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A TIME FOR CHANGE?

JAPAN'S "PEACE" CONSTITUTION AT 65

Edited by

Bryce Wakefield





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Photo: A supporter of Article 9 protests outside the National Diet of Japan.

The sign reads: "Don't change Article 9!" © 2006 Bryce Wakefield

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To Sue, Mark, and Henry Levenstein.

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INTRODUCTION

BRYCE WAKEFIELD

Constitutional revision is a perennial topic in Japanese political discourse. In May 2011, the ruling Democratic Party of Japan (DPJ) reopened its constitutional investigation committee after a four-year hiatus. According to its chair, Seiji Maehara, former minister of foreign affairs, the committee was formed to “collect the thoughts of the party” on “constructing afresh the constitution, which forms the basis of our nation.” Maehara declared his intention to present a report of the committee’s findings by March the following year, two months before the 65th anniversary of the constitution’s enactment.¹ Interparty groups also promoted renewed discussion on constitutional change, and there were attempts to reconvene a dormant lower house committee on the topic. The DPJ committee did not, however, meet its proposed deadline. Indeed, shortly after being named as the party’s new policy chief, Maehara stepped down as committee head in September 2011 without ever having convened a meeting.² Nevertheless, the opposition Liberal Democratic Party (LDP), perhaps in an attempt to take political advantage of the lack of a DPJ proposal, released details of its own draft in March 2012 reiterating its already long-standing plans for constitutional revision.

ARTICLE 9 AND THE CREATION OF A “PACIFIST” FOREIGN POLICY

The LDP’s draft is the latest in a long line of proposals for constitutional revision. The constitution was originally drafted by an American committee during Japan’s post-Second World War occupation, and politically motivated calls for revision emerged soon after Japan regained its formal

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independence in 1952.³ These proposals have typically focused on rewriting the constitution's "war-renouncing" Article 9, put in place to prevent Japan from reemerging as a threat to international society. The article "renounces war as a sovereign right of the nation and the threat or use of force as means of settling international disputes." It also states that Japan, in order to attain its objectives as a peaceful member of international society, shall never maintain "land, sea, and air forces, as well as other war potential." The current interpretation of Article 9 links these two clauses, allowing Japan to field armed forces only for non-threatening purposes, including the "minimum necessary capacity for self-defense" (*jiei no tame no hitsuyō saishō gendo no jit-suryoku*) of the nation.

This interpretation was extremely controversial when first formulated in 1954, and indeed, until the 1990s both major opposition Socialist and Communist Parties denied the constitutionality of Japan's Self-Defense Forces (SDF). Labor issues and attempts to forge a neutral foreign policy were priorities for many on the left in 1950s Japan, and their rejection of the armed forces, which they initially saw as both a potential strike-busting force and a symbol of Japan's subordination to American Cold War aims, meant that they would become the strongest supporters of the "peace" constitution in the National Diet. Moreover, the clear anti-revisionist stance of these parties, combined with broad postwar popular support for Article 9, and a reluctance of mainstream conservative elites to stir controversy over defense issues, effectively blocked any attempt at constitutional amendment, a process which must gain the support of two-thirds of the members of both Japan's legislative chambers, as well as a simple majority in a public referendum. From the 1960s to the 1990s, constitutional revision was sidelined as a political issue while Japan focused on its postwar reconstruction and high-speed economic growth.

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Indeed, Article 9 also acted as a powerful normative force that allowed certain Japanese governments to generate additional restraints on the armed forces when politically expedient. These restraints did not necessarily follow from strict interpretations of the text of the constitution, but were said to be in line with its principles. For example, in order to stave off criticism from opposition parties soon after the formation of the armed forces, the Yoshida Shigeru administration vowed to respect a legislative declaration that the forces would not be dispatched overseas, even on non-violent peacekeeping or reconstruction missions, a policy that continued until the early 1990s.⁴ In 1976, Prime Minister Miki Takeo, responding to pressure from within his own ruling LDP to expand Japan's defense budget, extended an existing export restriction on weapons trade with communist nations to all countries, claiming that such action "conformed with the spirit of the constitution."⁵ That same year, Miki also declared a limit on defense spending at 1 percent of gross national product (GNP). Sensitive to criticisms from the United States that Japan was not carrying its share of the burden to provide for the common defense of the region, later LDP governments also framed Japan's non-military investment and development efforts abroad as "comprehensive" contributions to regional and, by extension, national security.⁶ Such policies were the constituents of a wide-ranging "pacifist" stance for Japan, with Article 9 at its core.

ROLLBACK

Some of these constitutionally unstipulated elements of Japan's postwar foreign policy have been rolled back since the end of the Cold War. While Japan still values its comprehensive approach to security and has largely adhered to the 1 percent GNP limit on defense spending since 1976, restrictions on weapons exports, for example, were substantially relaxed in December 2011 in order to allow Japanese companies to engage more thoroughly in international arms manufacturing projects, provided those projects are deemed vital to the defense of Japan. While Japan previously allowed for limited joint defense development with the United States, the new relaxed policy permits cooperation with other countries as projects such as missile defense development are increasingly shared by America's NATO allies and other friends.⁷

The most striking changes over the past two decades, however, have been those made to the roles and functions of the SDF. Although politicians in Japan cautiously probed the possibility of allowing the SDF to participate in peacekeeping missions during the 1980s, criticism of Japanese passivity during the 1991 Persian Gulf War saw Tokyo first dispatch troops overseas in September 1992, to monitor a ceasefire in Cambodia. Since then, the SDF has participated in numerous similar missions, and since 2011 even maintains an overseas base in Djibouti that supports the international anti-piracy operations of its maritime branch off the horn of Africa. Meanwhile, concern that the U.S.-Japan relationship was coming “adrift” in the mid-1990s saw Japan engage in greater defense cooperation with its ally, which only increased after the terrorist attacks on the United States on September 11, 2001. This intensification of alliance cooperation arguably culminated in the Koizumi Junichirō administration’s dispatch of the SDF to Iraq in January 2004, a move that was highly controversial in Japan. Nevertheless, there is now broad consensus on the constitutional legitimacy of the SDF, and most Japanese view overseas dispatch of the forces in non-combat missions as a relatively benign affair. Meanwhile, the SDF’s prominent role in rescue, relief, and reconstruction efforts after the March 11, 2011, tsunami in Japan’s northeast has increased the level of public trust in the forces’ activities.

As a result of such increased activity, many Japanese lawmakers now see Article 9 as overly restrictive, or at best would like to clarify the roles and responsibilities, and indeed stipulate the very existence, of the SDF in the constitution. Much of the debate is centered on allowing the SDF to engage in collective self-defense with the United States. Conservative commentators, including a commission assembled in 2006 by the administration of Prime Minister Abe Shinzō and headed by legal scholar and former Ambassador to the United States Yanai Shunji, suggested that current constitutional interpretations that ban the SDF from coming to the aid of U.S. or other forces under attack by a third party can be changed according to strategic necessity simply by executive fiat.⁸ For many others who

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approve of the rationale behind collective self-defense, however, such “re-interpretation” would fly directly in the face of the explicit constitutional ban on using force to settle international disputes. This latter group, which includes Maehara,⁹ believes that constitutional revision is the only method of appropriately loosening existing restrictions to allow for collective self-defense missions. Still other proponents of revision, such as DPJ political heavyweight Ozawa Ichirō, continue to oppose collective self-defense, but seek clear constitutional revision to sanction SDF engagement in overseas missions mandated by the United Nations, even, perhaps, those which involve combat.¹⁰ When the views of those who continue to simply reject any revisions to the constitution are added to the mix, it is clear that debates surrounding Article 9 are highly complex.

ARTICLE 9 FROM DIFFERENT DIRECTIONS

To add clarity and consider these issues more deeply, the Woodrow Wilson International Center for Scholars hosted a panel discussion in September 2011 on the debate surrounding revision of Article 9. Panelists approached the topic from a variety of directions, considering historical, political, legal, and social aspects of the debate. This publication carries articles written by each of the participants on that panel.

According to **Thomas U. Berger**, associate professor of international relations at Boston University, while “Japan may be more receptive to revision than was true in the past, the forces that oppose taking the step towards revision remain formidable.” Given the expanding missions of the SDF since the early 1990s, many have thought that the Japanese constitution has been “ripe for revision.” However, Berger is careful to note that constitutional change has never been a foregone conclusion in Japan. While external developments, such as the rise of China and increased North Korean delinquency, have strengthened calls among political elites to revise Article 9 in order to better provide for the national defense, many Japanese feel that there are more pressing domestic issues to deal with than constitutional reform.

Indeed, Berger believes that “the prospects are not ideal” for constitutional revision and that “both the Japanese public and many political leaders are wary of reopening the issue.” While polls show that the Japanese public is tolerant of constitutional revision that would more fully permit the

SDF's participation in non-combat peacekeeping operations such as those in Cambodia, a fear of "entanglement" in foreign conflicts means that there is still "little interest in changing Article 9 in order to allow Japan to enter into a closer military alliance with the United States." Meanwhile, polls taken in 2006 showed relative public distaste with constitutional reform plans associated with Abe's overtly nationalist political agenda. The Japanese public at large has been highly skeptical of reform that links the ability to use military strength in overseas operations to a sense of national pride.

Such popular resistance to constitutional change explains why expanded roles for the SDF have instead consistently been enabled through constitutional reinterpretation. In his chapter in this volume, **Christopher W. Hughes**, professor of international politics and Japanese studies at the University of Warwick, outlines the political debate on collective self-defense and Article 9 since the end of the Cold War, describing in detail the often byzantine constitutional explanations various governments have offered in order to permit greater activity on the part of the SDF, with a particular focus on those missions that concern Japan's military cooperation with its American ally. Hughes also shows how attempts to avoid public debate by restricting discussion of the issue to legal and political elites, such as the members of the Yanai Commission, have actually been counter-productive, leading to a perception that conservative figures in Japan are attempting to "introduce collective self-defense through the back door."

But what of future proposals for change? After describing the approach to constitutional revision of the Democratic Party of Japan, the party in power since 2009, Hughes outlines possible directions the debate over revision and reinterpretation could take going forward. He notes that the scenarios that he outlines would each have an impact on Japan's key international relationships in different ways. Moreover, he ends by cautioning those in Washington who are most keen to see Japan cast off its constitu-

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tional restrictions on the use of force that, while constitutional revision may turn Japan into a more active ally, it would also enable Japan to act more autonomously and not always necessarily according to how the United States defines its own interests.

While Japanese conservatives have often tied themselves into knots attempting to revise or reinterpret the constitution, **Craig Martin**, associate professor of law at Washburn University, notes that many liberal supporters of Japan's postwar pacifism have done themselves a disservice by refusing to consider constitutional revision as a method that might help them reinforce the pacifist ideals that they see as central to Japan's national identity. Nevertheless, Martin thinks that any progressive attempt at revision should begin by recognizing Japan's long-standing defense arrangements, as it "is entirely unrealistic for proponents of Article 9 to think that the clock can be turned back with some radical disbandment of the SDF." Indeed, the numerous interpretations allowing greater activity on the part of the SDF create the necessity for clearer boundaries on the scope of the forces' activities, not only to preserve pacifist principles, but also the rule of law. As Martin notes, "a constitutional provision that is in a constant state of violation erodes the credibility and normative power of the entire constitutional framework."

To this end, Martin proposes a possible "progressive alternative" to constitutional reform, outlined in full in an appendix to his article on pages 73 to 75. While he takes no particular stance on whether Japan should change the article to allow for collective self-defense, he does stress the need for clarity around whether the SDF can engage in such missions, as well as whether the forces can take part in collective security operations with UN sanction. Indeed, seeking to "amend Article 9 without making these hard choices, and trying to fudge the issue with such ambiguous terms as 'international cooperation operations,' is precisely the wrong way to proceed." In addition to recognizing the SDF, other amendments to Article 9 should clearly place the forces under civilian control and define the roles and responsibilities of the prime minister as commander-in-chief. Legislative oversight and judicial review of the activities of the SDF, principles currently absent in Japan's constitutional framework and legal practice, could also be added to Article 9, as well as the requirement that the legislature approve any dispatch of the forces on collective security operations. In placing more explicit restrictions on the SDF, and clarify-

ing where responsibility for its actions lies, Martin believes that Japan can recognize its armed forces while remaining true to the pacifist intent of its current constitution.

Debates at a political level, sampling of public opinion, or legal analysis can tell us much about the current debate in Japan on the constitution. But how are the issues of constitutional reform and greater scope of the activities of the SDF and Japan's alliance with the United States interpreted in popular discourse, and by those who will be most affected by any change in policy arising from revision? **Sabine Frühstück**, chair and professor of modern Japanese cultural studies at the University of California, Santa Barbara, once assumed that SDF members would uniformly approve of constitutional revision, given their role as defenders of the nation. However, her research, which involved training in close quarters with the forces, revealed that SDF members hold a variety of views on the role of Article 9. While force members are legitimately concerned about restrictions on their ability to defend themselves during deployments, as well as the non-fighting image of the SDF compared with service personnel from other nations, many see Article 9 as preserving the force's identity as an instrument of peace. Views on constitutional revision, even within the SDF, are more nuanced than is usually assumed.

Such complex views have resulted in a significant difference between the public relations efforts on the part of the Japanese and American governments to promote the U.S.-Japan alliance and the SDF in Japan. Frühstück notes that in order "to convince the fearful that they are protected and the peaceful that they need not feel threatened," official public relations efforts by the SDF symbolically arm and disarm the forces in "a series of civilianizing, familiarizing, trivializing and spectacularizing messages about the military's capabilities, roles, and character." This contrasts greatly with official U.S. images of the role of its alliance with Japan. Frühstück believes that because "recent debates about changing Article 9 have also been driven primarily by American, not Japanese, security concerns," American military public relations efforts lack the ambivalence of similar Japanese approaches. In her chapter, she focuses on an official U.S. forces manga aimed at Japanese, noting that it positions the military and the use of force in a context which is severed from Japan's own history, while at the same time infantilizing complex issues such as Japan's support for the use of force by the United States. Frühstück notes that online discussion in Japan, conditioned by conflicting messages

from the Japanese government about the role of the SDF, has greeted this American public relations effort with skepticism.

BE CAREFUL WHAT YOU WISH FOR

Indeed, simplistic ideas about revision of the Japanese constitution often pervade discussion of the issue in Washington and elsewhere. While American policymakers and commentators are careful to note that the Japanese people are the final arbiters on decisions about their own constitution, they generally nevertheless see the eventual revision of Article 9 as a positive step that would forge closer bilateral cooperation between the two allies. Meanwhile, Japan's neighbors view moves toward revision of Article 9 as a further loosening of the restrictions on Japan after its adventurism in Asia during the 1930s and 1940s. Many commentators in these nations, particularly in China, are thus concerned about the prospect of an unbridled Japan. The fact that the lifting of such restrictions may be couched in terms of Japan's cooperation with the United States does not, for obvious reasons, quell concerns in Beijing.

Nevertheless, such views discount the complexity of the debate on revision of Article 9 in Japan. As already noted and as discussed in greater detail in the following chapters, the debate is not just one between anti-revisionists and revisionists, but also among those who favor different versions of revision. Change to Article 9 may well result in a Japan that is more flexible to the demands of the bilateral alliance. But it could also result in more restrictions on the SDF, a mere clarification of the status quo, or less emphasis on the alliance and more on Japan's obligations in UN-sanctioned missions. It might even result in a Japan that is initially free to cooperate with the United States but later uses its freedom and influence on the world stage to strike an independent stance on issues at cross purposes with Washington's objectives. Despite announcements by both major parties in the Japanese political world that they are considering changes to the constitution, what is perhaps most likely, however, is that disagreement on the shape of revision, domestic political problems and distractions, and the lingering attachment of many in Japan to Article 9 will mean that while revision will appear as an issue from time to time, Japan's peace constitution will remain unchanged for the foreseeable future.

NOTES

1 “Minshutō kenpō chōsakai ga rainen sangatsu ni kaiseian,” *Sankei Shinbun*, May 27, 2011, <http://sankei.jp.msn.com/politics/news/110527/stt11052717370006-n1.htm>.

2 “Kenpō rongi ushiromuki minshu chōsakai shusseikisha jūbun no ichi: mae-hara hōshin wa kūtegata,” *Sankei Shinbun*, December 3, 2011, <http://sankei.jp.msn.com/politics/news/111203/plc11120308580007-n1.htm>.

3 The first revision proposal that concentrated on Article 9 was published in February 1953. Before that, there was some discussion of revising other parts of the constitution, including a proposal for revision by Tokyo University scholars as early as 1949 that included changes to Article 9. However, Watanabe Osamu notes that the 1949 proposal is seen as more of a scholarly exercise than the politically motivated proposals that would come later. Watanabe keizai kenkyūsho no kaiken’an: kenpō kaisei kenkyū iinkai, “Kenpō kaisei yōten no shian” First published in 1953 and reprinted in Watanabe Osamu (ed.), *Kenpō “kaisei” no ronten, shiryō de yomu kaikenron no rekishi* (Tokyo: Junpōsha, 2002), 470-472.; See also pp. 420-424 for Watanabe Osamu’s description of early discussions on revision, including his comments on the Tokyo University draft.

4 Diet Records, Shugiin, *Honkaigi*, 57-gō, June 2, 1954, 38.

5 “Buki yushitsu ni kansuru seifu tōitsu kenkai,” February 27, 1976. Ministry of Foreign Affairs, last accessed April 20, 2012, <http://www.mofa.go.jp/mofaj/gaiko/arms/mine/sanngen.html>.

6 Pharr, Susan, “Japanese Aid in a New World Order” in Craig C. Garby and Mary Brown Bullock (eds.) *Japan: A New Kind of Superpower?*, 159-180, (Washington, D.C.: Woodrow Wilson Center Press, 1994) 161.

7 “Buki yushitsu sangensoku no kanwa: seishiki kettei kokusai kyōdō kaihatsu o yōnin,” *Asahi Shinbun*, December 27, 2011, <http://www.asahi.com/politics/update/1227/TKY201112270195.html>. The new policy also allows members of the SDF engaged in peacekeeping operations overseas to “contribute such equipment as heavy machinery and bulletproof vests” to local forces or populations, and to “export patrol boats for piracy counter-measures.”

