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Informal constitutional change: constitutional change without formal constitutional amendment in comparative perspective

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'The pacifism and national defense issue is the most controversial issue created by the Japanese Constitution.'

Shigenori Matsui¹

3.1 INTRODUCTION

As one of the few written constitutions in the world,² the Constitution of Japan (1947) includes a pacifism clause. Article 9 of the Japanese constitution states that the Japanese people 'forever renounce war as a sovereign right of the nation' and also renounce the right to 'use force as means of settling international disputes.' Section 2 adds that, in order to accomplish these aims, 'land, sea and air forces, as well as other war potential, will never be maintained.' It ends by saying that 'the right of belligerency of the state will not be recognized.' In the past seventy years, political actors have tried to revise Article 9 a number of times, yet its text has remained unaltered. Among the people of Japan, Article 9 has enjoyed significant support from the moment of its adoption until today.³

Meanwhile, in reality, Japan has developed an advanced defense policy. Already in the early 1950s, Japan established the Self-Defense Forces (SDF). Referring to the SDF, The Japanese government has always carefully evaded the words 'military' or 'Armed Forces', but international observers have counted the SDF among the five most powerful militaries in the world for at least three decades.⁴ Furthermore, since the early 1990s, the SDF have participated in international military operations. A recent policy shift should allow Japan to play an (even more) pro-active role on the international military stage.⁵

1 Matsui (2011), 254.

2 Moore and Robinson (2002), 307.

3 Kyodo, 'Japanese sharply divided over revising Article 9 amid regional security threats, poll finds', *The Japan Times*, 30 April 2017.

4 Stockholm International Peace Research Institute, 'SIPRI Fact Sheet April 2013'. <http://books.sipri.org/files/FS/SIPRIFS1304.pdf>

5 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People, July 1, 2014. http://japan.kantei.go.jp/96_abe/decisions/2014/_icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf

The tension that has mounted between the constitutional plan of Article 9 and the real-world institutional developments that have taken place is hard to overlook: the so-called ‘pacifism and defense issue’ is known as the most controversial issue of Japanese constitutionalism.⁶ But how exactly should we understand this strained connection? How can the relationship between a constitutional precept like Article 9 of the Japanese constitution and the actual evolution of the Japanese defense policy best be understood?

3.1.1 Perspectives on pacifism and defense

Scholars from around the world have tried to answer this question by taking legal-positivist views.⁷ They have presupposed that Article 9 – as formal constitutional norm – has an autonomous meaning, which can only change through formal constitutional amendment and judicial interpretation: as long as the Japanese constitutional legislator and the judiciary remain silent, Article 9 retains its original meaning; every real-world development that deviates from this meaning violates Japanese constitutional law. Indeed, attempts to amend Article 9 have failed. And in the (few) court-cases in which the constitutionality of the SDF and their activities were challenged, the courts refused to hear the merits, arguing that questions surrounding the national defense and pacifism are better dealt with by the political process.⁸ Therefore, the ultimate consequence of this thinking is that Japan, due to Article 9 and the absence of formal constitutional amendment and permissive judicial decisions, should disband the SDF.⁹

Taking a legal-doctrinal perspective has advantages and disadvantages. On the one hand, taking a legal-doctrinal perspective can be very helpful in making a normative case, for example before a court. On the other hand, it hardly enables us to adequately appreciate what import Article 9 has really had in the real world or what the implications of defense shifts have been as to how we should describe and explain the material meaning of Japan’s constitutional commitment to pacifism. It seems unlikely that Japan will indeed disband the SDF anytime soon. And whoever maintains, awaiting a formal constitutional amendment or judicial reinterpretation, that the meaning of Article 9 has remained unaltered, seems to run the risk of providing an overly formalistic account of the meaning of Japanese constitutional pacifism across time.

6 Matsui (2011), 254.

7 E.g. Martin (2007). Jeff Kingston, ‘Abe hijacks democracy, undermines the constitution’, *The Japan Times*, 21 June 2014. Craig Martin, ‘“Reinterpreting” Article 9 endangers Japan’s rule of law’, *The Japan Times*, 27 June 2014.

