- Ernst von Hippel, *The Role of Natural Law in the Legal Decisions of the German Federal Republic*, 4 *Natural Law Forum* (1959).
- Far Eastern Commission, *3 International Organization* (1949).
- Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 *Connecticut Law Review* (2005).
- Gary Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).
- Geoffrey Brennan, Jose Casas Pardo, *A Reading of the Spanish Constitution* (1978), 2(1) *Constitutional Political Economy* (1991).
- Giulio Pugliese, Aurelio Insisa, *Sino-Japanese Power Politics: Might, Money and Minds* (Palgrave Macmillan 2017).
- Gordon Wood, *The Creation of the American Republic* (University of North Carolina Press 1969).
- Hans Agné, *Democratic Founding: We the People and the Others*, 10 *International Journal of Constitutional Law* (2012).
- Heinz Klug, *Constitutional Identity and Change*, 47 *Tulsa Law Review* (2011).
- Herbert Bix, *Hirohito and the Making of Modern Japan* (Harper Collins 2009).
- Ichiro Ozawa, *A Blueprint for a New Japan: The Rethinking of a Nation* (Kodansha, 1994).
- James Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 *Law and Contemporary Problems* (1990).
- Jeffery K. Tulis, Stephen Macedo (eds), *The Limits of Constitutional Democracy* (Princeton University Press 2010).
- John Dower, *Embracing Defeat: Japan in the Wake of World War II* (W. W. Norton & Company, 2000).
- John Dower, *Empire and Aftermath: Yoshida Shigeru and the Japanese Experience, 1878–1954* (Harvard University Press, 1979).
- Andrew Gordon (ed.), *Postwar Japan as History* (University of California Press, 1993).

- John Haley, *Waging War: Japan's Constitutional Constraints*, 14 *Constitutional Forum* (2005).
- John Ikenberry, *American hegemony and East Asian order*, 58 *Australian Journal of International Affairs* (2004).
- John Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 *Law and Contemporary Problems* (1990).
- Karl Gustafsson, Linus Hagström, Ulv Hanssen, *Japan's Pacifism Is Dead*, 60 *Survival* (2018).
- Karl Gustafsson, Linus Hagström, Ulv Hanssen, *Long Live Pacifism! Narrative Power and Japan's Pacifist Model*, 32 *Cambridge Review of International Affairs* (2019).
- Karl Gustafsson, *Narratives and Bilateral Relations: Rethinking the "History Issue" in Sino-Japanese Relations*, PhD thesis, Department of Political Science (Stockholm University 2011).
- Kenneth B. Pyle, *Japan Rising: The Resurgence of Japanese Power and Purpose* (The Century Foundation, 2007).
- Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998).
- Lawrence Beer, John Maki, *From Imperial Myth to Democracy: Japan's Two Constitutions - 1889–2002* (University Press of Colorado 2002).
- Lawrence Beer, *Peace in Theory and Practice Under Article 9 of Japan's Constitution*, 81 *Marquette Law Review* (1998).
- Linus Hagström, Erik Isaksson, *Pacifist Identity, Civics Textbooks, and the Opposition to Japan's Security Legislation*, 45 *The Journal of Japanese Studies* (2019).
- Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999).
- Matthew Palmer, *What is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders*, 17 *Public Law Review* (2006).
- Michal Kolmaš, *Identity Change and Societal Pressures in Japan: The Constraints on Abe Shinzo's Educational and Constitutional Reform*, 33 *The Pacific Review* (2020).
- Michel Rosenfeld, András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

- Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge 2010).
- Miki Ishikida, *Toward Peace: War Responsibility, Postwar Compensation, and Peace Movements and Education in Japan* (iUniverse Pub 2005).
- Miyazawa Kiichi, *Secret Talks Between Tokyo and Washington: The Memoirs of Miyazawa Kiichi, 1949–1954*, translated by Robert D. Eldridge (Lexington Books, 2007), at 31.
- Osamu Nishi, *The Constitution and the National Defense Law System in Japan*, at 73 (Seibundo Pub. Co, 1987).
- Patrick Boyd, Richard Samuels, *Nine Lives?: The Politics of Constitutional Reform in Japan*, at 17–26 (2005), *available at* <https://www.eastwestcenter.org/publications/nine-lives-politics-constitutional-reform-japan> (last visited May 24, 2020).
- Patrick Glenn, *Legal Traditions of the World Sustainable Diversity in Law* (Oxford University Press 2010).
- Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).
- Ray Moore, Donald Robinson, *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (Oxford University Press 2004).
- Robert Post, *The Supreme Court, 2002 Term - Forward: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *Harvard Law Review* (2003).
- Rosalind Dixon, Guy Baldwin, *Globalizing Constitutional Moments? A Reflection on the Japanese Article 9 Debate*, 67 *The American Journal of Comparative Law* (2019).
- Sheldon Harris, *Factories of Death, Japan's Secret Biological Warfare Projects in Manchuria and China, 1932-1945* (Routledge 2002).
- Shigenori Matsui, *Fundamental Human Rights and 'Traditional Japanese Values': Constitutional Amendment and Vision of the Japanese Society*, 13 *Asian Journal of Comparative Law* (2018).
- Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press 2006).
- Takashi Yoshida, *From Cultures of War to Cultures of Peace: War and Peace Museums in Japan, China, and South Korea* (MerwinAsia 2014).
- Tatsuo Sato, *The Origin and Development of the Draft Constitution of Japan*, 24 *Contem-*

porary Japan (1956).

Theodore McNelly, *The Origins of Japan's Democratic Constitution* (University Press of America, 2000).

Thomas Kellogg, *Arguing Chinese Constitutionalism: The 2013 Constitutional Debate and the Urgency of Political Reform*, 11 *University of Pennsylvania Asian Law Review* (2016).