8 Anzenhoshō no hōteki kiban no saikōchiku ni kansuru kondankai, “Hōkokusho” June 24, 2008. Prime Minister’s Office, 7-8, last accessed April 20, 2012, <http://www.kantei.go.jp/jp/singi/anzenhosyou/houkokusho.pdf>.

9 “Kempō daikujō wa sakujo,” *Yomiuri Shinbun*, September 22, 2005.

10 Ozawa Ichirō, “Ima koso kokusai anzenhoshō no gensoku kakuritsu o” *Sekai* 771 (2007) 148-153.

RIPE FOR REVISION? THE STRANGE CASE OF JAPAN'S UNCHANGING CONSTITUTION

THOMAS U. BERGER

The Japanese constitution represents something of an anomaly in international politics. Forcibly imposed on Japan by a foreign power, it was never intended as anything other than a provisorium, a temporary stop-gap measure designed to create a breathing space in which democracy in Japan could be established and to prevent the adoption of a Japanese proposal that was deemed unacceptable by the U.S. occupation authorities.¹ Hastily drawn up by a team of young lawyers on General Douglas MacArthur's staff, it is written in stilted Japanese and many of its provisions, most notably the famous anti-war clause Article 9, seemed hopelessly idealistic. Yet, despite decades of determined efforts to revise it, and despite numerous changes in Japan's domestic and international political environments, to date the constitution has never been amended.² This stands in sharp contrast with other advanced industrial democracies. For instance, the Federal Republic of Germany has amended its constitution (the Basic Law) over 50 times since its adoption in 1948; the French constitution of 1958 has been revised 17 times. The Japanese constitution stands alone in its immutability.

Why has the Japanese constitution proven so difficult to change? Do the conditions that obtain today make the constitution ripe for revision? In the following I will argue that for much of the post-1945 period a combination of international and domestic political conditions made it extraordinarily difficult to push for revision. Over time these obstacles have been significantly reduced, and constitutional revision today is a real prospect for the first time in over half a century. Nonetheless, while Japan may be more

Thomas U. Berger is associate professor of international relations at Boston University. He is the author of *Cultures of Antimilitarism: National Security in Germany and Japan* (Johns Hopkins University Press, 1998) and is co-editor of *Japan in International Politics: Beyond the Reactive State* (Lynne Rienner Publishers, 2007).

receptive to revision than was true in the past, the forces that oppose taking the step towards revision remain formidable. While in certain respects the current Democratic Party of Japan (DPJ) government may enjoy certain advantages over its Liberal Democratic Party (LDP) predecessors, the party itself remains deeply divided over the issue and there is a remarkable lack of public enthusiasm for taking up the cause of constitutional reform in light of the many other, more pressing problems facing Japan today—above all recovering from the triple disaster of the March 2011 tsunami and its aftermath. Absent a powerful external impetus, it is unlikely that any Japanese government will be able to overcome the considerable inertia that has built up over the issue in the near future.

This chapter will briefly review the conditions that historically have blocked constitutional reform, before examining the extent to which these same conditions may hold today. In conclusion I will offer some thought on what might be the optimal conditions for constitutional revision and what the consequences of revision might be for Japanese political culture and Japan's relations with the outside world.

THE ORIGINS OF CONSTITUTIONAL IMMUTABILITY

Historically, there have been three major obstacles to Japanese constitutional revision.³ One of these has been international-political in nature, and two have been domestic-political.

In terms of Japan's external relations, the Japanese constitution—and Article 9 in particular—has been an extraordinarily useful device for Japanese leaders to deflect U.S. demands for burden sharing. Already in 1950, following the outbreak of the Korean War, Japanese political leaders were pleading that Japan could not support the war effort because of its constitution. These restraints were reinforced in 1954 when the Self Defense Forces were created. The Cabinet Legislative Bureau (CLB), the government office responsible for ensuring that national policy did not contravene the constitution, explained that Article 9 did not prohibit Japan from exercising a country's natural right to self-defense, but that it did limit Japan to maintaining only the minimum level of forces necessary for that purpose. Moreover, the CLB added, the article prevented Japan from participating in collective defense arrangements, like NATO or other traditional alliances in which both partners promise to come to each other's aid. Article 9 thus created a constitutional rationale for a

highly asymmetrical alliance structure in which Japan could work with other countries—for example, the United States—to defend itself without committing itself to helping defend others.

For a country like Japan this made perfect sense. Throughout the Cold War, Japan dreaded the possibility that the United States might drag it into costly and politically unsustainable conflicts in Asia and beyond. At

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the same time, it was relatively sure that the United States would not abandon it because of its central role in containing communism in Asia. Japan could afford to take an effectively free ride on the U.S. global security role, and Article 9 gave a perfect excuse to do so—one that ironically had been supplied by the Americans themselves.

Domestically, the formal and informal barriers to constitutional revision have been formidably high. According to Article 96, revision requires a two-thirds majority in both the upper and lower houses (which no Japanese party has had since 1957), followed by a national referendum in which the majority of the Japanese population votes in favor of amendment. Until recently, even the procedure for such

a referendum has been unclear, and given the fact that Japan has never had a national referendum on any topic, such a vote would be viewed as an unprecedented event. Beyond these formal barriers, the informal structure of Japanese politics makes implementing unpopular reforms very difficult. The dominant party in post-war Japanese politics, the Liberal Democratic Party (LDP) has been highly factionalized, and there were strong incentives for groups to use controversial issues—such as constitutional reform—for their own political advantage. In addition, to arrive at a two-thirds majority requires a coalition of parties, which during the Cold War would necessarily have had to include the Japan Socialist Party (JSP), which adamantly opposed amending the constitution. At no point since the late 1950s has it seemed possible to create such a solid, unified coalition.

Perhaps the most formidable barrier to revision, however, has been ideological. Broadly speaking, from the 1950s on there were three ideological groupings in Japanese politics, each with a very different stance on the issue of constitutional reform. First, there was a loud and influential group in Japanese politics that has advocated constitutional revision on nationalist grounds and the notion that Japan can only become a true and independent nation when it has a constitution written by Japanese and reflecting Japanese beliefs and values. Typically, such nationalist groups have advocated not only abolishing Article 9, but also upgrading the status of the Emperor, strengthening the central government and adding various duties alongside the rights that are enshrined in the current constitution.

Against the nationalists has been arrayed various progressive groups who have bitterly opposed any form of constitutional reform, and particularly change to Article 9, which they view as central to Japan's unique identity as a "peace nation" (*heiwa kokka*). The progressives have long feared that were the constitu-

tion revised, the nationalists would be able to subvert Japanese democracy and open the door to the remilitarization of Japanese foreign policy.

Between these two camps has been a broad spectrum of centrist opinion that has tended to be less ideologically driven in its views of the constitution. Centrists in principle have been more open to the idea of limited constitutional reform, but during the Cold War, while they often aligned with the nationalists on economic issues and in support of the alliance with the United States, they tended to break ranks and form tacit alliances with the progressives whenever it appeared that the nationalists might be in a position to push forward their ideological agenda.

For much of the history of post-1945 Japan, the combination of these forces appeared to place constitutional amendment out of reach. After the 1958 elections, when the militantly progressive JSP won over 35 percent

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of the seats, it became impossible for the conservative LDP to win the two thirds majority needed to revise the constitution. At the same time, while opinion data from the 1950s showed that a plurality of around 40 percent supported revision, after 1957 public opinion turned decisively against revision, with the number opposed to revision outstripping those in favor by considerable margins.⁴ While periodically conservatives raised the constitutional issue, most notably in the late 1970s and the first half of the 1980s, resistance to revision increased dramatically forcing even strongly nationalist leaders such as Prime Minister Nakasone Yasuhiro to abandon the idea.

OBSTACLES TO REVISION TODAY

Much has changed in Japan's domestic and international political environments since the end of the Cold War. Internationally, the old calculus of entanglement versus abandonment (the so-called alliance dilemma) has shifted in ways that have pushed Japan to play an enhanced, if still limited role in international security. Beginning with the 1990-1991 Gulf War, Japan has come under increased pressure to provide more substantial military support to United States, while some in Tokyo believe that the strength of the U.S. commitment to defend Japan has decreased in the absence of the Soviet threat. Consequently, for the first time Japan began to send its forces on overseas missions. Missions and weapon systems (such as tankers capable of in-air refueling), which previously had been defined as violating the constitutional ban on force beyond the minimum needed to defend Japan, are now viewed as acceptable. Just as importantly, Japan's successful conduct of such missions without becoming embroiled in regional conflicts demonstrated to the Japanese public and elites that the armed forces could be trusted not to undermine civilian control and run amok, as they had in the 1930s and 1940s.

At the same time, new regional threats to Japanese security began to emerge, beginning most notably with North Korea, which fired a missile over Japan in 1998, exploded an atomic bomb in 2006, and on more than one occasion threatened to turn Tokyo into a "sea of fire." Even more ominously, the People's Republic of China (PRC) embarked on a massive build-up while pressing territorial claims in the East China Sea. With both Korea and China, what made this increase in military capabilities all the more disturbing was that it came against the backdrop of a growing tide of

nationalist sentiment throughout the region, fueled by bitter disputes over such symbolically laden issues as Prime Minister Koizumi Junichirō's visits to Yasukuni Shrine, a symbol for many in Asia of Japanese colonization, and the way in which Japanese war crimes were downplayed in certain Japanese textbooks. While in terms of actual material capabilities, the Soviet Union posed a greater overall threat than North Korea or the PRC, by the start of the 21st century, Japan's sense of being threatened exceeded that which existed at the height of the Cold War.⁵

Partly in response these external changes, but also because of the near collapse and subsequent protracted stagnation of the Japanese economy, Japan's domestic political environment began to change quickly after the end of the Cold War. For our purposes, the important development to note is the general ideological depolarization of Japanese politics, symbolized most clearly by the collapse of the JSP and the slow decline of the Communist Party of Japan, but also reflected by a more subtle moderation of the Japanese nationalists. While in many respects, Japanese politics became more fluid and unwieldy, the fear that Japanese democracy could wither if either the left or the right found an opening dissipated.

Consequently, both the Japanese public and political elites became more open to considering constitutional reform. Survey data showed a sharp increase in public support for revision, so that by 2002 support for changing the constitution for the first time rose to over 50 percent.⁶ Another sign of depolarization was that the types of proposals for modifying the constitution in ideological terms were more moderate than they had been in the past. According to a careful content analysis of prominent proposals for constitutional reform between 1950 and 1965, as compared to between 1980 and 2005, the percentage of proposals that could be deemed progressive declined 2 percent or nationalist by 17 percent, while more centrist proposals increased by 19 percent to represent 65 percent of all proposals.⁷ In 1999, political leaders, not only in the LDP but also in the more moderate Kōmeitō and the opposition DPJ agreed to allow the creation of the first

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parliamentary committees to investigate constitutional reform. In 2000, the committees (one in the upper house, the other in the lower) began their work, and in 2005 they submitted their reports to the government.

As a result of these trends, by the early 21st century many well informed observers had come to the conclusion that it was only a matter of time until the constitution would finally be revised.⁸

**FEARS OF
ENTANGLEMENT
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TROUBLED U.S.-LED
OCCUPATION IN IRAQ.**

Soon, however, it became clear that while there was general support for constitutional revision, considerable obstacles still remained. While Japan had moved after 1991 to adopt a more active role in international security, public fears of becoming entangled in overseas adventures continued to hamper the types of missions and roles that the Self Defense Forces could adopt. Fears of entanglement rose considerably after 9/11, particularly after Japan dispatched forces to provide assistance to the troubled U.S.-led occupation in Iraq.⁹

Domestically, while there was no longer a serious fear that constitutional revision could lead to an undermining of democracy and a majority of public opinion even indicated a readiness to consider reform, there remained considerable divisions over what should be reformed. According to a 2005 *Asahi* poll, while 55 percent supported revision, there was a considerable diversity of views over what should be revised. 38 percent did so because they wanted new rights and institutional reforms to be included. 21 percent said they felt Japan should have its own constitution, not one imposed by the United States, while 17 percent wanted the inclusion of new duties and 13 percent because the constitution never had been amended. Only 9 percent of the respondents indicated that they supported revision because they felt there was a problem with Article 9.¹⁰

Despite these divisions, when the conservative Abe Shinzō was selected as prime minister in 2006, he plunged ahead with an agenda for reform. Abe made upgrading the alliance with the United States a central plank of his administration, and argued that Article 9 had to be revised to allow Japanese participation in collective defense arrangements. He combined

this with an overall nationalist stance on a number of symbolic issues, including allowing the publication of revisionist textbooks and opposition to constitutional reform escalated rapidly, with a fairly large and well-organized anti-revision movement holding demonstrations and rallies throughout Japan. Public support for revision of the constitution, and particularly of Article 9, began to cool rapidly. According to a 2007 *Kyodo* poll, overall support for revision dropped from 61 percent in 2005 to 57 percent, and a plurality of respondents, 45.5 percent said there was no need to revise Article 9, as opposed to 33 percent who supported amendment.¹¹

**ABE'S CHOICE TO
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TOUCH.**

As a result of these pressures, already before the campaign for the 2007 upper house election began, LDP politicians began to abandon the cause of constitutional amendment. Likewise, the LDP's powerful coalition partner, the Kōmeitō warned that they were opposed to changing Article 9. Because of internal divisions, the opposition DPJ had already dropped any reference to allowing the SDF to engage in overseas combat missions from its proposal for constitutional reform. In the elections, the LDP went on to suffer a historical defeat. While exit polls showed that constitutional revision issues measured only fourth in importance after bread-and-butter issues such as restoring the nation's ailing pensions and health care schemes, Abe's choice to focus so much on defense and the constitution reinforced a general perception that he was out of touch with the issues that were of concern to the voters and contributed mightily to his defeat. Except for a relatively small minority, Abe's nationalism did not represent so much a threat to democracy as much as a lack of understanding of the needs of his constituents.

The events of 2007 underlined what had changed as much as what had not changed from the past. While the Japanese public was ready to support constitutional revision to an unprecedented degree, they had little interest in changing Article 9 in order to allow Japan to enter into a closer military alliance with the United States. The fear of entanglement continued to

loom large, as did a lack of enthusiasm for the kind of nationalist message that Abe put out, as had the general tendency in the Japanese political system for support to collapse over controversial ideological issues.

After 2007, public support for constitutional revision dropped sharply. According to *Yomiuri* polls in late 2011, while approximately 70 percent of the Japanese population favored continued debate on constitutional issues, and a slim plurality (43 percent to 39 percent) favored revision, fully 74 percent believed that it was not the time to pursue the issue. Of these, 64 percent argued that Japan has other more pressing concerns.¹²

CONCLUSIONS

It is tempting to conclude in light of recent events that the cause of constitutional reform has reached an impasse. To do so, however, would be a mistake. Clearly there is a willingness to consider reform in the broader Japanese public, and there is a growing awareness that at some point constitutional reform will be both necessary and healthy for the further consolidation of Japanese democracy. At the moment, however, the prospects are not ideal. After the events of 2007 both the Japanese public and many political leaders are wary of reopening the issue. After the March 11, 2011, tsunami and related disasters, there are other matters for the Japanese government to focus on. A politically costly fight over the constitution would be both unnecessary and counterproductive, as it could open up further rifts in an already deeply divided DPJ party.

Nonetheless, in certain respects the DPJ enjoys advantages over the LDP in pushing for reform. Unlike the LDP, and certainly unlike the unusually conservative government of Abe Shinzō, the DPJ does not suffer from the same nationalist taint and is unlikely to provoke the same level of grass roots resistance. Like Nixon going to China, it is sometimes easier for those who are perceived on the other side to carry out an ideologically controversial policy. Secondly, the focus of the U.S.-Japanese alliance is beginning to shift away from global security issues to the increasingly pressing issue of coping with the rise of regional security threats. While the Japanese public has expressed strong reservations about becoming involved in military operations in places like Iraq, they have also demonstrated strong support for defending Japan. A constitutional reform project that stresses changes to Article 9 in the context of coping with such threats, and linking the reform

project to a broader, moderate reform agenda including the expansion of rights such as protection of privacy, the right to information and the right to a healthy environment, is likely to be able to build a far wider basis of support than in 2007. Japan may not yet be ripe for constitutional revision, but it certainly is ripening.

NOTES

1 U.S. officials ominously emphasized the fact that other allied nations wished to try Emperor Hirohito as a war criminal and that accepting the hastily drafted U.S. version would be one way of avoiding this development. When General Courtney Whitney, head of the Government Section in occupation's General Headquarters, presented the U.S. draft to Minister of State Matsumoto Jōji, who had authored the "unacceptable" Japanese proposal for revision, and then Foreign Minister Yoshida Shigeru, he reportedly offered to wait outside in the courtyard while Yoshida and Matsumoto considered their reply in order, he said, to "enjoy Japan's atomic sunshine."

2 It is worth noting that the Imperial Japanese Constitution of 1889 was only revised once in its 58 history, that one time being when the new constitution was ratified in 1947. The reason for the pre-war constitution's immutability was its status as a gift by the Japanese Emperor, who was viewed as a living god in the ideology of the time, to his children, the people of Japan. This may raise some interesting theological questions regarding the status of the United States in post-war Japan.

3 For a somewhat different and very thorough discussion of the forces hindering constitutional revision, see Samuel Patrick Boyd and Richard J. Samuels, "Nine Lives? The Politics of Constitutional Reform in Japan," *Policy Studies* 19 (Washington, DC: The East West Center, 2005). Samuels and Boyd dismiss the external and domestic institutional factors that are sometimes used to explain Japan's passivity and stress the ideological ones instead. This leads them to relatively neglect the subtle interaction between external and internal forces.

4 See Tsuyuki Nishikawa, using NHK data, in "The Future of the Japanese Constitution: From the 'MacArthur Constitution' to What?" *Hikakubōbunka* 17 (2009), 12.

5 *Jieitai bōei mondai ni kan suru yoronchōsa* (Tokyo: Naikakufudaijin kanbōseifu kohoshitsu, 2003) chart 24.