8 Matsui (2011), 243.

9 E.g. Port (2005).

Alternatively, observers of Japanese politics have studied the development of pacifism and national defense from a common-law perspective. In describing and explaining constitutional development, the common-law perspective focusses on the evolution of real-world institutional practices and understandings. While this perspective is indispensable in revealing the real mechanisms by which defense shifts have come about, it tends to ignore the fact that, even though a large gap has come into existence between Article 9 and institutional practices and understandings on the ground, Article 9 may have some firmness of authority and determined and marked the evolution of real-world practices and understandings to a significant extent. Indeed, commentators who have taken a common-law perspective have commonly reached the sweeping (and possibly wrong) conclusion that, as a consequence of defense shifts, Article 9 has become irrelevant or even 'died'.¹⁰

Instead of taking a legal-positivist or common-law perspective, this chapter seeks to understand the evolution of Japanese national defense and pacifism by taking an historical institutionalism view. This cross-disciplinary view focuses on the historical interplay between formal constitutional rules and institutional practices and understanding (see chapter 2). It will enable us, first, to describe the evolution of Japanese national defense policy and then explore what implications this evolution has had for the material meaning of Article 9.

3.1.2 Explanations and implications of textual unresponsiveness

The two remaining sections of this chapter have two aims. The first is to suggest some possible factors that might explain why, despite significant change in the area Article 9 seeks to regulate, this provision has never been subject of formal constitutional amendment. The second is to explore whether and to what extent the alternative processes of change by which defense shifts in Japan have come about have functionally substituted the formal constitutional amendment procedure of the Japanese Constitution.

Understanding the Japanese defense and pacifism issue through the historical institutional lens may shed new light upon the mechanisms that have brought this situation about. It may be particularly relevant at a time when the Japanese government is bringing about another set of sweeping defense reforms without amending Article 9 of the constitution. Moreover, the Japanese pacifism and national defense issue can teach us a great deal about the more general theme of informal constitutional development, including the ways in

10 See e.g. Repeta (2015). Kato, 'Japan's Break With Peace', *New York Times* July 16, 2014. Feffer, 'Is Japan's Peace Constitution Dead?', *Inter Press Service*, July 2014. Snow, 'The Tragic Death of Japan's Pacifist Brand', *Foreign Policy Focus*, September 29, 2015. Leupp, 'The Death of the 'Pacifist' Constitution: Japan's Return to Its Martial Roots', *Counterpunch*, September 29, 2015.

which law and politics intersect, the significance of rigid constitutional norms, and the consequences that informal constitutional change can have for a constitutional democracy that (supposedly) lives under a written constitution.

3.2 FROM CONSTITUTIONAL PACIFISM TO BECOMING A 'NORMAL' COUNTRY AGAIN

This section¹¹ will start by exploring the origins of Japan's constitutional commitments to pacifism. It will then examine how, in the decades after the Second World War, Japan has rearmed by establishing the Self-Defense Force and has grown into one of the largest and most active military powers in the world – without formally amending its written constitution. In conclusion, the section will consider the relationship between this development and the war-renouncing Article 9 of Japan's written constitution.

3.2.1 The birth of Japan's pacifist constitution

In order to trace the origins of Japan's constitutional commitment to pacifism, we must go back to 1945 – the year in which the Second World War in the Pacific ended and in which Japan was placed under the authority of the Allied Powers headed by the Supreme Commander of the Allied Powers (SCAP), the American General Douglas MacArthur. The occupying powers sought to democratize Japan and purported to ensure that Japan would never become a threat to the world as a military power again.¹² To this end, the SCAP, among other things, dismantled the imperial armed forces (in November 1945) and purged all ultra-militarists from governmental positions (in January 1946). Meanwhile, MacArthur gave orders to start major legal reforms, most notably constitutional ones.

It was initially the Japanese government itself that was asked to prepare amendments that would democratize the old Meiji Constitution, but the proposals the government came up with were far too conservative from the viewpoint of the SCAP.¹³ On February 3, 1946, MacArthur stated three 'musts' that had to be embodied by the new constitution in response to the government's proposals: popular sovereignty; the dismantling of the feudal system;

11 I published an earlier version (in Dutch) of this section in the Dutch *Journal of Constitutional Law* under the title 'De ontwikkeling van het Japanse pacifisme en defensiebeleid als informele constitutionele verandering' (The development of Japanese pacifism and self-defense as informal constitutional change). See: Passchier 2017a.

12 Matsui (2011), 13.

13 Moore and Robinson (2002), 77.

and – most notable – the renunciation of war.¹⁴ The general expected that if Japan would constitutionally renounce war, other Asian countries might not object to the preservation of the Emperor.¹⁵ The war-renouncing principle was defined as follows:¹⁶

‘War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection.