Tom Ginsburg, Daniel Rockmore, Nick Foti, *We the Peoples: The Global Origins of Constitutional Preambles*, 46 *George Washington International Law Review* (2013).

Tom Ginsburg, *Studying Japanese Law because It's There*, *University of Chicago Public Law & Legal Theory Working Paper No. 294* (2010).

Tom Ginsburg, Rosalind Dixon, *Comparative Constitutional Law – Research Handbooks on Comparative Law* (Edward Elgar Publishing 2011).

Tommaso Pavone, *Constitutional Identity: An Overview and Some Conceptual Concerns*, available at https://scholar.princeton.edu/sites/default/files/tpavone/files/jacobsohn-_constitutional_identity_critical_review.pdf, (last visited May 24, 2020).

Esin Öricü, David Nelken (eds.), *Comparative Law: A Handbook* (Hart Publishing 2007).

Yaniz Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2019).

Yasuhiro Izumikawa, *Explaining Japanese Antimilitarism - Normative and Realist Constraints on Japan's Security Policy*, 35 *International Security* (2010).

Yasuo Hasebe, *Book Review on Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea by Chaihark Hahm and Sung Ho Kim*, *Asian Journal of Comparative Law* (2016).

Yasuo Hasebe, *The End of Constitutional Pacifism?*, 26 *Washington Law Review* (2017).

Yasuo Hasebe, *The Supreme Court of Japan - A Judicial Court, Not Necessarily a Constitutional Court*, in *CONSTITUTIONAL COURTS IN ASIA - A COMPARATIVE PERSPECTIVE* 289 (Albert Chen & Tom Ginsburg ed., Cambridge Univ. Press 2018).

Yoichi Higuchi (ed.), *Five Decades of Constitutionalism in Japanese Society* (University of Tokyo Press 2001).

Hyperlinks

<https://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article4647800.ece>, (last visited May 24, 2020).

<https://kyotoreview.org/issue-3-nations-and-stories/the-thai-cultural-constitution/>, (last visited May 24, 2020).

<https://www.theatlantic.com/international/archive/2015/08/emperor-hirohito-surrender-japan-hiroshima/400328/> (last visited May 24, 2020).

http://afe.easia.columbia.edu/ps/japan/bilateral_treaty.pdf, (last visited May 24, 2020).

<https://www.nixonfoundation.org/2015/06/1953-vp-nixon-in-japan/> (last visited May 24, 2020).

<http://www.jca.apc.org/~kenpoweb/articles/wada041202b.html>, (last visited May 24, 2020).

<http://www.jpri.org/publications/workingpapers/wp99.html>, (last visited May 24, 2020).

<https://www.mofa.go.jp/policy/un/disarmament/nnp/>, (last visited May 24, 2020).

<https://www.mofa.go.jp/policy/un/disarmament/policy/index.html>, (last visited May 24, 2020).

<https://data.worldbank.org/indicator/MS.MIL.XPND.GD.ZS?locations=JP>, (last visited May 24, 2020).

<https://www.loc.gov/law/help/japan-constitution/japan-constitution-article9.pdf>, (last visited May 24, 2020).

<https://www.mofa.go.jp/policy/other/bluebook/1991/1991-2-2.htm>, (last visited May 24, 2020).

<https://en.yoshiko-sakurai.jp/2015/09/25/6893>, (last visited May 24, 2020).

<https://www.wsj.com/articles/for-japans-shinzo-abe-unfinished-familybusiness-1418354470>, (last visited May 24, 2020).

<https://www.japantimes.co.jp/news/2012/12/26/national/formed-in-childhood-roots-of-abes-conservatism-go-deep/> (last visited May 24, 2020).

<https://www.japantimes.co.jp/news/2013/08/21/national/amendment-needed-for-shift-on-self-defense/#.XsQLLWgzY2w>, (last visited May 24, 2020).

<https://www.japantimes.co.jp/community/2013/11/20/issues/for-no-war-article-9-any-reinterpretation-will-do/#.XsTmJGgzY2w>, (last visited May 24, 2020).

<https://thediplomat.com/2017/03/abe-scraps-japans-1-percent-gdp-defense-spending-cap/>, (last visited May 24, 2020).

<https://www.japantimes.co.jp/news/2014/12/17/national/politics-diplomacy/low-voter-turnout-mars-abes-claim-election-triumph/>, (last visited May 24, 2020).

<https://www.japantimes.co.jp/news/2016/07/12/national/politics-diplomacy/turnout-rate-among-new-teen-voters-meager-45-survey-shows/>, (last visited May 24, 2020).

<https://www.japanpolicyforum.jp/archives/politics/pt20140925231907.html>, (last visited May 24, 2020).

https://web.archive.org/web/20140626033643/http://ajw.asahi.com/article/behind_news/politics/AJ201406230028, (last visited May 24, 2020).

<https://www.cfr.org/blog/japanese-public-opinion-constitutional-revision-2016>, (last visited 24 May 2020).

<https://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.XsU3kmgzY2w>, (last visited May 24, 2020).

<https://www.rt.com/news/341719-japan-article-constitution-protest/>, (last visited May 24, 2020).

<https://www.voanews.com/east-asia-pacific/anti-american-protests-japan-reflect-opposition-abes-ruling-party> (last visited May 24, 2020).

<https://www.latimes.com/world/asia/la-fg-japan-protests-20150915-story.html>, (last visited May 24, 2020).

http://anti-security-related-bill.jp/index_en.html, (last visited May 24, 2020).

https://www.jpjf.go.jp/j/project/intel/exchange/organize/ceeja/report/13/pdf/13_03.pdf (last visited May 24, 2020).