6 A 2002 *Yomiuri* poll, for instance, showed 54 percent of those surveyed favored revision. See *Yomiuri Shimbun*, April 2, 2002. By 2006, 56 percent were in favor and 32.3 opposed. *Yomiuri Shimbun*, April 4, 2006. Even surveys conducted by the traditionally liberal *Asahi* newspaper showed the public favored revision by a margin of 55 to 32 percent. *Asahi Shimbun*, May 3, 2005.

7 Christian Winkler, *The Quest for Japan's New Constitution* (New York and London: Routledge, 2010). Winkler labels progressives “moderates” and nationalists “reactionary.”

8 See for instance Robert D. Eldridge, “The Prospects for Constitutional Reform in Japan,” *Kokusai kōkyō seisaku kenkyū* 10:1 (2005), as well as Boyd and Samuels, “Nine Lives?”

9 For a detailed analysis, see Paul Midford, *Rethinking Japanese Public Opinion on Security: From Pacifism to Realism* (Stanford: Stanford University Press, 2011), ch. 8.

10 *Asahi Shimbun*, May 3, 2005.

11 Cited in Midford, *Rethinking Japanese Public Opinion*, p.154.

12 *Yomiuri Shimbun*, September 13, 2011, <http://www.yomiuri.co.jp/feature/20080116-907457/news/20110913-OYT1T00894.htm>. An earlier *Yomiuri* poll yielded similar results, and also reported that 44 percent feel that Article 9 can be managed through constitutional reinterpretation, without revision, while only 32 percent feel that interpretation has reached its limit. *Yomiuri Shimbun*, April 13, 2010, <http://www.yomiuri.co.jp/feature/20080116-907457/news/20100409-OYT1T00167.htm?from=popin>.

JAPAN, CONSTITUTIONAL REFORM, AND REMILITARIZATION

CHRISTOPHER W. HUGHES

Japan's principal brake on remilitarization has been and remains its constitution. Article 9 of the constitution is the point of origin for Japan's exclusively defense-oriented policy, its non-exercise of the right of collective self-defense, and a range of anti-militaristic prohibitions. Japan's constitution has certainly not proved an absolute barrier to its remilitarization, given the ability of policy-makers to skillfully reinterpret and stretch constitutional constraints and the fact that it has been able incrementally to build up extensive military forces, to strengthen U.S.-Japan alliance cooperation, and to initiate the dispatch of the Japanese Self Defense Forces (SDF) on a range of overseas operations. Nevertheless, despite Japanese policy-makers' past ingenuity in stretching the constitution, there are increasing indications, post-Cold War and post-9/11, that Japan is bumping up against the limits of constitutional reinterpretation as a means to deal with international security demands, and thus that the movement for a measure of outright revision is gaining a degree of long-term strength.

The objective of this paper is to consider the motivations behind Japanese policy-makers' consideration of the need to implement constitutional change, either by formal revision or reinterpretation, or a subtle combination of the two; the extent of the obstacles to constitutional revision; the likely probability of its being effected; and the implications for Japan's security policy and military stance.

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POST-COLD WAR MOVES TOWARDS CONSTITUTIONAL REINTERPRETATION

Japanese policy-makers originally interpreted Article 9 as prohibiting both offensive war and the right of national self-defense, but from the 1950s onwards they have held to an interpretation allowing Japan, in line with its position as a sovereign state under the United Nations Charter, to exercise the right of individual self-defense (*kobetsuteki jieiken*) to maintain military armaments for this purpose.¹ Japan alongside its interpretation of Article 9 as permitting the right of individual self-defense, maintained an additional interpretation prohibiting the exercise of the right of collective self-defense (*shūdanteki jieiken*). That is, Japan may defend itself, but it may not come to the aid of another nation's forces, even if those forces are defending Japan. Japan's government recognizes that, as a sovereign state, it possesses under Article 7 of the UN Charter the inherent right of collective self-defense, but since 1954 has taken the position that the actual exercise of this right would exceed the minimum force necessary for the purposes of self-defense and is unconstitutional. Japan's prohibition on the exercise of collective self-defense thus limited the potential for it to assist its U.S. ally outside its own immediate territory during the Cold War period.

Japan's constitutional interpretations, although not unquestioned by conservative politicians as a restriction on national sovereignty, held until the end of the Cold War and enjoyed relatively broad support from the opposition parties and the wider public. However, Japan's failure to respond to U.S. and international expectations that it should make a "human contribution" during the Gulf War of 1990-1991 first led Ozawa Ichirō, as the then LDP secretary general, to enunciate the concept of "international" (*kokusaiteki anzen hoshō*) or "collective security" (*shūdanteki anzen hoshō*). Ozawa's concept of "collective security" contrasts with collective self-defense in that the latter is an inherent right under Chapter 7 Article 51 of the UN Charter that can be exercised without UN approval in instances where it is deemed necessary to defend another state or ally as if your own territory were attacked; whereas the former is derived from earlier articles of Chapter 7, especially Article 43, which stress the exercise of force only if sanctioned by the UN and for the purposes of collective retaliation by UN members against aggression.²

In turn, Ozawa argued that the preamble of the constitution (preferably combined with a revision at some point of Article 9 to make clear Japan's right to maintain military forces for international security cooperation), which obliges Japan to strive for an "honored position in international society" and thus for enhanced international cooperation, means that the SDF can participate in any form of UN-sanctioned and UN-centered multilateral military activity, including full war-fighting, without violating Article 9.³ Ozawa attempted to implement his stance through the formation in mid-1991 of the LDP's Special Study Group on Japan's Role in International Security.⁴ But its findings were marginalized as the government shifted the focus of its search for an international security role to the passage of the International Peace Cooperation Law of June 1992 enabling the dispatch of the SDF on non-combat United Nations Peacekeeping Operations (UNPKO).

JAPAN'S CONSTITUTION CREAKS UNDER PRESSURE: POST-9/11 AND REGIONAL CONTINGENCIES

In seeking to respond to the attacks on September 11, 2001, Japan was again faced with expectations for the overseas dispatch of the SDF to provide a human contribution, and again responded through the stretching of its constitutional interpretations. Japan could have followed the U.S. in relying principally on the right of individual self-defense given the Japanese fatalities in the 9/11 attacks, but this might have then mandated the constitutional use of force and an open-ended combat mission. Moreover, Japan, in contrast to the U.S.'s NATO allies, could not invoke the right of collective self-defense. Instead, Japan's preference was to design the Anti-Terrorism Special Measures Law (ATSML) and subsequent Replenishment Support Special Measures Law (RSSML) for SDF non-combat dispatch to support Operation Enduring Freedom in Afghanistan from 2001 until 2009, invoking neither individual self-defense nor collective self-defense, but predicated on relevant UN resolutions. Japan stressed UN resolutions that identified the attacks on the United States as a threat to international peace, and which called on all UN members, and by implication Japan as well, to counter terrorism. Japan then linked this UN legitimacy to its own constitution to legitimize SDF dispatch by switching emphasis from Article

9 to the preamble, the latter stating Japan's obligation to work with international society for the preservation of peace.

Japanese policy-makers subsequently used a similar method to justify the passage of the Iraq Reconstruction Law through the Diet in July 2003, which enabled SDF dispatch to Iraq on non-combat reconstruction missions from 2004 to 2008. Japan's government based the law on extant, if rather weak, UN resolutions; and Prime Minister Koizumi Junichirō, in arguing for the constitutionality of the SDF dispatch in December 2003, chose to read out the preamble in support of the law, neglecting all mention of Article 9.⁵

**JAPANESE POLICY-
MAKERS' CREATIVE
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Japan has employed similar constitutional sleights of hand to expand SDF cooperation in regional contingencies. Japan's government deflected accusations during the revision of the U.S.-Japan Guidelines regulating bilateral military cooperation and the passing of the Regional Contingencies Law between

1997 and 1999 that SDF logistical missions in support of the United States might amount to the exercise of collective self-defense. At the time, the government insisted that it was possible even in the midst of a major regional conflict to fix a line between combat zones involving U.S. deployments and non-combat zones for SDF logistical deployments, and thus that there was no risk of the SDF becoming sucked into combat. Japan's leaders argued as well that the Maritime Self Defense Force (MSDF) can if necessary defend U.S. ships when engaged in refueling operations on the basis of individual self-defense. In October 2006, then Director General of the Japan Defense Agency (JDA) Kyūma Fumio compared Japanese refueling operations as analogous to two companions walking alongside each other, with one then subject to a mugging, and thus the other companion seeking to defend the first on the basis that the attack might be directed at both, and so presenting yet another ingenious Japanese preservation of its individual self-defense stance.⁶

Japanese policy-makers' creative constitutional interpretations have enabled the SDF to undertake a range of new regional and global missions, whilst also ensuring that Japan does not over-commit itself to certain forms of dispatch. Nevertheless, Japan's policy-makers perceive that, whilst expedient, these interpretations contain major potential drawbacks over the longer term. Japan's non-exercise of collective self-defense and the circumventions of this restriction through the ATSM and Iraq Reconstruction Law imposed cumbersome operational restrictions on SDF cooperation with the United States and other states in the field. Furthermore, the *de facto* collective security option, although opening up the possibility of a genuine military combat role for the SDF, is not one which can be explicitly

IN CASES WHERE THERE ARE NO EXTANT UN RESOLUTIONS, JAPAN'S COLLECTIVE SECURITY OPTION MIGHT LEAD TO INACTION AND THE UNDERMINING OF THE BILATERAL ALLIANCE.

explored as the principal basis of Japan's international security role. The long-governing Liberal Democratic Party (LDP) with its pro-U.S.-Japan alliance stance, saw it as inappropriate because it is a UN-centered option. Japan can exploit UN legitimization to provide support for its U.S. ally as in Afghanistan and Iraq. However, if it were to more strongly push the linkages between the UN and its own security policy, then this might set up tensions with its ally's disinclination to allow the UN to constrain its own and its allies' military actions. Hence, in cases where there are no extant UN resolutions, Japan's collective security option might lead to inaction and the undermining of the bilateral alliance.

Japanese thinking about the limitations of current constitutional restrictions and incremental reinterpretations as means to respond to international crises has been reinforced by a range of emerging security challenges. Japanese policy-makers perceive in particular ever growing demands from the United States for expanded regional and global security cooperation, as well as increased strategic and tactical integration of the SDF and the U.S. military, thus raising questions about Japan's ability in the future to resist engaging in operations in support of the United States which might transgress the non-exercise of collective self-defense.

BALLISTIC MISSILE DEFENSE: EXACERBATING THE PRESSURE FOR REVISION

Most significantly, Japan's embarkation on ballistic missile defense (BMD) in cooperation with the United States, and underlined by the BMD-related realignments in the bilateral 2006 Defense Policy Review Initiative (DPRI), and American calls for Japan's BMD system to function for the defense of the U.S. homeland, have placed severe stress on the ban on collective self-defense. U.S. Ambassador Thomas Schieffer in October 2006, Deputy Under Secretary of Defense for Asia-Pacific Affairs Richard Lawless in December 2006, and Secretary of Defense Robert Gates in May 2007, made it progressively clearer that Washington expected Japan to use its BMD assets to help intercept missiles targeted for the United States.⁷ In addition, the May 2007 Security Consultative Committee (SCC), the principal coordinating body for the alliance, agreed that both sides would "clarify concepts, roles, and missions for each side in the conduct of missile defense and related operations in response to ballistic missile threats," interpreted by the Japanese media as requiring Japan's investigation of its use of BMD to assist in the defense of the United States itself.⁸

Japan's government in moving forward with BMD deployments has sought to avoid any breach of the collective self-defense ban. Fukuda Yasuo, as the then chief cabinet secretary, announced Japan's decision to introduce BMD with the statement that the system:

...will be operated on Japan's independent judgment, and will not be used for the purpose of defending third countries. Therefore, it does not raise any problems with regard to the issue of the right of collective self-defense. The BMD system requires interception of missiles by Japan's own independent judgment based on the information on the target acquired by Japan's own sensors.⁹

Japan maintains that any U.S.-Japan information exchanges for the purposes of BMD will not necessarily conflict with existing prohibitions on collective self-defense, as they can be classified as routine information-gathering that is not directed specifically for the exercise of the use of force in support of an ally.¹⁰ Japan has deflected U.S. calls for the system to oper-

ate for defense of the American homeland by arguing that its current BMD capabilities are simply technologically insufficient to intercept missiles targeted at the United States. Kyūma, in response to Schieffer's October 2006 remarks, and consequent speculation within the government that it might reconsider Fukuda's 2003 statement, emphasized in a press conference on November 21 that the issue of collective self-defense could not arise because Japan's BMD was "physically incapable" (*butsuriteki ni muri*) of pursuing missiles targeted at third countries.¹¹ Kyūma then repeated this line in response to Robert Gates's critique of Japan's stance in bilateral talks in May 2007.¹²

Japanese policy-makers have been prepared, though, in their desperation to maintain the ban on the exercise of collective self-defense, to construct a second line of argument which maintains the formal ban but at the same time leaves open the possibility of assisting in the defense of the U.S. from missile attacks if deemed necessary to preserve the U.S.-Japan alliance. For even though Japanese policy-makers are aware of the risks of the exercise of collective self-defense in support of the United States, they are also aware that if Japan is seen to be totally impassive in the defense of its ally from missile attacks, and despite its possession of an increasing capacity to intercept missiles targeted for the American homeland, and especially with the introduction of the upgraded and co-developed Standard Missile-3 interceptor missile with possible break out capabilities against Intercontinental Ballistic Missiles (ICBM), then this might prove fatal for the future of U.S.-Japan alliance cooperation. Japan's policy-makers have again sought to prepare a fallback hedging position utilizing convoluted constitutional interpretation and linguistic artifice. JDA policy-makers were thus ready in 2006 to argue that Japan might look to intercept missiles targeted for the United States by using the justification that these missiles in passing over Japanese airspace could jettison rocket material over Japan's territory and thus pose a risk to

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its national security, so mandating a BMD intercept predicated on the right of individual self-defense.¹³

Japanese policy-makers may then have managed in the case of BMD to devise a short-term escape route on the issue of collective self-defense and the defense of the U.S. homeland. However, the complex and operationally deficient nature of this position is clearly not satisfactory over the long term, and has not relieved the pressure for reconsideration of the right of collective self-defense as the BMD project progresses. Indeed, Japan's management of collective self-defense issues in BMD is simply illustrative for many government and opposition policy-makers of the fact that Japan cannot continue to articulate security policy based on constant reinterpretation, and consequently that a more formal degree of constitutional revision is necessary. As Gotōda Masazuki of the LDP commented at the time of the ATSMML debate, the constitution is increasingly strained like an "elastic band" to breaking point.¹⁴

FIRST MOVES TO FORMAL REVISION AND INTRA-PARTY DEBATES

Japan, against this background of growing dissatisfaction with the existing constitutional status quo, has thus begun to shift towards the most serious consideration of formal revision of at any time of the post-war period. The first moves towards constitutional revision took the form of the National Diet's House of Representatives and House of Councilors release of separate reports on the issue in April 2005. The House of Representatives reported a consensus that Article 9 of the constitution should be revised in such a way that the first clause, the renunciation of the right of belligerency, should be kept in place, but that in the second clause Japan's right of self-defense and the constitutionality of the SDF should be explicitly acknowledged.¹⁵ The House of Councilors failed to agree on revisions to Article 9, and neither of the chambers was able to reach a consensus on revisions relating to the exercise of the right of collective self-defense, although they both agreed that Japan should engage more actively in international security cooperation.¹⁶ In this sense, many of changes debated in the Diet reports were only proposals for *de jure* confirmation of the *de facto* realities of Japan's security policy. Nonetheless, these reports were important in initiating deeper de-

bates on constitutional revision and in preparing the way for party political concrete proposals for revision.

The LDP as the governing party until 2009 was the principal initiator of attempts at constitutional revision, long advocating formal revision (*kaiken*) as part of its party platform. In March 2004, the LDP's Policy Research Council (PRC) Defense Policy Studies Subcommittee issued a report titled "Recommendations on Japan's New Defense Policy." It proposed that Japan should amend Article 9 to recognize the SDF as a national armed force responsible for national territorial defense and the support of international security, and to state clearly the possession of the rights of individual self-defense and collective self-defense. In addition, the PRC recommended that Japan should pass a "Fundamental Law for National Defense" and a general law governing international peace cooperation activities to replace the existing practice of passing *ad hoc* legislation to cover individual SDF missions and thus enable Japan to respond more readily to international contingencies.¹⁷

The LDP's "New Constitution Drafting Committee" (*shinkempō kisō iinkai*) then released a final draft of a revised constitution in November 2005 to coincide with the fiftieth anniversary of the LDP's foundation. The draft settled upon three key issues for constitutional revision relating to security. Chapter 2 of the constitution is to be renamed "security" instead of the "renunciation of war," and the first paragraph renouncing war retained. Major changes are made to the second paragraph. Firstly, the SDF, which appears nowhere in the current constitution, is recognized in the LDP draft with its nomenclature changed from Self Defense Forces (*jieitai*) to Self Defense Military (*jieigun*). Secondly, the *jieigun* is specifically charged with international cooperation for the preservation of international peace and security. This change is reinforced by a revised preamble which states that the Japanese people pledge themselves to cooperate for the preservation of

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AS PART OF ITS PARTY
PLATFORM.**

international peace.¹⁸ Thirdly, the LDP sought to tackle the collective self-defense issue not through the process of constitutional revision itself, but through the legislative process and plans to submit to the National Diet a separate Fundamental National Security Law that will specify the right and particular conditions for the exercise of collective self-defense.¹⁹

The LDP appeared relatively confident that it could effect this change because of the subtle modification in the status of the SDF created by its designation as a military (*gun*) in the revised Article 9. The party argued

THE DPJ HAS FOLLOWED THE LDP IN RECOGNIZING THE NEED FOR A FULL DEBATE ON CONSTITUTIONAL REVISION, ... ALTHOUGH IT HAS EXPERIENCED GREATER DIFFICULTY IN DEVELOPING AN INTRA-PARTY CONSENSUS ON THE FORM OF REVISION.

that by establishing in the constitution the principle of Japan's possession of a military with international security responsibilities, rather than just a force designed for its own individual defense *per se*, and by setting this alongside the already established principle of Japan's inherent possession of the right of collective self-defense, then it will be able to push forward the concept that it is only "natural" (*tōzen*) for Japan to breach its self-imposed ban to exercise this right and to utilize its military forces for the support of its ally and the international community.²⁰ LDP policy-makers appeared confident that this legislative and re-interpretative package could be pushed through because the drafting of the bill would enable the party and its

New Kōmeitō coalition partner to negotiate acceptable limits on the extent of collective self-defense exercise in terms of specific conditions and geographical extent; and because a straight legislative bill would only require a simple majority in the National Diet rather than the tough two-thirds majority required for constitutional revision.²¹

The LDP was further emboldened due to its detecting grounds for convergence with the then main opposition Democratic Party of Japan (DPJ) on constitutional revision. The DPJ has followed the LDP in recognizing the need for a full debate on constitutional revision in order to respond to Japan's changing security circumstances, although it has experienced

greater difficulty in developing an intra-party consensus on the form of revision and how to position itself as the main opposition party on this issue vis-à-vis the LDP. The DPJ initiated its own “Research Committee on the Constitution” in 1999, which produced a mid-term “proposal” (*teigen*) in June 2004, and then a final proposal report in October 2005. The DPJ originally intended to produce its draft version of a new constitution by mid-2006, although this final draft is yet to materialize even as of 2012. The party’s basic position in opposition to the LDP’s revision (*kaiken*) is conceptualized as one of constitutional “augmentation” (*sōken*). Influential figures from all wings of the party are disturbed by what they perceive as the “hollowing out” (*kūdōka*) of the constitution’s principles by endless government reinterpretations. Instead the DPJ’s basic aim is to re-augment the fundamental pacifist principles of the constitution and to bring

clearer demarcations to the utilization of its military force for its own individual self-defense and in support of the United States, whilst at the same time expanding Japan’s scope for international security cooperation with the wider East Asian regional community and especially the UN.