No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.’¹⁷

MacArthur gave the Japanese government until February 13 to come up with a new draft constitution that would reflect, among the other two ‘musts’, this war-renouncing principle. Meanwhile, however, the general had secretly decided to come up with a draft himself. On 4 February 1946, he ordered his staff members to make a completely new constitution for Japan. The job was finished in no less than eight days.

On 13 February, the day the government was to present its proposals for amending the old Meiji Constitution, the SCAP instead presented MacArthur’s new constitution to the Japanese government.¹⁸ As the story goes, the Japanese government was surprised to see the document.¹⁹ Cabinet members were especially shocked by the war-renouncing provision it included, although the words ‘even for preserving its own security’ were deleted.²⁰ Initially, some

14 See: State-War-Navy Coordinating Committee, Reform of Japan (SWNCC-228). http://www.ndl.go.jp/constitution/shiryo/03/059/059_0011.html (accessed 8-2-2017). For the SCAP’s three original basic ‘musts’ in constitutional revision: ‘Three basic points stated by the Supreme Commander to be ‘musts’ in constitutional revision’. www.ndl.go.jp/constitution/e/shiryo/03/072/072tx.html (accessed 8-2-2017).

15 MacArthur believed that saving the emperor was essential for a successful implementation of occupation policy. He presumed this measure would sharply reduce the period of Allied control over Japan. See: Koseki (1998), 107.

16 MacArthur later told reporters that this idea was suggested to him by Kijurou Shidehara, the Japanese prime minister at the time. This explanation is contested, however. See: Auer (1990), 173 and Koseki (1998), 82.

17 Quoted in Matsui (2011), 15. See also Koseki (1998), 79.

18 See for an elaborate overview of the events: Moore and Robinson (2002), 7 et seq.

19 Koseki (1998), 99.

20 See, for the 13 February 1946 SCAP draft: Alfred Hussey Papers, Constitution File No. 1, Doc. No. 12 <http://www.ndl.go.jp/constitution/e/shiryo/03/076shoshi.html>

ministers found the proposal unacceptable.²¹ Nevertheless, the Japanese government soon decided to accept the SCAP draft.²²

In the months thereafter, the Japanese government vigorously defended the new constitution, including the war-renouncing provision, in the Diet.²³ That provision did not meet serious opposition in the Diet.²⁴ It was only slightly modified: the phrase '[a]spiring sincerely to an international peace based on justice and order' was added to the first paragraph, and the phrase '[i]n order to accomplish the aim of the preceding paragraph'²⁵ was added to the second paragraph.

After the deliberations in the Diet, the proposal passed the House of Representatives, the House of Peers and the emperor, pursuant to the formal amendment procedure of the old Meiji Constitution.²⁶ 'The Constitution of Japan' came into force on 3 May 1947.²⁷ The final version of the war-renouncing provision, now Article 9, stipulates that:

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

(2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.'²⁸

Students of Japanese constitutional law generally agree upon the original meaning of Article 9: it was designed and adopted with the intention of prohibiting Japan from maintaining armed forces for all purposes, including self-defense.²⁹ Indeed, during the deliberation in the House of Peers, the minister of Constitutional Amendment argued that even though the phrase

21 Matsui (2011), 236.

22 Between the day of presenting the draft and the day of acceptance, the SCAP attempted to persuade the Japanese government to accept the draft, mainly by using the save-the-emperor argument. However, Koseki noted that it was only later that the Japanese government came to understand the political significance of the SCAP draft. Although the government expressed unanimous approval from the outset, it is unclear to what extent the cabinet members actually understood the SCAP draft when it was accepted. Koseki (1998), 107–108.

23 Matsui (2011), 236.

24 Ibid and Koseki (1998), 193.

25 This amendment is also called the 'Ashida' amendment, after the member of the Diet who proposed it. It was later argued that the Ashida amendment meant to recognize war and war-potential for self-defense. However, according to Koseki, there is no basis for this argument, partly because the records of the discussion of the argument do not show such an intention. Koseki (1998), 207.

26 Article 73 Meiji Constitution.

27 Matsui, *The Constitution of Japan*, p. 13–16.

28 In addition to Article 9, the preamble of the Japanese constitution also emphasizes the commitment never to go to war.