In practice, though, forming a DPJ consensus on constitutional revision has been a difficult task due to internal factionalism. The Social Democratic Party of Japan (SDPJ) rump that merged with the DPJ and is led by Yokomichi Takahiro has been opposed to revision in general and especially any moves to lift the prohibition on the exercise of collective self-defense.²² Former DPJ President Ozawa has made common cause with Yokomichi on this position, arguing that in line with his notion of collective security, constitutional revision is not necessary for Japan to play an international security role. Ozawa and Yokomichi have jointly argued that Japan should thus avoid any move to constitutional revision that would only enable the LDP to further expand support for the U.S., and that instead Japan should seek to support the establishment of a UN standing army with SDF par-

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ticipation.²³ The social progressives in the party, led by Naoto Kan, prime minister from June 2010 to September 2011, have preserved a more open mind on revision, but also proposed the establishment of a special reserve force, separate from the SDF, for overseas operations.²⁴ The intent of Kan and his followers was clearly to expand the scope for Japanese international security cooperation, but to do this in a means divorced from, and therefore capping also the future potential extent of, SDF dispatch overseas in support of U.S. military operations.

Meanwhile on the other more liberal or conservative-leaning wings of the DPJ there is a greater appetite for constitutional revision and the possible exercise of collective self-defense. Hatoyama Yukio advocated in

his own draft for a revised constitution in 2005 a limited form of collective self-defense, mandating Japan to participate in PKO and peace-creation activities conducted by the UN and “other established international organizations.”²⁵ Former DPJ President and later Foreign Minister Okada Katsuya caused controversy within the party when he argued in a speech in the United States in July 2004 that based on clear UN resolutions Japan could actually use military force to contribute to international security, although this definition was closer to collective security.²⁶ Maehara Seiji, yet another former DPJ President, and later foreign minister and contender for prime minister, has gone even further stating that Japan should investigate, based on constitutional revision, the exercise of collective self-defense and be entitled to use military force in carefully designed circumstances such as regional contingencies and in UN-led operations.²⁷ Maehara has emphasized in the past his willingness to work on a bipartisan basis with the LDP on key security legislation and constitutional revision.

The consequence of the DPJ's internal divisions has been its need to forge compromises in its proposals for constitutional revision, as seen in the *teigen* reports of 2004 and 2005. The DPJ in a similar fashion to the LDP first proposed that the existence of the SDF and right of individual self-defense should be recognized in the constitution. Its second proposal also

focused on specifying an international security role for the SDF, but this is linked more strongly to the concept of collective security and operations under UN mandates, although the extent of force available in these missions was left deliberately vague to placate the left of the party.²⁸ The DPJ's third major proposal also resembled that of the LDP by seeking to create a Fundamental Security Law that would draw up specific restrictions on the international security operations of the SDF.²⁹

ABE'S SUCCESSES AND FAILURES ON CONSTITUTIONAL REVISION

Although the LDP was aware of the not insignificant remaining challenges to constitutional revision, under the leadership of Prime Minister Abe Shinzō it began in 2006-2007 to press ahead with concrete steps for revision. During his election campaign for LDP president and prime minister, Abe made clear his intention to seek constitutional revision, and after securing election duly made this, along with the revision of the Fundamental Law of Education, an official policy pledge of his administration. Abe himself viewed revision of the constitution and the exercise of the right of collective self-defense as an essential part of his vision for Japan to escape from the constraints imposed by the post-war settlement (*senjo dakkyaku*) and to reassert its identity as a great power.³⁰

Abe subsequently moved to push forward legislation in the National Diet, already mooted since Koizumi's period in office, designed to create the procedures for a national referendum on constitutional revision. Abe was undoubtedly emboldened by his inheritance from Koizumi of the two-thirds "supermajority" in the House of Representatives (Article 96 of the constitution allowing for revision in the case of two-thirds majority support in both chambers, and a simple majority in a special referendum), and succeeded in ramming the legislation through the upper and lower chambers of the National Diet on April 12 on May 14, 2006, respectively. The successful passage of the legislation included a three year moratorium on any attempts to submit drafts for constitutional revision to the National Diet. The LDP's intention during this three year period was to begin to lay the foundations for a bid to revise the constitution by encouraging the formation of a "Research Commission on the Constitution" in the House of Councilors

in January 2007 and a “Deliberative Council on the Constitution” in the House of Representatives in August 2007, and by producing an LDP outline draft for a revised constitution for submission to and passage through the National Diet in 2011, and then submission to a national referendum in the same year.³¹

In the meantime, Abe turned his attention to attempts to more immediately loosen restrictions on Japan’s exercise of collective self-defense. The prime minister had already opined in an interview given to the *Washington Post* on November 14, 2006, that Japan should, in reaction to emerging U.S. demands, reconsider its ban on the exercise of collective self-defense in order to intercept missiles targeted at the United States.³² This was then followed by Chief Cabinet Secretary Shiozaki Yasuhisa’s indications on November 20 that the Japanese government might reconsider Fukuda’s 2003 statement on BMD, so sparking the speculation that led to Kyūma’s explanation that Japan could not intercept U.S. missiles with current technological capacities.³³ Abe then proceeded on April 17 to establish within the Prime Minister’s Office a panel charged with researching the means of bringing Japan’s legal measures into line with a range of new security scenarios facing the SDF. Particularly implicit in the tasks of the panel, led by Yanai Shunji, a former ambassador to the United States, was considering areas where Japan might exercise the right of collective self-defense in relation to BMD. Abe’s intent to use the Yanai Panel as a means to salami-slice at existing interpretations, and thereby build pressure for the breach of the ban on collective self-defense, was made clear by the fact that he packed it with experts already known to be supporters of the exercise of this right.³⁴

The Yanai Panel produced its final report on June 24, 2008, having studied four major scenarios. The first scenario concerned Japan’s legal ability to respond to an attack on nearby U.S. warships engaged in joint exercises with the MSDF in international waters. The second, Japan’s legal ability to respond, irrespective of extant technological capabilities, to utilize its BMD assets to intercept a missile launch targeted at the United States. The third, Japan’s legal ability to use force to defend the military personnel of other states engaged in UNPKO in which Japan was also participating. The final scenario raised Japan’s legal right to provide logistical support to the militaries of other states involved in UNPKO operations which might involve the use of force.

The panel concluded that in the first and second scenarios Japan had no other option but to seek to exercise the right of collective self-defense. In the first scenario, it argued that any attempts to justify Japanese defense of U.S. warships as an act of individual self-defense under Article 95 of the SDF Law on the grounds that an attack might also inflict damage on MSDF forces nearby would only create operational vagaries and only apply if U.S. warships were extremely proximate.³⁵ The report thus sketched out the possibility that the SDF might have to sit idly by whilst its ally's warships suffered damage. In the second scenario, the panel concluded that attempts to justify an interception of a missile targeted at the U.S. as an act of individual self-defense based on Articles of 82-2 and 93-3 of the SDF Law relating to BMD and drawing on the right to police the safety of the seas would again founder on a lack of operational clarity. The report pointed out that if Japan were to take no action then this would undermine the purpose of BMD in promoting U.S.-Japan alliance cooperation, the U.S. deterrence posture around Japan, and the foundations of the alliance. The report stressed that Japan must exercise the right of collective self-defense for operations involving its BMD assets deployed on its own territory and in international waters in order to defend the United States; although it also quietly noted that this did not oblige Japan to exercise the same right to defend the United States against missile attacks in the territorial waters of other states, thus maintaining a degree of limitation on the extent of U.S.-Japan BMD operational commitments outside Japan itself.³⁶

In regard to the third and fourth scenarios, the panel concluded that these could be responded to not through collective self-defense, but through constitutional reinterpretations utilizing individual self-defense. The panel argued that Japan's use of force in support of military personnel from other states involved in UNPKO should not be seen as a violation of Article 9's renunciation of the use of force for settling international disputes, as these missions are not traditional wars, but UN mandated operations for the restoration and maintenance of international peace. Similarly, for the fourth scenario, the panel argued that the provision of logistical support to UNPKO was not the same as engaging in the use of force in traditional war-fighting, and thus did not transgress Article 9 of the constitution. Indeed, the panel argued, Japan's enhanced participation in scenarios three and four would actually bring it firmly into line with international norms on the use of force.³⁷ However, the panel still maintained a degree of reserve

in pushing the logic of participation in UN operations and the constitutionality of the use of force. The panel was careful not to follow Ozawa's line and argue for full collective security, stressing that Japan should only participate selectively in UNPKO as national interests dictated, and that its arguments for reinterpretation did not imply that Japan should as yet engage in full combat duties under the UN.³⁸ Finally, the panel concluded that if Japan were to squarely face the security challenges of the new century then it would have to continue to revisit the issues of collective self-defense and constitutional reinterpretation.³⁹

ABE'S USE OF STRONG-ARM TACTICS... ONLY SERVED TO PROVIDE ANOTHER POLICY ISSUE TO GALVANIZE MUCH OF THE DPJ INTO MORE ACTIVE OPPOSITION.

Abe's promotion of national referendum legislation and his institution of the Yanai Panel appeared to position his administration to move ahead with constitutional revision by a mixture of formal revision and reinterpretation, and broadly in line with LDP plans. However, Abe's plans were to be derailed by late 2007. The LDP and DPJ were already at loggerheads over the issues of whether a special referendum could be used to seek public approval on other policy matters, and if government

employees such as university professors and high school teachers were to be allowed to engage in constitutional debates in the event of a referendum. However, Abe's use of strong-arm tactics to force the referendum legislation through the National Diet, irrespective of calls for bipartisanship on constitutional revision, only served to provide another policy issue to galvanize much of the DPJ into more active opposition.⁴⁰ Abe's tactics further raised the concerns of his New Kōmeitō coalition partner, with its declarations in April and May 2007 that it remained broadly opposed to the exercise of collective self-defense, although it was prepared to tolerate the Yanai Panel's research into "grey zone" areas where the borderline with individual self-defense was indistinct.⁴¹ In addition, Abe's stance attracted criticism from the LDP itself, with the influential faction leaders Yamazaki Taku and Tanigaki Sadakazu both stating their discomfort at the prime minister's attempt to introduce collective self-defense through the backdoor by utilizing the Yanai Panel in order to avoid open debate, and former JDA Director General Ishiba Shigeru comparing Abe's tactics to those of his grandfather

Prime Minister Kishi Nobusuke in forcing through the National Diet in 1960 the revised U.S.-Japan security treaty.⁴² Abe then made the fateful mistake of attempting to campaign on the issue of constitutional revision as one of his main campaign pledges in the September 2007 elections for the House of Councilors, only to find that he was punished by an electorate baffled as to why he was concentrating on this and other foreign policy issues when the problems of growing economic inequalities in Japanese society seemed to be more pressing.

AFTER ABE: CONSTITUTIONAL REVISION OFF THE AGENDA

Abe's consequent fall from power and the succession of Fukuda as prime minister put further dampeners on the constitutional revision debate. Fukuda's preoccupation with domestic political and economic problems, fighting Ministry of Defense (MOD) scandals, and maintaining the MSDF mission in the Indian Ocean, meant he had little appetite for engaging in the controversy over the constitution. Indeed, during Fukuda's period in office the Yanai Panel was never convened, and he received its final report in June 2008 with minimal interest and no intention to act upon it.⁴³

Asō Tarō succeeding Fukuda as prime minister in September 2009 demonstrated some renewed interest in the exercise of collective self-defense in line with his more assertive stance on security. After speaking at the UN General Assembly in New York on September 30, just one day after his appointment as prime minister, Asō remarked in response to reporters' questions concerning current constitutional interpretations that collective self-defense was an "important issue," thereby raising speculation that he might follow Abe in seeking to exercise this right.⁴⁴ Foreign Minister Nakasone Hirofumi and Minister of Defense Hamada Yasukazu then denied on September 30 that there were any government moves to change the interpretations relating to collective self-defense, even though they were both personally in favor of the exercise of this right.⁴⁵ Asō then back-pedaled on his earlier statements on constitutional reinterpretation, stating on November 4 that he had no intention of following this line, undoubtedly mindful of the controversy brewing at that time over Air Self Defense Force (ASDF) Chief of Staff Tamogami Toshio's denial of wartime aggression on the part of the Japanese state, and related questions of civilian control.⁴⁶

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Asō's caution was certainly reinforced by the fact the Japanese public appeared to be blowing hot and cold over the possibility of constitutional revision. An *Asahi Shimbun* poll of 2004 showed 53 percent of respondents

in favor of constitutional revision—the first time a majority was recorded since the newspaper began polling on the issue. According to the survey, 60 percent of respondents opposed revision of Article 9, but this was a decline of 14 points from the previous survey in 2001.⁴⁷ Another *Asahi Shimbun* poll in 2006 demonstrated a rise in support for constitutional revision overall to 55 percent, and a drop in those opposed to revision of Article 9 to 42 percent, with those in favor now edging ahead for the first time at 43 percent, with

15 percent undecided.⁴⁸ The *Asahi Shimbun's* poll in 2007 recorded that 58 percent of respondents favored overall constitutional revision, but that those opposing revision of Article 9 had risen to 49 percent, and those in favor falling to 33 percent, with 18 percent undecided.⁴⁹ In 2008, the same poll indicated that public support had now shifted significantly, with 59 percent opposed to constitutional revision overall, and 66 percent opposed to revision of Article 9, 23 percent in favor and 11 percent undecided.⁵⁰ This impression of declining support by 2008 amongst the public for constitutional revision in general is supported by *Yomiuri Shimbun's* polls. It found in 2006 that 39 percent were in favor of revising Article 9, but by 2007 this had fallen to 36 percent, and then down to 31 percent in 2008.⁵¹

By 2009, therefore, it appeared that constitutional change, either by formal revision or reinterpretation, had been demoted down the list of Japanese policy-makers' security priorities. Nevertheless, Japanese policy-makers clearly harbored continuing interest in the issue. LDP, DPJ and New Kōmeitō politicians dissatisfied at the waning of the constitutional revision debate under Fukuda formed a cross-party Diet Member's Alliance for the Establishment of a New Constitution in March 2008, including 191 National Diet members, with prominent members such as the then LDP Secretary General Ibuki Bunmei, Koga Makoto, Tanigaki, and the DPJ's then Secretary General Hatoyama and Maehara. Japanese security experts

also continued to agitate for constitutional revision, Kitaoka Shinichi and Tanaka Akihiko, two of the members of the Yanai Panel, supervised the production of a report by the private Tokyo Foundation in October 2008 on Japan's future security strategy which called for the exercise of collective self-defense in BMD and international peace operations.⁵² The Prime Minister's Council on Security and Defense Capabilities report (or Katsumata Report, and including many of the same personnel as those involved in the Tokyo Foundation report), produced in August 2009 to prepare for a scheduled NDPG revision later that year, recommended that the Yanai Report's measures for the exercise of collective self-defense should be implemented by the government.⁵³ The three year moratorium on introducing drafts for a revised constitution also came to an end in 2009, meaning the issue could be tackled openly again. Former Prime Minister Abe continued to agitate on the constitutional reform issue, calling in May 2009 for reinterpretation to allow collective self-defense be included in the LDP election manifesto.⁵⁴ The LDP, in its report on Japanese defense policy in June 2009, called for movement on establishing the Deliberative Council on the Constitution in the House of Representatives to consider revision measures, and also for the reinterpretation of the ban on collective self-defense.⁵⁵ Although the impending House of Representatives' election in 2009 meant that few policy-makers were willing to openly campaign on the issue of the constitution, most acknowledged that it was an issue for after the general election.⁵⁶

Furthermore, even as the formal debate on constitutional revision reached an impasse in 2009, Japan continued to chip away incrementally in *de facto* terms at constitutional revision as seen in the MSDF's anti-piracy dispatch since March 2009 to the Gulf of Aden. Japanese policy-makers felt that existing legal basis for anti-piracy activities based on the Self Defense Forces Law policing provisions were inadequate to ensure effective operations and the safety of Japanese personnel if confronted by pirates using force.⁵⁷ Hence, Japan in June 2009 passed a new Anti-Piracy Law after an MSDF dispatch. The new law allows the SDF to protect non-Japanese

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ships as long as they are in the same vicinity, and to use force not only for self-defense but also to force pirate ships to halt if no other reasonable means is available.⁵⁸ Japan's government argues that the use of force against pirates to protect foreign shipping does not equate to collective self-defense because it is essentially a police action against a non-state actor.⁵⁹ However, the new law—very interestingly closely modeled on one of the Yanai Panel scenarios—is another exercise in setting *de facto* precedents for Japan to defend other countries and to pave the way for extending the exercise of collective self-defense in other contexts; although the government has looked to obfuscate these changes with the stipulation that all ships under its protection must be close by, thus blurring the lines between self-defense and collective self-defense.

DEVELOPMENTS UNDER THE DPJ

The advent of the DPJ might have been expected to give renewed momentum to the constitutional revision debate, given the presence of major figures in the party, such as Hatoyama, Ozawa, and Maehara, who were open proponents of revision. However, the DPJ has thus far demonstrated reluctance to prioritize tackling the issue.

The DPJ's 2009 House of Representatives election manifesto made rather vague non-committal mention of constitutional revision, simply promising a "free and open-minded debate" on the constitution and possible items for revision built on a consensus and "cautious and active" investigations.⁶⁰ Mention of constitutional revision was then omitted altogether from the DPJ's 2010 House of Councilors election manifesto. The DPJ's caution was accounted for by its awareness of other economic priorities more appealing to the electorate, the fact of its own internal divisions on the reform issues, and that in 2009 it needed especially to appeal to the SDPJ as a potential coalition partner. The likely divisions between the DPJ and SDPJ over constitutional revision were revealed in 2009 by the comments of the SDPJ leader Fukushima Mizuho in March 2010 that she still personally regarded the SDF as unconstitutional and only accepted its existence in her capacity as a member of the coalition cabinet.⁶¹

Meanwhile, public opinion continues to show a fluid mix of amenability and resistance to revision. A *Yomiuri Shimbun* poll in April 2009 demon-

strated that support for revision of Article 9 had suddenly rebounded to 38 percent, close to the high levels of 2005-2006; the apparent reason for the new level of support being the lack of clarity in Japanese constitutional interpretations for the overseas dispatch of the SDF.⁶² But a *Yomiuri Shimbun* poll the following April, showed support for Article 9 revision dipping to 32 percent. The *Asahi Shimbun* poll for 2010 showed a decline to 30 percent in support of revision of Article 9 and then down to 24 percent in 2011.⁶³

But despite the lack of apparent momentum for constitutional revision the issue clearly rumbles on amongst policy-makers, intellectuals and the public. The LDP, deprived of the responsibilities of government, has found new found freedom to play with issues of nationalism, revisionism and the constitution. The LDP launched its Headquarters for the Promotion of Constitutional Revision in December 2009 to produce a new version of its 2005 draft constitution plan. The DPJ then initiated its own Constitution Research Council in May 2011, chaired by Maehara, with a view to producing a report by March 2012. The DPJ administration's production in August 2010 of its own new Prime Minister's Council on Security and Defense Capabilities report—known as the Satō report and with its membership generally rigged in line with DPJ preferences—also indicated that Japan might want to reconsider its ban on collective self-defense in line with the Yanai report.

JAPAN'S SECURITY POLICY AND FUTURE SCENARIOS FOR CONSTITUTIONAL REVISION

Japan has reached something of a short-term hiatus in its debate on constitutional revision, but it is arguable that there are still longer term drivers working to re-stimulate the debate in the future whether under an LDP or DPJ government. Japan's deepening of security cooperation with the United States in BMD and other operations will only serve to demonstrate the mounting contradictions and limitations of constant reinterpretation. Japan may also face new regional and global security crises which will highlight in policy-makers' own eyes the seemingly untenable nature of Article 9 and its related restrictions on the exercise of military power. Exactly how attempts to implement constitutional revision will play out are as yet un-

known, but it might be possible to envisage three outcomes with related impacts on the direction of Japanese security policy.

The first scenario might be an LDP or DPJ-led strategy of formal constitutional revision followed by Diet legislation and reinterpretation, enabling Japan, through the essential recognition of the right of exercise of collective self-defense, to engage in the full gamut of military operations. These include Japan's current participation in UN-centered/mandated, non-combat operations in UNPKO and past operations such as in the Indian Ocean, as well as an extension to now partake in UN Chapter 7 collective security and non- or weakly UN mandated U.S.-centered "coalitions of the willing" combat operations. Although Japan may continue to place restrictions on the use of force by limiting collective self-defense to East Asia and in support of the U.S., this constitutional revision route will in effect mean the lifting of most restrictions on Japan's use of military power for national security ends. Japan will thus become a "normal" military state.

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A second scenario might be a more consensual attempt by the LDP and DPJ to simply recognize the *de facto* realities of the existence of the SDF and its engagement in international security cooperation. This will necessarily enable Japan to continue to its current non-combat participation in UNPKO and non-combat support missions in the Indian Ocean, and finally settle criticisms of these as unconstitutional, thereby opening the way for Japan to increase its participation in these types of operations. However, Japanese policy-makers will still be free to pursue the route of constitutional reinterpretation and thus potentially open the way for participation in a full range of operations. Thus, constitutional revision in this form may only be a way station on Japan's path towards assuming a "normal" military role, rather than placing any kind of long term cap on the remilitarization of its security policy.

A possible third scenario is that of attempts to revise the constitution which fail, or even a reticence by the LDP and DPJ to deal with this controversial issue. If this scenario of non-revision occurs, then this will certainly slow down the current trajectory of Japan's security policy. It may lead to the questioning of even current activities as against the spirit of the constitution and strengthen the argument for preserving the constitution as it currently stands. However, it is more likely that it will not halt participation in UNPKO or non-combat support missions. Indeed, it may only temporarily slow Japan's military path, as faced with the same pressures to pursue an enhanced security agenda, then Japan may resort to reinterpretation once again to push forward its military role, even if at an even slower incremental pace.

These various scenarios and developing military roles will impact in different ways on Japan's key international relations. If Japan moves the LDP route then this should clearly strengthen U.S.-Japan alliance ties and provide new avenues for military cooperation. If Japan settles for *de facto* recognition or non-revision then this will certainly hamper expanded alliance cooperation, disappoint U.S. expectations and engender new tensions in ties. However, the United States may wish to be careful what it wishes for. If Japan goes the LDP revision route it will certainly create a more active ally, but also an ally released from many previous restrictions that may also then feel empowered to at last pursue a more independent security agenda from the United States.

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A CONSTITUTIONAL CASE FOR AMENDING ARTICLE 9

CRAIG MARTIN

The revision of the Constitution of Japan is once again part of the public discourse. Article 9, the war-renouncing provision of the constitution, is seen by many as hindering Japan's efforts to contribute more meaningfully to international peace and security initiatives, and undermining Japan's ability to develop a more realistic national security posture in light of growing regional threats. On the other hand, it is seen by many others as the foundation of Japan's post-war identity as a uniquely peaceful and pacifist nation. The conflict over whether to amend it is not of course new—it has been the subject of political dispute almost from its inception. The previous chapters in this volume explain that political history, and why it has once again emerged as a political issue. Given that there is a real possibility that efforts to amend Article 9 could be seriously undertaken in the near future, and that the procedure is now in place for a national referendum necessary to adopt any revision, this chapter provides a very brief outline of a constitutional case for amending the provision.

What I mean by the term “constitutional case” is an argument that is both grounded in constitutional law principles, and aims to remain loyal to the purpose and spirit with which Article 9 was ratified. It suggests that there are legal reasons why Article 9 ought to be amended, and there are ways in which Article 9 could be amended that would nonetheless remain true to the pacifist and internationalist objectives that animated those who ratified the constitution in 1946. It is an argument that is informed by principles of international and constitutional law that are understood to play a vital role in enhancing the peaceful tendencies of democracies. Such arguments stand

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in contrast with those proposals to amend Article 9 that are apparently based on purely political and policy considerations, and are designed to essentially undermine the provision's effectiveness as a meaningful legal constraint on Japan's foreign policy. This constitutional case includes a specific amendment proposal, outlined in an appendix to this article on pages 73 to 75, as the basis for meaningful discussion about alternatives. It is an amendment proposal that is meant to serve as a starting point for discussion of a more realistic and meaningful alternative than the current position taken by pro-Article 9 advocates, which is simply to reject any and all talk of revision. In laying out this proposal, I will touch on some of the dangers inherent in the proposals of the Liberal Democratic Party (the LDP), but will also emphasize that simply maintaining the *status quo* is no longer in the best interest of the constitutional order or the normative power of Article 9 itself.

THE MEANING AND OPERATION OF ARTICLE 9

Before embarking on a discussion of why and how Article 9 ought to be amended, it is necessary to have a baseline understanding of what it means. This is, of course, the subject of considerable debate in the political, policy and academic spheres. Nonetheless, leaving aside the particulars of that debate, it is helpful to sketch out the broad concepts, as well as explain the formal and well-established government position. Article 9 provides that:

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.

In essence, the provision has three distinct elements: First, it prohibits war and the use of force for settling international disputes; second, it prohibits the maintenance of armed forces or "other war potential"; and third, it provides that the rights of belligerency will not be recognized. It is the first and second elements that have proved the most controversial, while the third is typically ignored and often misunderstood. The first paragraph, what I will refer to as Article 9(1), explicitly incorporates principles from

the international law system that governs the use of force by nation states against one another, the *jus ad bellum* regime.¹ An interpretation of this provision that was informed by both the meaning of those international law principles, and the drafting and ratification history, would likely conclude that the provision prohibited all use of force, including that employed in self-defense.²

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The second paragraph, what I will refer to as Article 9(2), is unique and rather odd. The first clause is largely without precedent in any other constitution. The plain meaning of the text, along with a study of the history of the drafting and ratification of the provision, would suggest that the first clause in Article 9(2) prohibits the maintenance of any military forces whatsoever.³ The third element, being the second clause in Article 9(2), is often misunderstood and typically ignored in most Article 9 debate, but it constitutes the incorporation of principles of international humanitarian law (or *jus in bello*) to deny individual members of the armed forces of Japan, as a matter of domestic law, the privileges and immunities that they would otherwise enjoy as belligerents in an armed conflict.⁴ It would not, of course, have any impact on the rights and obligations of Japanese armed forces under international law, and it is a curious provision with no parallel in any other constitution. The foregoing understanding of Article 9, as will be discussed in a moment, is of course quite different from the official interpretation of the provision.

While we cannot review here the drafting and ratification history, it is important to note a number of important features of the process.⁵ The Japanese government itself took the position during the revision and ratification process that Article 9 precluded all use of force and maintenance of any armed forces.⁶ The government was, of course, under some pressure from the staff of General MacArthur, which had drafted the provision, but the Diet members who considered it for purposes of ratification, and who were then unaware of the U.S. role in its creation, also embraced this posi-

tion.⁷ This was not animated solely by a desire to ensure against the militaristic errors that had led to national disaster. In both houses of the Diet and in the Privy Council, members of the government and rank and file Diet members made impassioned speeches about how Japan would, through its adoption of this constitution, come to represent the vanguard of nations in establishing a new and more peaceful international order. It was in this process that Article 9 began to be embraced not only by segments of the political elite (though there were strong opposing forces among these as well, to be sure), but also by the people of Japan. It was the beginning of a process by which Article 9 would become a powerful constitutive norm, providing the legal foundation for a new national identity centered on pacifist ideals.⁸ This is important in thinking about how to retain the essential purpose and spirit of the provision.

Notwithstanding the early understanding and apparent intent, from 1954 the government of Japan has interpreted the first paragraph of Article 9 as permitting the use of force for the individual self-defense of Japan. Quite aside from the history, this is very difficult to square with the plain meaning of the text. As already noted in previous chapters of this volume, this interpretation was based upon an opinion provided by the Cabinet Legislation Bureau (the CLB), which not only interpreted the first paragraph as permitting the use of force for individual self-defense, but also interpreted the second paragraph as therefore only prohibiting a maintenance of armed forces that exceeded the minimum necessary for such individual self-defense.⁹ At the same time, while interpreting the provision as permitting individual self-defense, the CLB also entrenched the understanding that Article 9 prohibited the use of force for collective self-defense under Article 51 of the UN Charter, and for collective security operations authorized by the United Nations Security Council under Article 42 of the Charter.¹⁰

The Supreme Court of Japan, which has largely abdicated its authority and responsibility with respect to the interpretation and enforcement of Article 9, nonetheless in 1960, in the only case in which it has addressed the meaning of Article 9, endorsed the view that Article 9(1) did not prohibit the use of force for individual self-defense.¹¹ While the clarity of the government's position, and thus the precise scope of Article 9(1), has been undermined by such policy statements as the U.S.-Japan 1997 Guidelines, and some of Japan's military deployments since 9/11, as a formal matter

this legal interpretation—limiting the permissible use of force to only individual self-defense, and armed forces to the minimum necessary for that purpose—has been consistently maintained by the government.¹²

It is important to understand the extent to which Article 9(1), and the government's interpretation of it, goes further than the *jus ad bellum* regime in international law, in the sense that it imposes greater constraints on the use of force than does the UN Charter. There was considerable concern among Japanese politicians during the ratification process as to whether Article 9 would make it impossible for Japan to comply with what were then understood as legal obligations under the UN Charter to contribute forces and participate in collective security operations. But given the manner in which the collective security system has developed,¹³ Article 9 does not put Japan at odds with international law. It deprives Japan of rights it would otherwise have under international law, namely the right to use force in collective self-

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defense or in collective security operations—but there is no legal duty on Japan to engage in such operations. And one is always at liberty to waive one's own rights. It may be, as Ozawa Ichirō and others have argued, that Article 9(1) constrains Japan in ways that prevent it from contributing to international peace and cooperation to the extent that many would like, or to the degree expected by its allies, but it does not cause Japan to violate the principles of international law. Moreover, the provisions of Article 9(2) do not have, as a matter of law, any relevance to the *jus ad bellum* regime whatsoever, even though they were no doubt conceived to limit Japan's ability to use force, and thus to prevent Japan from violating the principles of that regime.

An important question remains, however, regarding how effective Article 9 has been as a meaningful constraint on national policy. Much of the controversy surrounding Article 9 has been related to the existence and increasing size of the Self-Defense Force (SDF). Japan's defense budget ranks fifth or sixth in the world, it has one of the most sophisticated naval forces in Asia, it is cooperating with the United States in ballistic missile

defense systems, and is developing increasing force projection capabilities.¹⁴ It is widely argued that such military capability is far in excess of what is permitted by Article 9(2).¹⁵ The official interpretation of Article 9(2) relies upon the first sentence of the paragraph, which refers to fulfilling the purposes of Article 9(1), to mean that the clause only prohibits armed forces that could be used for the type of force that is renounced in Article 9(1)—that is, any use of force above and beyond individual self-defense.¹⁶ It is thus understood to prohibit the kind of military capability that could enable not only acts of aggression, but also participation in collective self-defense or collective security operations.

Whether or not one can really make meaningful distinctions between military capability that is strictly for individual self-defense and that which exceeds such requirements is the basis for much criticism.¹⁷ As a constitutional constraint Article 9(2) is highly ambiguous and not really capable of enforcement. But even on the basis of this interpretation, there is a wide and growing chasm between that which is permitted by the constitution, and the reality on the ground. It may be, as some have argued, that Japanese military capability would have been much greater had Article 9(2) not provided some foundation for political and popular opposition to the SDF and defense spending,¹⁸ but it is difficult to deny that Article 9(2) has become utterly undermined. This is a compelling reason for amendment. It is entirely unrealistic for proponents of Article 9 to think that the clock can be turned back with some radical disbandment of the SDF, and a constitutional provision that is in a constant state of violation erodes the credibility and normative power of the entire constitutional framework.

In contrast, the government interpretation of Article 9(1) provides much clearer and more enforceable limits, and the provision has operated to effectively constrain government policy over the years.¹⁹ In the early 1950s Yoshida Shigeru's government used the Article 9 constraints as a useful shield against American pressure to contribute more to the alliance and to

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participate in international peace and security operations. While cynical at the outset, this use of Article 9 nonetheless strengthened the normative power of Article 9(1), and helped reinforce the growing social, political and legal norms that were anchored in the Article 9(1) renunciation of the use

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of force. Over time, Article 9 thus came to comprise a real constraint on policy. This was most clearly illustrated during the Gulf War. The government felt a powerful need to participate militarily in the coalition operations to drive Iraqi forces out of Kuwait, but the CLB advised that the government's proposed actions would constitute a use of force and thus violate Article 9. When the government proposed legislation for the contribution of non-

combat related logistical support, it was defeated in the Diet on grounds that it too would violate Article 9.²⁰ Notwithstanding the enormous pressure from Washington and the deeply felt sense that inaction was causing a major diplomatic crisis for Japan, Article 9(1) mobilized sufficient institutional compliance to prevent government action that would have violated the provision.²¹

The Gulf War generated pressure to relax the constraints imposed by Article 9, and that pressure has only strengthened in the post-9/11 environment, for reasons that are explained in the chapters in this volume by Chris Hughes and Thomas Berger. And while Article 9 has continued to constrain policy even as Japan sought to contribute to the so-called "global war on terror," the reality is that over the long term the calls for amendment are likely to become irresistible. The growing sense of insecurity in the face of strategic developments in the region, not least of which being the development of Chinese military capability and uncertainty regarding North Korea, together with Japan's ongoing aspiration to obtain a seat on the UN Security Council, and pressure from the United States to contribute more to the alliance, all militate in that direction.

As the earlier chapters in this volume have outlined, a number of constitutional amendment proposals have been published. The most comprehensive and serious of these was that of the LDP, published in 2005.²² The LDP published a revised version of this proposal in April, 2012, just as this vol-

ume was going to press. It included revisions to its 2005 document, and this proposal contains significant changes to the language of Article 9.²³ While there is not room here to engage in a detailed analysis of the text, under the LDP proposal Article 9(1) would be revised to clarify that Japan retains a right of self-defense (without specifying whether individual, collective, or both), and the language prohibiting the use of force would be significantly relaxed. Article 9(2) would be entirely replaced, and it would begin by making explicit the authority to maintain a “national defense military” (*kokubōgun* – the NDM), for the purpose of, among other things, defending the peace and independence of the country, and to engage in “international cooperation operations” (*kokusai kyōchō kastudō*)²⁴ to guarantee the peace and security of the international society.²⁵ Moreover, an entirely new Article 9(3) provides that the state, in cooperation with the people, shall protect the land, territorial waters, and air space of the country, together with all resources therein.