29 Matsui (2011) 237. Koseki (1998), 192 *et seq.* Moore and Robinson (2002), 247–250. See also Port (2005), 142–145.

'even for preserving its own security' was scrapped from section 1, section 2 made it impossible to exercise a right to self-defense. Another minister held that section 1 prohibited self-defense since most of the recent wars had been fought in the name of 'self-defense'.³⁰

After the constitutional document was adopted, it became the official interpretation of the government of Japan that 'Japan retained a right of national self-defense in international law but, by virtue of the second paragraph, could not wither wage or maintain an armed force – even for the purpose of national self-defense'.³¹ The government's interpretation became generally acknowledged. It was taught at university law schools and other educational institutions throughout Japan.³² The general public embraced the new constitution, including Article 9. Totally exhausted by the war effort, the people of Japan accepted the Pacifist Clause with open arms.³³

3.2.2 Rearming Japan

In the first years after adopting its pacifist constitution, Japan did refrain from establishing new armed forces or any organization that could be classified as a military organization. However, from the 1950s on, things gradually started to change. We can distinguish three policy shifts that resulted into to the *de facto* rearmament of Japan: the establishment of the National Police Reserves, the establishment of the National Safety Forces, and the establishment of the SDF.

3.2.2.1 The National Police Reserves

In 1950, when the larger part of the occupying US military force had to leave Japan in order to fight in the Korean War, General MacArthur, concerned with the defense capability of the island, directed the Japanese government to form a 75,000-man 'National Police Reserves' (NPR).³⁴ Contrary to what this designation might suggest, the NPR was clearly an armed force from the beginning.³⁵ The NPR had tanks (called 'special vehicles') and the ranks were filled by former Imperial Japanese Army servicemen, even though they were called 'reserve policemen'.³⁶

30 Matsui (2011), 237.

31 Auer (1990), 176.

32 Ibid.

33 Matsui (2011), 238.

34 Japan regained its sovereignty in 1952.

35 The establishment of the NPR is recognized as the beginning of the post-WW2 rearmament of Japan. Matsui (2011), 238.

36 Auer (1990), 177.

The tension between the pacifist precepts of the formal constitution and the newly evolved situation on the ground was immediately apparent. In 1952, a Diet member representing the Japanese Socialist Party (JSP) challenged the constitutionality of the establishment of the NPR directly before the Supreme Court.³⁷ However, the Court refused to review the challenge. The Japanese government did not address the question of constitutionality. It just continued to stand by its opinion that 'to maintain war potential, even for the purpose of self-defense, would mean rearmament' – and that rearmament 'would necessitate [formal] revision of the constitution.'³⁸

3.2.2.2 *The National Safety Forces*

In 1952, the NPR was reorganized and expanded, following the Mutual Security Treaty³⁹ Japan had concluded with the United States in 1951.⁴⁰ What were now called the 'National Safety Forces' (NSF) had a ground and maritime element (but no air power). Like the NPR, the NSF were highly controversial in light of Japan's constitutional commitment to pacifism from the beginning. This time, however, the government did respond to those who argued that the NSF were unconstitutional. It innovatively asserted that Article 9 only prohibited the maintenance of 'offensive' war potential, to be differentiated from 'defense' potential.⁴¹ More specifically, the government held that the NSF were in accordance with the constitution because they were not capable of waging modern wars and did not form an offensive threat.⁴² A few months later, in reply to accusations by the JSP that the NSF were unconstitutional, the Cabinet Legislation Bureau (CLB)⁴³ – an authoritative interpreter of the Japan-

37 Supreme Court, grand bench, 8 October 1952, 6 *Minshu* 783. Explained by Matsui (2011), 142 and 241.

38 Prime Minister Yoshida quoted by Auer. Auer (1990), 177.

39 Japan–United States Mutual Security Treaty, 8 September 1951.

40 The Treaty was renewed in 1960. Contrary to what its title suggests, the treaty is not a *mutual* security arrangement like the NATO Treaty, for example. Article V of the document states that '[e]ach Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes' (emphasis added). Since it has been held that the Japanese constitution does not allow for 'collective self-defense', it has been the government's position that the Mutual Security Treaty was based on 'individual self-defense'. The result is that if Japan is attacked, the United States is obliged to come to the aid of Japan, but, in the understanding of the Japanese government, the treaty does not commit Japan to come to the aid of the United States if the opposite scenario would occur. See: Matsui (2011), 248–249.