While the LDP proposal for Article 9(2) does introduce new provisions to establish greater civilian control, placing the NDM under the control of the prime minister, with several of its specified activities being subject to the approval of the Diet, the overall effect of the revisions would be to significantly undermine the constraints that Article 9 currently exercises on the use of force. Not only does the revision to Article 9(1) itself weaken the explicit constraint imposed, but the proposed changes to Article 9(2), and the new Article 9(3) would necessarily require a change to the current understanding of Article 9(1).²⁶ Moreover, the introduction of the new authority to engage in “international cooperation operations,” a term that has no defined meaning in international law, would provide the ambiguity sufficient to encompass collective self-defense, collective security operations, and indeed even aggressive military operations in violation of international law, so long as they were conducted in cooperation with other states.

The main point is that this and other proposed amendments to Article 9 would utterly hollow out the provision’s constraints on the government’s ability to use armed force, and would be a marked departure from the pacifist principle that is thought to one of the three pillars of the Japanese constitutional order. Yet these are concrete proposals, and it is increasingly likely that they will be the subject of substantive debate as the prospect of amendment becomes more real. Supporters of Article 9 cannot continue to simply stonewall the debate, and refuse to discuss the details of these

amendment proposals. They cannot continue to leave the field to the revisionists, and refuse to submit some alternative proposals that are true to the underlying principles. They must address the fundamental question: how can Article 9 be amended in a manner that addresses not only the very real security and diplomatic concerns, but also the constitutional law imperatives for amendment, while nonetheless remaining true to the spirit of the provision?

A PROGRESSIVE ALTERNATIVE

Clarity on the Permissible Use of Force

Article 9(1) is the most important and effective provision of Article 9. It is at the core of the idea of Japan being a pacifist country, and it has operated to effectively constrain government policy. With the exception of marginal involvement in post-occupation Iraq, Japan has not used military force in *jus ad bellum* terms since the end of World War II, and that is due at least in part to both the direct operation and broader influence of Article 9(1).²⁷ That is impressive. Nonetheless, as has been explained, Article 9(1) is not without legal ambiguity. There is tension between the government interpretation and the facial meaning of the language, and the ambiguity inherent in the provision could be the source of considerable mischief depending on how Article 9(2) is amended. The LDP's amendment proposal is clearly intended to broaden the scope of permissible use of force, while leaving Article 9(1) largely intact, which would merely provoke greater political and legal conflict down the road. In the event that Article 9 is to be amended, Article 9(1) should be revised to provide in explicit terms precisely that which is prohibited, and that which is permitted.

This would require, of course, some important decisions about the scope of the prohibition that is to be created. Rather than burying or avoiding the issue, a clear amendment proposal will need to explicitly articulate that the use of force for the purpose of the individual self-defense of Japan, pursuant to Article 51 of the UN Charter, is permitted. In addition, it will also have to make clear whether force is permitted for either, or both, collective self-defense, and collective security operations authorized by the UN Security Council. Part of the debate in Japan has been over precisely this question, with people like Ozawa Ichirō of the DPJ, for instance, arguing that collective self-defense should be prohibited, but UN authorized collective se-

curity operations permitted.²⁸ On the other hand, collective self-defense is at the core of the U.S.-Japan security arrangement, and there is pressure on Japan from Washington to broaden its ability to more fully contribute to the defense of U.S. interests outside of Japan.²⁹ Indeed, the efficacy of the ballistic missile defense system being jointly developed relies upon such cooperation. Given that collective self-defense can be exercised unilaterally, requiring no authorization by the UN, many Japanese are justifiably concerned that permitting it could lead to Japanese involvement in military adventures that were in violation of international law. A constitutional prohibition on the use of force for collective self-defense, while permitting participation in UN collective security operations, would have the benefit of subjecting Japanese use of force (for anything beyond individual self-defense) to external checks, and would ensure it complied with international law.³⁰ Of course it would still deny to Japan a right that exists in international law, but, as is currently the case, the denial of the right would not prevent Japan from fulfilling its legal obligations.³¹ Such a provision would still bring Article 9(1) into greater conformity with the *jus ad bellum* regime, and allow Japan to better fulfill its perceived international responsibilities. Such a provision would, for instance, have permitted participation in the first Gulf War, and in the UN mandated operations in Afghanistan, but would have prohibited participation in the invasion of Iraq.

I am not here making a case for any particular position, such as revising the constitution to permit only UN authorized collective security operations, or only collective self-defense, or indeed to permit both. But I am arguing that Article 9(1) ought to be amended to make very clear what is to be permitted and what not, in terms that have specific meaning under international law. Seeking to amend Article 9 without making these hard choices, and trying to fudge the issue with such ambiguous terms as “in-

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MISCHIEF.**

ternational cooperation operations,”—which has absolutely no legal meaning—is precisely the wrong way to proceed. If the decision is made that Article 9 should permit both collective self-defense and collective security operations, then one option with respect to the actual language would be to simply incorporate generally by reference that which is permitted by the UN Charter and customary international law, so that the constitutional provision would adjust with international law over time.³² (Sample language, with different possible options for a proposed Article 9(1), is provided in the appendix on pages 73 to 75.)

Armed Forces, but With Clear Civilian Control

Turning to Article 9(2), I would endorse the LDP proposal’s move to delete the prohibition on the maintenance of armed forces or “other war potential,” as well as the denial of rights of belligerency, and also agree with its proposal to acknowledge the legitimacy of the SDF. Moreover, credit is due for the attempt to add some degree of civilian control. Nonetheless, there need to be stronger and more elaborate constraints adopted in conjunction with these moves to legitimate the existence of a military. This abandoning of the renunciation of armed forces will, of course, be enormously controversial for many supporters of Article 9, while the new constraints will be objectionable to the right. But as already argued, the left must come to recognize that the existence of the SDF is a reality that cannot be realistically reversed. It is futile to argue for the disarmament of Japan in the current environment. Moreover, the future that was envisioned when the constitution was ratified, in which UN forces would enforce a collective security system to maintain international peace and security, making the maintenance of national armed forces increasingly unnecessary, has not materialized.³³ And as already argued, the ever growing gap between the reality of Japan’s military capability and the prohibition in Article 9(2) is increasingly unhealthy for the constitutional order as a whole. Even accepting the government interpretation, Article 9(2) is increasingly problematic. If Article 9(1) is amended to make clear that Japan can use force in individual self-defense, as well as for collective security operations, it will be impossible to meaningfully distinguish between a military capability that is the minimum necessary for such purposes, and that which exceeds the limit. Opaque and unenforceable provisions corrode a constitution. It is, therefore, advisable to

eliminate the general prohibition on the maintenance of armed forces, and to put in place important constraints that the constitution currently lacks.

The overriding purpose behind the first clause of Article 9(2) was to prevent the possibility of a Japanese military again leading the country into a disastrous war.³⁴ It was a response to the militarism of the 1930s, and the ruin that a defeated nation suffered as a result. That militarism had been made

possible precisely because of fundamental flaws in the Meiji Constitution of 1898.³⁵ Among other things, the Meiji Constitution was highly ambiguous on the nature of the executive, it failed to identify the locus of supreme command over the military, and it did not establish

civilian control over the military. While the 1947 Constitution of Japan corrected the problems regarding the location and scope of executive power, it was largely silent on the issues of civilian control and supreme command, precisely because it did not contemplate that Japan would have any military at all, or that it would be able to use force. There is only one relevant provision (Article 66(2)), added late in the ratification process, which requires that the prime minister and other cabinet ministers be civilians.³⁶ Beyond that, there are no provisions regarding supreme command or civilian control. Moreover, there is nothing that provides for legislative oversight. It will be recalled that in the last five years there have been significant incidents in which the Diet was misled by the SDF regarding operations in support of coalition actions in Iraq and Afghanistan, and the Diet inquiry into those incidents was handcuffed by its limited power to compel the disclosure of information from the Ministry of Defense and the SDF.³⁷

Similarly, because Article 9(1) originally contemplated that Japan was to be prohibited from using any force at all, there are no constitutional provisions regarding how decisions are to be made regarding the use of force. Assuming that the decision is to be made by the executive, is it a decision of the prime minister alone, or the cabinet as a whole? Is it a purely executive decision, or must it be also approved by the legislature? Is there some threshold level above which a decision to deploy military forces requires legislative approval? A convention has developed in Japan pursuant

**OPAQUE AND
UNENFORCEABLE
PROVISIONS CORRODE
A CONSTITUTION.**

to which the Diet is required to pass a law for each deployment of the SDF, but there is no provision of the constitution that requires this process. Not long before it was replaced in the last election, the LDP government was working on legislation that would provide the government with permanent

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authority to deploy the SDF so long as prescribed conditions were satisfied, thereby eliminating this very convention.³⁸

There is a growing trend among constitutional democracies towards the establishment of constitutional or statutory provisions that require governments to obtain legislative approval for decisions to use armed force.³⁹ As was observed by Immanuel Kant and James Madison over two hundred years ago, such separation of powers with respect to the decision to go to war is an important factor in not only satisfying the requirements of representative democracy, but also in reducing the risk of democracies embarking on military misadventures.⁴⁰ When the representatives of those citizens who will be dying and paying for the war participate in the

decision-making process, there is less chance that wars will be fought for the benefit of narrow interests. Modern political theory has reinforced our understanding of the various ways in which such legislative involvement and oversight can enhance the decision-making process and reduce the risk of states engaging in ill-advised or illegitimate wars.⁴¹

If we accept that Article 9 is to be amended in a manner that contemplates the possibility of some use of force, and formalizes the existence of an armed forces, but also insist that Article 9 nonetheless reflect its pacifist origins, and continues to serve as an *avante garde* model for other nations, I would suggest that any amendment must include some entirely new provisions that address the foregoing problems. First, an entirely new Article 9(2) ought to include provisions that would provide for civilian control and strict neutrality of the military (in place of the current Article 66(2)). Building on the LDP proposal, this could be achieved by establishing that

the prime minister is commander in chief, prohibiting the appointment of serving officers of the armed forces as ministers in the cabinet, and limiting other ways in which the military might become involved in politics and policy. As part of both civilian control and legislative oversight, the new Article 9(2) ought to include provisions that would require the establishment of institutions that would monitor military deployments, along the lines of the Armed Services Committee in the U.S. Congress, and the oversight mandated in the German Basic Law.⁴²

Second, a new sub-paragraph, Article 9(3), should include provisions that establish the formal separation of powers with respect to decisions to participate in armed conflict or other military operations. As reflected in the draft language in the appendix to this chapter, this would include a requirement that the government obtain approval in both houses of the Diet for decisions to use force or deploy the armed forces for international operations. It would require a super-majority in such votes with respect to decisions to use force in *jus ad bellum* terms, but a simple majority for other operations. The deployment of military forces for UN peacekeeping missions, for instance, will typically not contemplate the use of force, and so ought to be subject to lower thresholds than the dispatch of troops for collective security operations under Chapter 7 authority to use force. The provision should include a mechanism for requiring further approval of the Diet in the event that a peacekeeping mission morphs into a full-blown Chapter 7 “peace enforcement” operation, as has happened with operations such as that in Somalia.

This provision would merely build upon and constitutionalize a convention that already operates in Japan, so in many respects it should not be seen as a radical suggestion. Yet the constitutionalizing of this convention is important, as it protects the current convention from capricious change. Even more significant, such a provision entrenches principles that are increasingly understood to be central to explanations for the democratic peace, and which enhance democratic accountability and deliberation in respect

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SECURITY OPERATIONS.**

of the most important decision a government can make—that is, the decision to engage in armed conflict.⁴³ It would, moreover, do much to reassure Japan's neighbors in the region, who will be highly sensitive to the ramifications of these amendments.

Many will of course resist this innovation on the grounds that it makes decision-making cumbersome and time-consuming, and may lead to the Diet actually preventing a contemplated use of force or military deployment, as it did during the Gulf War crisis. But that is of course precisely the point. Engaging in armed conflict should not be easy, and ought to be possible only when the reasons are compelling enough to mobilize the opinions and support of a significant percentage of the polity. Decisions to engage in armed conflict ought to be taken only after serious debate, with the assumptions and reasons of government exposed to interrogation and analysis, and challenged from various perspectives.⁴⁴ There will of course be possible scenarios, such as when the state itself is under direct attack, in which the luxury of time for such debate and analysis is impossible. But mechanisms can be developed to deal with such circumstances, permitting decisions be made by the executive to use force in an emergency, subject to *ex post facto* approval by the legislature within a defined time frame, as the U.S. *War Powers Act* and the constitutions of several other countries provide for.⁴⁵

Reinforcing the Power of Judicial Review

The final element of the amendment required to fully establish civilian control over the military and separation of powers with respect to the decision to engage in armed conflict would be a provision for more specific judicial review of decisions or actions that might be in violation of Article 9. The Constitution of Japan already provides for considerable powers of judicial review,⁴⁶ but the Supreme Court has largely abdicated its responsibility and authority with respect to the interpretation and enforcement of Article 9.⁴⁷ The lower courts have generally followed the Supreme Court's lead by insulating Article 9 from judicial review through the application of excessively narrow standing requirements, such that virtually no one other than a member of the SDF ordered into combat could establish the narrow legal interest deemed necessary to ground a claim that government action is in violation of Article 9.⁴⁸

This of course means that Article 9, one of the three pillars of the Japanese constitutional system, is immunized from judicial scrutiny and is largely unenforceable, and that the third branch of government in the Japanese democratic system has opted out of any involvement in the process of ensuring that decisions to use force comply with the constitutional limits. To the extent that one takes seriously the idea that Article 9 is a fundamental component of the constitutional system, and takes seriously the notion that constitutional limits ought to be binding and enforceable, then this situation ought to be considered unacceptable. If we understand one of the roles of constitutions as being to operate as pre-commitment devices, serving to bind future governments

to principles and values viewed at the outset as crucial for the polity, then one role of the courts is to ensure that those commitments are enforced.⁴⁹

Aside from broader constitutional theory, the role of the judiciary is key to ideas that form part of liberal theories regarding the democratic peace. While the separation of powers as between the executive and legislature is central to republican ideas of democratic accountability, and for creating the circumstances in which the benefits of representative and deliberative democracy will operate to reduce the risk of rash decisions to engage in armed conflict, it is not sufficient. It is recognized that there will be times when legislatures too can be carried away in irrational fervor for war. Political theory suggests that this risk is highest for democracies when dealing with illiberal states. There is, therefore, a real need for a further check in the democratic system, a further separation of powers with respect to the decision to use force. The third branch of government, independent and the least susceptible to the political pressure of the day, in the course of constitutional litigation plays a crucial role of monitoring government conduct, disseminating information about such conduct and coordinating public opinion regarding decisions, and finally in actually enforcing the constitutional provisions governing the decisions to use force.⁵⁰ Over time the very possibility of such judicial review exercises a powerful influence on

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government conduct, and serves to internalize constitutional norms. It is yet another but crucial mechanism for moderating the tendency of democracies to engage in illegitimate or unlawful armed conflicts.⁵¹

As previously mentioned, there are a number of other countries that have constitutional provisions requiring legislative involvement in decisions to use force or deploy armed forces, and several that also have constitutional limits on the circumstances under which the state may engage in armed

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conflict.⁵² Courts have thus been called upon to consider these issues in other countries. While many argue that the domestic courts of many countries do not and ought not to interfere in government decision-making on national security issues, there is increasing evidence of a trend towards courts rejecting the notion that questions relating to national security are somehow non-justiciable or beyond the jurisdiction of the judiciary.⁵³ In particular, many courts have not been reluctant to

engage in a review of specific questions regarding the extent to which government decisions relating to national security were made in a manner that complied with clear and unambiguous constitutional conditions, or were made by the branch of government that had the requisite constitutional authority to do so.⁵⁴ The Constitutional Court of Germany illustrated this most famously with its 1994 decision relating to Germany's involvement in Bosnia, holding that the Bundestag must approve each and every decision to deploy the armed forces of Germany for international military operations.⁵⁵

I would therefore propose a new clause for Article 9, Article 9(4), which would provide for explicit powers of judicial review with respect to government compliance with the rest of the provision. This sub-section would also establish broad standing for citizens seeking to commence applications to enforce the provisions of Article 9. Such standing would not require existence of a personal narrow legal interest, as currently serves to insulate Article 9 from virtually all judicial review. Rather, employing a standard similar to that established by the Supreme Court of Canada, the Supreme Court of Japan should merely require that there be a serious issue to be de-

terminated, that the applicant has a genuine interest in the issue, even if only as a representative of the broader public, and that there would be no more reasonable or effective manner for the issue to be brought before the court.⁵⁶ Such a provision would bring Article 9 back into the realm of enforceable constitutional provisions. In so doing, it would also provide some reassurance that the amendment of Article 9 to permit some use of force would not be the beginning of a slippery slope towards unrestricted participation in military operations of all kinds.

The LDP draft amendments and other proposals being developed by those who are essentially hostile to the underlying premise of Article 9, would operate to undermine the constraints that Article 9 has exercised over Japan's use of force over the last sixty five years. They are potentially dangerous. Yet those who support Article 9 and the idea of a pacifist Japan can no longer afford to simply reject all talk of amendment. The winds of change are moving against them, and they must develop realistic and feasible alternatives to the proposals being developed by those on the right. When the debate is finally joined in earnest, and questions of amendment are being developed to lay before the people of Japan, the champions of Article 9 will have to have some meaningful response. There are sound reasons to think that Article 9 ought to be amended, for the good of the constitutional order as a whole, and in the interests of preserving reasonable constraints on Japan's ability to use armed force. I have tried here to provide the outline of some of those arguments, and to provide some revised language that may serve as the starting point for a discussion on what form alternative proposals might take—proposals that would remain true to the spirit and purpose of Article 9.

NOTES

1 For my more detailed analysis of the meaning of Article 9, from an international law perspective, see Craig Martin, "Binding the Dogs of War: Japan and the Constitutionalizing of *Jus ad Bellum*" 30 *University of Pennsylvania Journal of International Law* 267-357 (2008), 309-317.

2 Ibid, 309-312; There is, of course, an enormous literature on and intense debate over the interpretation of Article 9. A few sources that approach the issue with a greater attention to the international law principles from which Article 9 was drawn, include: Hatake Motoaki, *Kenpō 9 jō: kenkyū to giron no saizensen*, ch. 6 (Tokyo:

Seirin Shoin, 2006); Fujii Toshio, *Kenpō to kokusai shakai* (Tokyo: Seibundō, 2005), 2d ed., chs. 12–14; Nasu Hitoshi, “Article 9 of the Japanese Constitution Revisited in the Light of International Law,” 18 *Journal of Japanese Law* 50-66 (2004).

3 James E. Auer, “Article Nine: Renunciation of War” in Percy R. Luney Jr. and Kazuyuki Takahashi, ed. *Japanese Constitutional Law* (Tokyo: Tokyo University Press, 1993), and Kenneth L. Port, “Article 9 of the Japanese Constitution and the Rule of Law,” 13 *Cardozo Journal of International & Comparative Law* 127 (2005).

4 As will be discussed below, there are actually two theories as to the meaning of this clause. For an account of both theories, see Hatake, *Kenpō 9 jō*, note 2, 87–88; Tamura Shigenobu et al., *Nihon no bōeihōsei* (Tokyo: Naigai Shuppan 2008), 15; Ashibe Nobuyoshi, *Kenpōgaku*, Vol. 1 (Tokyo: Yuhikaku, 1992), 283-84; On the rights of belligerency in international law generally, see e.g., Yorum Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press, 2004), 27-33; for my more detailed analysis of this clause, see Martin, “Binding Dogs of War,” note 1, 314-17; See also, Craig Martin, “Denying the Right of Belligerency: The Significance of the Forgotten and Misunderstood Clause of Japan’s Article 9” (forthcoming, 2013).

5 For a very detailed account of the process in English, see Ray A. Moore and Donald L. Robinson, *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (Oxford: Oxford University Press, 2002); see also Koseki Shōichi, *The Birth of Japan’s Postwar Constitution*, (Boulder, CO: Westview, 1997).

6 Even Prime Minister Yoshida took this position in answering questions during the committee deliberations. See Moore, *Partners for Democracy*, note 5, 212; Osamu Nishi, *The Constitution and the National Defense Law System in Japan* (Tokyo: Seibundō, 1987), 5, 100-102; but see Yasuzawa Kiichirō, *Kenpō daikyūjō no kaishaku* (Tokyo: Seibundō, 1981), from 156 and from 186.

7 Moore, *Partners for Democracy*, note, 170, 212-216.

8 Peter J. Katzenstein, *Cultural Norms and National Security: Police and Military in Postwar Japan* (Ithaca: Cornell University Press, 1996), 4-5, 44, 112; and Martin, “Binding Dogs of War,” note 1, 282, 304-305, 355-56.

9 The interpretation was provided by Director Hayashi in the House of Representatives Budget Committee deliberations, on December 21, 1954. See Nishikawa Shinichi, *Shirarezaru kanchō: naikaku hōseikyoku*, ch. 2 (Tokyo: Gogatsu Shobo, 2000), 40. See Richard J. Samuels, “Politics, Security Policy, and Japan’s Cabinet Legislation Bureau: Who Elected These Guys, Anyway?” (Japanese Policy Research Inst., Working Paper No. 99, 2004), available at <http://www.jpri.org/publications/workingpapers/wp99.html>, 6.

10 John O. Haley, “Waging War: Japan’s Constitutional Constraints” 14(2) *Constitutional Forum* 18-34 (2005), 28-29, 33; Nishikawa, *Shirarezaru kanchō*, note 8, 46.

11 *Sunakawa* case, 13 Keihō hanreishū 3225, (Supreme Court, December 16, 1959), <http://www.courts.go.jp/english/judgments/text/1959.12.16-1959-A-No.710>.

html (trans); for discussion of this aspect of the case, see Martin, “Binding Dogs of War,” note 1, 338-40; Haley, “Waging War,” note 9, 24 and 28.

12 The CLB reinforced and elaborated upon its formal interpretation again in 1981; see Samuels, “Cabinet Legislation Bureau,” note 8, 8, for the full formulation; on the 1997 Guidelines, see Joint Statement in Review of U.S.-Japan Defense Cooperation Guidelines, U.S.-Japan, September 23, 1997, 36 I.L.M. 1621; For analysis, see Yamauchi Toshihiro (ed.), *Nichibei shingaidorain to shuben jitaihō* (Tokyo: Hōritsubunkasha, 1999).

13 In particular, the establishment of a U.N. standing force, to which all members would be required to contribute forces, and the use of such forces in collective security operations, as contemplated by Article 43 of the U.N. Charter, never came to pass. See Yorum Dinstein, *War, Aggression, and Self-Defence*, (Cambridge: Cambridge University Press, 2005), 4th ed., ch 10, and Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2008) 3rd ed., ch. 7 and 8; for more on this point in the context of Article 9, see Martin, “Binding the Dogs of War,” note 1, 327-28.

14 For analysis of Japan’s military capability and national defense policy, see Christopher W. Hughes, *Japan’s Re-emergence as a ‘Normal’ Military Power*, (Oxford: Oxford University Press, 2006); Christopher W. Hughes, *Japan’s Security Agenda: Military, Economic & Environmental Dimensions*, (Boulder, CO: Lynne Rienner Publishers, 2005).

15 Auer, “Article Nine: Renunciation of War,” note 3; Kenneth L. Port, “Article 9 of the Japanese Constitution and the Rule of Law.”

16 This is the famous “Ashida amendment” – for my analysis of this as it bears on the official interpretation of Article 9, and some of the myths surrounding its origins, see Martin, “Binding Dogs of War,” note 1, 303-06; see also Moore and Robinson, *Partners for Democracy*, note 5, 248-50, and 275; Shōichi, *Birth of Japan’s Constitution*, note 5, 195-202.

17 Watanabe Yōzō, *Nichibei Anpotaisei to Nihonkoku Kenpō*, (Tokyo: Rōdōjunpōsha, 1991), 129–30.

18 Article 9 was the well-spring for such other limiting policies as that which limited defense spending to 1% of GNP, the three non-nuclear principles, and the prohibition on the export of arms. See Kenneth Pyle, *Japan Rising: The Resurgence of Japanese Power and Purpose* (New York: Public Affairs, 2007), 273-76.

19 For a detailed argument to support this assertion, see Martin, “Binding Dogs of War,” note 1, 329-56.

20 For more on the crisis, the government’s attempt to respond to it, see Pyle, *Japan Rising*, note 17, 290-293; Kazuhiko Togo, *Japan’s Foreign Policy 1945-2003* (Leiden: Brill, 2005), 305-307; Katzenstein, *Cultural Norms and National Security*, note 7, 125-127.

21 Martin, “Binding the Dogs of War,” note 1, 346-47.

22 Liberal Democratic Party, “Jiyūminshūtō shinkenpō sōan,” Kenpōkaigi website (n.d.), <http://www.kenpoukaigi.gr.jp/seitoutou/051028jimin-sinkenpousouan.pdf>.

23 “Jiyūminshūtō shinkenpō sōan,” Liberal Democratic Party website, April 27, 2012, http://www.jimin.jp/policy/policy_topics/116666.html

24 Ibid. Paraphrased from the full clause “*kokusai shakai no heiwa to anzen wo kakubosuru tamenī kokusaiteki ni kyochōshbite okonowareru katsudō.*”

25 Ibid. Also entirely new to the 2012 draft, as compared to the 2005 LDP proposal, is the introduction of a provision in Article 9(2) establishing the authority for a military court to try members of the military and other public officials for offences committed in the performance of their duties, and for crimes relating to the disclosure of military secrets.

26 Reinterpretation of Article 9 was, of course, one of the prongs of prime minister Abe Shinzo’s attacks on Article 9, and was the recommendation of the so-called Yanai Report. “*Anzen hoshō no hōteki kiso no saikōchiku ni kansuru kondankai*” *hōkokusho*, Prime Minister’s Office website, June 24, 2008, <http://www.kantei.go.jp/jp/singi/anzenhoshyou/houkokusho.pdf>.

27 Martin, “Binding the Dogs of War,” note 1, 346-47.

28 Ozawa Ichirō, *Nihon kaizō keikaku*, (Tokyo: Kodansha, 1993), 114-137.

29 Togo, *Japan’s Foreign Policy*, note 19, 78-85; Thomas A. Drohan, *American-Japanese Security Agreements, Past and Present* (Jefferson, NC: MacFarland, 2007), 61-70, 85.

30 For more on the distinction, see Craig Martin, “Collective Self-Defense and Collective Security: What the Differences Mean for Japan,” *The Japan Times*, August 30, 2007. For more on the scope and nature of each concept in international law, see Dinstein, *Aggression*, *supra* note 12, chs. 9 and 10.

31 Though, this proposition becomes somewhat more debatable as Japan increasingly agrees to vaguely worded commitments regarding mutual defense, as in the 1997 Guidelines; see footnote 12.

32 A number of countries have adopted this approach to the incorporation of human rights principles from international law into their constitutions; see Thomas Buergenthal, “Modern Constitutions and Human Rights Treaties,” 36 *Columbia Journal of Transnational Law* 211 (1997).

33 See footnote 13.

34 I am here referring to the purpose as contemplated by the ratifiers. The American drafters, of course, had a similar though slightly different purpose of preventing Japan from ever again posing a military threat to the United States and its allies.

35 George M. Beckmann, *The Making of the Meiji Constitution: The Oligarchs and the Constitutional Development of Japan, 1868–1891* (Lawrence: University of Kansas Press, 1957).

36 Article 66(2) provides that “the Prime Minister and other Ministers of State must be civilians.” It was added at the insistence of the Far Eastern Commission during the ratification process, after the Ashida amendment was added to Article 9. There was uncertainty at the time as to how “civilian” should be translated, and the word *bunmin* was used, though with little clarity on what its exact scope and meaning

would be (would it cover retired officers, for instance, or only serving members of the military?). Moore and Robinson, *Partners for Democracy*, note 5, 306.

37 Riji Yoshida, “MSDF Knew of Oil Error Since ’03: Opposition Demands Sworn Diet Testimony by Officials,” *The Japan Times*, October 23, 2007; “Ex-MSDF Officer Snubs Diet Summons in Refueling Snafu,” *The Japan Times*, November 6, 2007.

38 Craig Martin, “Permanent SDF Overseas Deployment Law Endangers Democracy,” *The Japan Times*, May 21, 2008.

39 Wolfgang Wagner, *Parliamentary Control of Military Missions: Accounting for Pluralism* (Geneva Center for the Democratic Control of Armed Forces, 2006).

40 Immanuel Kant, “Perpetual Peace: A Philosophical Sketch” (1795), reprinted in H.S. Reiss ed., H.B. Nisbett trans., *Kant: Political Writings* (Cambridge: Cambridge University Press 1991) 2nd ed; James Madison, *The Federalist No. 41*, 251-60 (James Madison, Clinton Rossiter ed., (New York: Signet 1961); I analyze these arguments and develop a normative model for both constitutional incorporation of international law principles on the use of force, and greater constitutional control over such decision-making, in Craig Martin, “Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law,” 76:2 *Brooklyn Law Review* 611-730 (2011).

41 On the functions of parliaments in this context, see, e.g., Heiner Hänggi, “The Use of Force Under International Auspices: Parliamentary Accountability and ‘Democratic Deficits,’” in Hans Born & Heiner Hänggi eds., *The “Double Democratic Deficit”* (Burlington, VT: Ashgate, 2004); Owen Greene, “Democratic Governance and the Internationalisation of Security Policy: The Relevance of Parliaments,” in *The “Double Democratic Deficit”*; on the functioning of deliberative democracy more generally, see Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004); for literature on the “democratic peace,” which is huge, see, e.g., R.J. Rummel, *Understanding Conflict and War* (Beverly Hills, CA: Sage, 1979); Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton University Press, 1993).

42 German Basic Law, Article 45b.

43 See authorities in footnotes 39 and 40, and my analysis of these issues in Martin, “Taking War Seriously,” footnote 40.

44 *Ibid.*

45 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)); for examples of such mechanisms or other exceptions in the constitutions of other countries, which would include Denmark and Sweden, see Wanger, *Parliamentary Control*.

46 Articles 76, 81, and 98, Constitution of Japan, 1947.

47 Martin, “Binding the Dogs of War,” note 1, 337-43; but see Haley, “Waging War,” note 9, 24 and 28.

48 The Supreme Court established this narrow standing requirement in the *Naganuma* case, 36 Minpō Hanreishū 1679 (Sup. Ct., Sept. 9, 1982).

49 Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge: Cambridge University Press, 1979); See also, Stephen Holmes, "Precommitment and the Paradox of Democracy," in Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), 195.

50 See David S. Law, "A Theory of Judicial Power and Judicial Review," 97 *Georgetown University of Law Journal* 723-801 (2009).

51 Much more could be said about this last assertion – but to the extent the Constitution incorporates principles of international law, adherence to the constitutional limits will help ensure that the state does not use force in violation of international law principles. See "Martin, Taking War Seriously," note 33; on the need for such checks to resist the tendency of democracies to engage in irrational wars with illiberal states, see Michael Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (New York: Norton, 1997), 251-301.

52 See Wagner, *Parliamentary Control*.

53 Aziz Z. Huq, "Against National Security Exceptionalism," *Supreme Court Review* 225 (2009); Cass R. Sunstein, "Judging National Security Post – 9/11: An Empirical Investigation," *Supreme Court Review* 269-292 (2008); Kent Roach, "Judicial Review of the State's Anti-Terrorism Activities: The Post 9/11 Experience and Justification for Judicial Review," 3 *Indian Journal of Constitutional Law* 138-167 (2009).

54 For the analysis supporting this proposition, see Martin, "Taking War Seriously," 693-704.

55 *Bundesverfassungsgericht* [Federal Constitutional Court] July 12, 1994, 106 I.L.R. 320 (Ger.); see also Georg Nolte, "Germany: Ensuring Political Legitimacy for the Use of Military Forces by Requiring Constitutional Accountability," in Charlotte Ku & Harold K. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law*, (Cambridge University Press, 2003).

56 *Thorson v. Attorney General*, [1975] 1 S.C.R. 138 (Can.); *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (Can.); see also, Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 2007) 5th ed., 776-80.

APPENDIX

PROPOSED AMENDMENTS TO ARTICLE 9

Article 9(1) – (Option One) - Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce the threat or use of force as means of settling international disputes, except for the purpose of individual self-defense of the nation in the event of armed attack, or for the purpose of maintaining international peace and security as authorized by the United Nations Security Council.

Article 9(1) – (Option Two) - Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce the threat or use of force as means of settling international disputes, except in accordance with that which is permissible under the United Nations Charter and customary international law.

Article 9(2)(a) – The government may establish land, sea, and air armed forces for the primary purpose of defending the territorial and political integrity of Japan. In addition to self-defense, the armed forces of Japan may only be employed for such purposes as are permitted by the exceptions provided for in the preceding paragraph, and otherwise in accordance with the provisions of the Constitution and other laws of Japan.

Article 9(2)(b) – The Prime Minister, acting through the Minister of Defense, shall be the commander in chief of the armed forces of Japan. No serving member of the armed forces may be appointed as a minister in cabinet, and no serving officer with the rank of Colonel or higher may serve in any ministry of government other than the Ministry of Defense.

Article 9(2)(c) – No serving member of the armed forces may run for public office, be a member of any political party, actively participate in any

political campaign, or otherwise engage in public debate or other activity designed to influence the formulation of public policy.

Article 9(2)(d) – A Committee for the Armed Forces shall be established by law in the House of Representatives and the House of Counselors in the Diet, for the purpose of requesting and receiving reports from the Ministry of Defense and other branches of government, on the deployment and operations of the Armed Forces, otherwise monitoring such operations of the Armed Forces, and generally providing legislative and civilian oversight over the Armed Forces. The Committee for the Armed Forces shall have subpoena power over documents and may compel testimony before it, and shall issue reports of its findings.

Article 9(3)(a) – Any decision by the government to use force consistent with and as permitted by paragraph one of this Article, shall be approved in a formal vote by each of the House of Representative and the House of Counselors, by a minimum of two thirds of votes cast by the members of each House.

Article 9(3)(b) – In the event that the nation is under attack or the government has determined that there is a state of emergency threatening the territorial and political integrity of the state, making prior approval from the Diet impractical, the government may use force in accordance with paragraph one of this Article without such prior approval. In such event, the government shall immediately provide notice of its decision to each House of the Diet, and it shall obtain approval from each House in accordance with the terms of sub-paragraph (a) of this paragraph within twenty days thereof, failing which the government shall immediately cease such hostilities.

Article 9(3)(c) – Any decision by the government to deploy members of the Armed Forces for participation in peacekeeping operations, to provide logistical support for international collective security operations, or other such activity that does not include the use of force contemplated in paragraph one of this Article, shall be approved by a formal vote of each of the

House of Representatives and the House of Counselors, by a simple majority of the votes cast by the members of each House.

Article 9(3)(d) – In the event that the character of any operations in which members of the Armed Forces are participating in accordance with sub-paragraph (c) of this paragraph, should develop such that they will likely require a use of force contemplated in paragraph one of this Article, the government shall obtain further approval for the continuation of such operations according to the terms of sub-paragraph (a) of this paragraph, failing which the government shall immediately discontinue such operations.

Article 9(4)(a) – Any person in Japan may apply to a court of competent jurisdiction to obtain a declaration, injunctive relief, damages, or any other remedy for alleged violation of this Article that the court considers appropriate and just in the circumstances.

Article 9(4)(b) – Any person who has made application under sub-paragraph (a) of this paragraph shall be granted standing by the court so long as the issue raised is a serious issue to be tried, the person has a genuine interest in the issue, even if only as a representative of the general public, and there would be no other reasonable or effective means for the issue to be brought before the court.

Article 9(4)(c) – The Supreme Court has the final authority with respect to the interpretation and meaning of this Article.

ARTICLE 9—ETHNOGRAPHICALLY SPEAKING

SABINE FRÜHSTÜCK

On September 7, 2011, Maehara Seiji, the new policy chief of the Democratic Party of Japan, told an audience of experts on the Japan-U.S. security alliance in Washington that the restrictions on the use of weapons by Japan's Self Defense Forces (SDF) should be eased. He also said that Japanese troops should be allowed to use weapons to protect troops of other countries with whom Japan is working during overseas missions, such as peacekeeping operations¹

Maehara's musings on how Japan's SDF should operate in times of war stimulated debate about Article 9 of the constitution and whether it should be revised or not. In this chapter, I will focus on some of the core components of this constitutional debate. But instead of talking about the ideological posturing of politicians such as Maehara, I want to describe how some of the participants in the debate—the Japanese population at large, service members of the SDF, and the United States Forces in Japan—deal with war-time realities on the ground

THE PUBLIC

Anybody debating the constitution needs to keep in mind that it was not only written by the United States but that recent debates about changing Article 9 have also been driven primarily by American, not Japanese, security concerns. In discussing the constitution it is important to remember that these security concerns are not taken for granted in Japan and that large sections of the Japanese population hold sometimes contradictory opinions

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on Article 9. Cabinet opinion polls show that many Japanese believe that Article 9 remains useful in preserving Japan's peace and prosperity. Many believe therefore that the constitution should not be modified. Conversely, the same polls show that many also believe that the constitution should *only* be modified to reflect the current uses of the SDF, while some believe that the SDF should not be turned into a "conventional/normal military." Collective self-defense often emerges as a justification for constitutional revision, however some Japanese believe that the constitution can be reinterpreted to allow for collective self-defense. Others think that the constitution denies the right of collective self-defense and this should remain so.²

Opinion polls of the last thirty years indicate that a majority of Japanese people views the SDF positively with regards to its work in disaster relief and peacekeeping missions that are designed to provide non-combatative support; in short, missions other than war.³ This is an important point to make, particularly as one of the most pronounced public concerns with regards to a possible amendment of the constitution is the fear that Japan might then be dragged into an "American war."

THE SELF-DEFENSE FORCES

These public fears are not necessarily unfounded. According to most pundits, the dispatch of the SDF to Iraq from 2004 constituted a deployment to a war zone. Eager to please the U.S. administration at the time, but facing a Japanese citizenry whose majority was against such a deployment, then-Prime Minister Koizumi Junichirō felt prompted to publicly promise that no Japanese soldier would kill or die; their mission would be in line with previous peacekeeping missions and thus exclude combat and armed defense as engagement options.⁴

However, in my conversations with Japanese service members over the last fifteen years or so, restrictions on service members' use of weapons on such international deployments constitutes one of the core issues of contention. Since 1992, Self Defense Forces (SDF) members have been deployed abroad on peacekeeping and reconstruction missions, but because of the government's concern that the SDF adheres to constitutional restrictions, the forces have been subject to strict regulations over when they may use arms. Returning from a peacekeeping mission, one army officer remembers that he was frightened when off duty and unarmed. He told me:

I was very self-conscious every single minute, knowing that I had no appropriate weapon on me to defend myself if anything happened. I also felt ridiculed and pitied by men of other units of the UN forces who shook their head over us Japanese because they thought that we did things rather strangely.⁵

**THE SDF'S
PRECARIOUS POSITION
IN LIGHT OF THE
CONSTITUTION AND
SERVICE MEMBERS'
AMBIVALENCE
TOWARDS THE
MISSIONS IN WHICH
THEY PARTICIPATE
HAS RESULTED IN
DISTINCTIVE PUBLIC
RELATIONS EFFORTS.**

The SDF's precarious position in light of the constitution and service members' ambivalence towards the missions in which they participate has resulted in distinctive public relations efforts. The SDF public relations apparatus projects a series of civilianizing, familiarizing, trivializing and spectacularizing messages about the military's capabilities, roles, and character. Some of these messages are mutually reinforcing, whereas others are ambiguous and contradictory.⁶ These images deliberately appeal to recruitable youth, worried parents, and complacent and even hostile citizens. No matter how different, contradictory, and unrealistic these images might be, their core message is designed to make the Self Defense Forces appear useful and necessary.

For instance, the role of violence in the SDF is deeply problematic. Some observers assume that the training for and prospect of combat is what really holds the military together; yet, during the deployment to Iraq—the closest Japanese soldiers have ever come to war—recruitment rates decreased, while the number of suicides soared, and returnees from Iraq have expressed primarily relief that everybody survived the mission unharmed. The public relations efforts by the SDF do not simply cover up some hidden, real character of the military that is assumed to be its potential for violence. Rather, at a time of an ever-shrinking population of potential (male) recruits, and in light of the recent enormity of Japan's tsunami-related domestic disasters, it has become increasingly difficult for public relations officers to maintain the notion that combat should be the

core role of the military. As the response to the recent relief efforts of the SDF in northeastern Japan shows, the Japanese population very clearly differentiates between their appreciation of such activities in contrast to their attitude towards a possible deployment in war should Article 9 be eliminated or substantially revised.⁷ How would one summon a nation's troops under the dictum of national defense against natural disasters? In light of these various functions that the SDF perform, it appears that they symbolically arm and disarm themselves for public consumption in order to convince the fearful that they are protected and the peaceful that they need not feel threatened.

THE U.S. FORCES JAPAN

The United States Forces Japan (USFJ) are eager to counter what they perceive to be a trenchant lack of sympathy and even a hostility among some Japanese toward the U.S.-Japan alliance. In 2010, to celebrate the 50th anniversary of the Treaty of Mutual Cooperation and Security between the United States and Japan, the Public Relations Office of USFJ released the first of four volumes of a manga, *Our Alliance—A Lasting Partnership* (*watashitachi no dōmei—eizokuteki pātonāshippu*).⁸ Despite its express purpose to burnish the reputation of USFJ and appease critics of the alliance, the launch of this entirely new publicity effort was unfortunately timed. Delayed by several months, it was released two days prior to the 65th anniversary of the atomic bombing of Hiroshima on August 6, 1945. It also came shortly after the failure by the newly elected Hatoyama government to move the Futenma Marine Corps Air Station off the island prefecture of Okinawa.⁹ The base relocation issue had become a point of extreme friction between the two alliance partners. “In this politically and militarily charged environment,” explained the director of the Public Relations Office, “every element in the manga suddenly meant something.”¹⁰

While the anniversary might have been an opportunity for a critical reflection on the history of the alliance and its relevance to the current moment, this was not desired by the PR office. Rather, the manga playfully describes a carefree U.S.-Japan alliance and confirms the role that USFJ have played in this relationship. Two characters dominate the narrative. One is Ms. Alliance, an ordinary-looking Japanese girl with long dark hair who wears glasses and impersonates Japan. The other is Mr. USA, a boy visit-

ing from and embodying the United States who wears shorts and a bunny hoodie. The two figures contemplate the role of USFJ and the usefulness of the U.S.-Japan alliance.

There are too many aspects pertaining to the aesthetics of the manga and the details of the narrative to be interpreted here, but there are key moments that deserve attention: Mr. USA roams Ms. Alliance's house with a rolled-up newspaper while Ms. Alliance eats a cookie and watches television. Mr. USA finds a cockroach in the kitchen and kills it. Ms. Alliance inquires why Mr. USA has come to "protect her house."¹¹ He announces that they share an alliance and thus are "important friends."

Despite the children's conversation about the 50-year relationship, the narrative is deliberately ahistorical. There is no narrative about the *actual* historical impact of the treaty. Too hot to handle are the stories about Japan being used as a launching pad for American troops during various American wars, from Vietnam to Iraq and Afghanistan; or the stories of the political, economic and environmental burden military bases pose particularly in Okinawa.

The manga metaphorically covers issues that strike at the heart of Japan's current debate on the constitution and the relationship between Article 9 and collective self-defense. However, it does so in a way that fails to delve into deeper issues of constitutional legitimacy. As Ms. Alliance contemplates the notion of a country's right to self-defense, Mr. USA asks her to join him in the extermination of cockroaches. She prefers to leave that to him while she continues to eat breakfast and meditate on the right of self-defense. Despite the centrality of Article 9 to the debate on collective self-defense, there are no metaphors in the manga that pertain directly to the constitution itself. Mr. USA is depicted as providing a service to Ms. Alliance, but there is very little consideration of the reasons for Ms. Alliance's "inactivity" in their shared relationship.

Another conversation in the manga emphasizes that the two children, and by extension the two countries, maintain shared values. Nothing even hints at the possibilities of why Ms. Alliance actually needs to be convinced of the similarities about which Mr. USA is so adamant. As with the constitution, there is also no historical explanation as to why the two share this relationship. Mr. USA simply appears one day, and claims to be of benefit to Ms. Alliance. His instruction is successful because it has to overcome only her ignorance, naïveté, and doubt, not a difference in her perspective,

an awareness of the inequality of the relationship, concerns about the legality of the current alliance, or Japan's sovereignty as a nation state.¹²

CONFLICTING IMAGES

Public relations efforts around the world promote an impressive variety of images of the military. These include selective, cleansed and aestheticized images of what the military claims they do. Accordingly, such images typically center on the military capacity to project power and use sophisticated technology, for instance, while carefully suppressing its capacity to kill large numbers of people and cause enormous destruction and environmental disasters. Other images underscore what the military promises to provide its members. These images focus on a portrayal of the military as a platform to mature as an adult, show courage, and/or sacrifice oneself for a national objective. Alternatively, military organizations present themselves as a valuable or, at least, a predictable career path.

Military establishments the world over perceive such public relations activities as increasingly necessary in order to identify and attract new recruits. At the same time public interest in and willingness to go to war has decreased in many western democratic societies.¹³ On this front, Japan is an obvious case in point. The public relations officers of both the SDF *and* USFJ agree that Japan is a particularly difficult place to successfully engage in such efforts. With SDF action circumscribed by the constitution, it is clear that many Japanese are both unknowledgeable and ambivalent about the role of Japan's armed forces. However, such ambivalence translates to how many Japanese see the USFJ as well. According to the PR Office, the environment is challenging:

Japan has lived in a peaceful environment for so long that they don't see the need for a standing military and thus don't understand the role of the U.S. military in the country. In that sense the situation of the U.S. military is similar to their own SDF, but on top of it, we are foreigners.

The PR Office measures the success of its public relations efforts by comparing the number of hits on the USFJ homepage: Before the *Lasting Partnership* manga was posted, the website got about 900 hits per day. Since the manga has become available it gets about 100,000 a day. The increase of

the hit-rate at the USFJ website does not, however, answer other questions, such as who is reading the manga and how sophisticated their reading might be. The website “2-Channeru,” which with 10 million users is one

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AUDIENCES.**

of the world’s largest Internet fora, provides some hints of how many Japanese view the manga. One poster writing in Japanese asks whether the cockroaches in Ms. Alliance’s/ Japan’s kitchen are “Korean or Chinese.” Another calls it “propaganda.” And yet another expresses discomfort at the claim that “Japanese and Americans are similar.” Posters writing in English are less polite, calling the manga “Aryan propaganda shit” and worse, or suggesting that “the boy ‘lives off’ the girl (effectively making him a waste of space freeloader) and in return, only squishes a cockroach? Yeah, that about sums up America’s contributions to the world, stealing the best of our crap and attacking less powerful nations.”¹⁴ While the

hostile tone is typical for 2-Channeru discussions, which are anonymous, such comments invite doubts about whether the manga actually achieves its twin objectives, to create a more sympathetic attitude towards USFJ and to solidify the alliance as the best solution to potential security issues in Japan and East Asia.

Beyond the question of the success of the manga within the parameters of the Public Relations Office, however, it is important to keep in mind that military establishments the world over put substantial effort into presenting certain fabricated images of themselves to their various audiences. They condense the everyday unheroic boredom of most service members to the adrenaline-driven moment of high-speed aircraft; they present the military as a social apparatus whose main goal is to make men of children; they assure parents that the careers they offer are predictable and safe bets for their sons and daughters. Making such messages believable is a challenge for the armed forces of most nations, but it is especially difficult in a country with formal constitutional restrictions on the use of force.

The choice of two children as representatives of two of the most powerful nation states in the world further infantilizes these nations and their capabilities while also underestimating the experience and intelligence of their populace. In terms of addressing the tensions between the two militaries, and a Japan that is at best ambivalent about, and has in the past been divided over, the continued presence of the U.S. military in the country, the 50th anniversary commemorations of U.S.-Japanese alliance was a lost opportunity to conduct an honest review of the history and utility of the bilateral arrangements. As such, it was in line with political issues, such as the role of the constitution, that the Japanese government so vehemently refuses to directly address.

CONCLUSIONS

I have been asked to share my thoughts on how public debate impacts on Article 9 of the constitution. As we have seen, there are a variety of views on the constitution, the use of force, and the presence of the United States Forces in Japan. The Japanese population is far from being convinced that removing Article 9 is desirable, and only a weak majority of the population is in favor of revising Article 9 to legitimize the kinds of missions the SDF has become engaged in over the last twenty years or so.

While there is limited data about attitudes of service members of the SDF, it becomes clear from my interviews and conversations with service members that opinions vary greatly. These range from those who believe that the status quo should remain in place, to others who would prefer Article 9 be modified to reflect their existence and current engagements as fully legitimate armed forces.

Meanwhile, what remains clear and unambiguous is the discomfort of USFJ and, by extension, the U.S. administration with the Constitution of Japan. While the U.S. administration continued to plan for worst-case military scenarios, Japanese media announced that the SDF units ended most of the aid missions they had undertaken in northeastern Japan following the March 11, earthquake and tsunami. The SDF had deployed as many as 107,000 personnel to seven disaster-hit prefectures, including Iwate, Miyagi, and Fukushima. They have been engaged in search and rescue operations and have helped prepare meals for survivors at evacuation centers. The SDF has also been instrumental in attempts to cool the crippled reac-

tors at the Fukushima Daiichi nuclear power plant by spraying water from the air and ground.¹⁵

In light of this largest mission to-date of the SDF and the likely increase of such disasters in Japan and elsewhere, focus on the forces' role in military situations is misplaced. With respect to peace and security in Japan and around the world, is it really in the Japanese population's best interest to focus on Article 9 of the Japanese constitution? Shouldn't Maehara and others in the Diet who seek to change the constitution to allow for greater cooperation between the United States and Japan in military contingencies instead be rethinking the narrow confines and almost exclusively military terms of Japan's security and begin facing the very real threats that nature has in store for Japan and the world?

NOTES

1 "SDF Needs More Freedom in Using Guns Abroad: Maehara," *The Japan Times*, September 9, 2011.

2 Naikaku Sōri Daijin Kanbō, *Yoron chōsa nenkan: Zenkoku yoron chōsa no genkyō Heisei 18 nenpan* (Tokyo: Ōkurashō insatsukyoku, 2007), 557 (survey 455, questions 12, 13 and 16), 609 (survey 516, questions 11–13), 612 (survey 540, questions 6 and 7).

3 Paul Midford. *Rethinking Japanese Public Opinion and Security: From Pacifism to Realism?* (Stanford: Stanford University Press, 2011).

4 On that specific balancing act, see Sabine Frühstück, *Uneasy Warriors: Gender, Memory and Popular Culture in the Japanese Army* (Berkeley: University of California Press, 2007), 179–188.

5 Interview conducted by the author in April 2003.

6 Public relations efforts are dramatically different across different military establishments precisely because they appeal to a multi-layered audience. For the distinctive approach of the SDF, see Frühstück, *Uneasy Warriors*, 116–148; and Sabine Frühstück, "In Order to Maintain Peace We Need Guns and Rockets': The Military Uses of Popular Culture in Current-Day Japan." *The Asia-Pacific Journal: Japan Focus* 34:2, <http://japanfocus.org/-Sabine-Fruhstick>.

7 I outline these differences, referring to my research, in my interview with James Simpson, "JSW Talks: Prof. Sabine Frühstück," *Japan Security Watch*, July 30, 2011 (weblog), <http://newpacifcinstitute.org/jsw?p=7467>.

8 *Watashitachi no dōmei—eizokuteki na pātonāshipu* 1, U.S. Forces Japan website, July 2007, <http://www.usfj.mil/manga/Vol%201/Index.html>. Matt Alt, who runs a Tokyo-based entertainment localization company that specializes in video games,

comic books and other pop culture wrote about the manga, descriptions of which also appeared in other news outlets: Matt Alt, “The U.S.-Japan Alliance... Manga Style,” *CNNgo*, August 5, 2010, <http://www.cnn.com/tokyo/life/new-manga-835838>. Alt writes the following: “For years, foreigners have tittered over the Japan SDF’s cuddly mascot character, Prince Pickles. But now the United States military has upped the ante by producing an entire *manga*-style comic book celebrating the strategic relationship between the two nations. Could this be the beginning of a new era of ‘mutually assured cuteness?’” See also “*Manga to Promote U.S.-Japan Alliance*,” *BBC*, August 3, 2010, <http://www.bbc.co.uk/news/world-asia-pacific-10851195>; Kyung Lah, “Winning Hearts, Minds With Comic Books,” *CNN*, September 12, 2010, www.cnn.com/video/data/2.0/video/world/2010/09/12/lah.jp.military.manga.cnn.html.

9 Gavan McCormack has dissected the history of that conflict in a series of essays, “Ampo’s Troubled 50th,” *The Asia-Pacific Journal – Japan Focus*, May 2010, <http://japanfocus.org/-Gavan-McCormack/3365>. Ōe Kenzaburō, Terashima Jitsurō and others also have participated in this recent debate. See, for instance, Terashima Jitsurō, “The U.S.-Japan Alliance Must Evolve: The Futenma Flip-Flop, the Hatoyama Failure, and the Future,” *Japan Focus*, August 9, 2010, <http://www.japanfocus.org/-Jitsuro-Terashima/3398>.

10 All quotations of the officer in the Public Relations Office in Yokota, Japan, are from an interview with the author, September 10, 2010.

11 See *Watashitachi no dōmei—eizokuteki na pātonāshippu*, 4.

12 For a shot-by-shot analysis of the *manga*, see Sabine Frühstück, “AMPO in Crisis? US Military’s Manga Offers Upbeat Take on US-Japan Relations.” *The Asia-Pacific Journal: Japan Focus*, <http://www.japanfocus.org/-Sabine-Fruhstuck/3442>, posted November 8, 2010.

13 See, for instance, James J. Sheehan. *Where Have All the Soldiers Gone? The Transformation of Modern Europe*. (New York: Mariner Books, 2009).

14 See, for instance, “Otaku Culture,” *4chan Archive*, August 3, 2010, <http://archive.easymodo.net/cgi-board.pl/jp/thread/5853878>.

15 “Only SDF nuke responders to stay on in zone.” *The Japan Times*, August 18, 2011.

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