41 Auer (1990), 177.

42 Ibid.

43 According to the CLB's website, 'the Cabinet Legislation Bureau directly assists the Cabinet on legislative matters. It examines legislative bills, draft Cabinet orders and draft treaties that are to be brought before the Cabinet. It also undertakes the interpretation of laws.' <http://www.clb.go.jp/english/index.html> (accessed 9-2-2017).

ese Constitution – also changed its stance on the normative content of Article 9, declaring that:

[war potential] refers to a force with the equipment and organization capable of conducting modern warfare ... Determining what constitutes war potential requires a concrete judgment taking into account the temporal and spatial environment of the country in question ... It is neither unconstitutional to maintain capabilities that fall short of war potential nor to utilize these capabilities to defend the nation from direct invasion.⁴⁴

Two things in this (re)interpretation stand out. First, the CLB held that Article 9 contains a 'modern warfare' standard. This idea was highly controversial and soon to be revised. However, the mere assertion that such a standard existed at all was indeed 'a significant innovation', as Boyd and Samuels put it.⁴⁵ Second, the CLB opined that the constitution does not prohibit such a force from being utilized to defend the country 'from direct invasion'. Thus, for the first time, one of the most, if not the single most, authoritative interpreters of the Japanese constitution had asserted that, under the pacifist constitution, even though it is not formally amended, Japan has the possibility to use force as an act of self-defense.

Interestingly, throughout 1952, Prime Minister Yoshida maintained that Japan would not rearm. He continued to insist that 'to rearm we must ask the consent of the people and revise the Constitution.'⁴⁶

3.2.2.3 *The Self-Defense Forces and the first 'official' reinterpretation*

Finally, in 1954, the Japanese legislator adopted the Self-Defense Forces Act.⁴⁷ This Act converted the NSF into the SDF: it established Ground-Self-Defense Force (GSDF), a Maritime-Self-Defense Force (MSDF) and an Air-Self-Defense Force (ASDF).⁴⁸ After these measures were brought about, the CLB persuaded the government to render the interpretation of Article 9 more flexible in order to justify the sweeping security shifts under the pacifist constitution. The government agreed, and in December 1954 the CLB, with the consent of the government, changed its 'official' interpretation of Article 9. The CLB held that the maintenance of 'war potential' forbidden by Article 9 Section 2 was any capability that exceeded the 'minimum necessary level' required to protect

44 Nakamura (2001), 99. Quoted by Boyd and Samuels (2005), 7.

45 Boyd and Samuels (2005), 7.

46 Auer (1990), 178.

47 Self-Defense Forces Act (Act No. 165 of 1954).

48 The SDF law was accompanied by a Diet resolution banning the deployment of SDF troops abroad. See: Boyd and Samuels (2005), 23.

Japan from direct attacks.⁴⁹ That is, according to the CLB, Japan could exercise force in self-defense under three conditions:

‘[1] when it is facing an imminent and illegitimate act of aggression; [2] when there is no other means of countering this act; and [3] when the use of force in self-defense is limited to the minimum necessary level.’⁵⁰

In a June 1955 statement, the government confirmed this interpretation, declaring that:

‘The Constitution, while denouncing war, has not denounced war for self-defense... To check armed attack in event of such an attack from outside is self-defense itself, and is entirely different from settling international disputes. Hence, the case of military power as a means of defending the nation when the nation has been attacked by military power is not counter to the constitution.’⁵¹

These major defense shifts, including the very explicit reinterpretations of Article 9 by some of the most prominent constitutional actors, clearly deviated substantially from the original plan of the pacifist constitution. In time, and with sufficient recognition, these shifts could have profound constitutional consequences, even if they did not show on the face of the formal constitution.

3.2.3 Expanding the SDF’s capabilities and activities

The SDF increased in size in the following decades and the scope of organizations’ activities gradually expanded. From the 1990s, the government started to deploy the SDF abroad. At the same time, with each policy shift, the government sought to bridge the gap between Article 9 of the written constitution and the evolving reality on the ground that was gradually widened by interpretation.

3.2.3.1 *Defense Build-Up Programs*

Between 1954 and 1976, Japan ran four Defense Build-Up Programs with the aim of building a force that could deal with small-scale aggression. In case of a larger attack, Japan would rely upon the cooperation with the United States. In nominal terms, the budget of the SDF grew gradually. In real terms, however, as a percentage of GNP, the budget fell from 1.8 percent of GNP in 1952 to 0.7 percent in 1971, mainly because of the unprecedented growth of

49 Boyd and Samuels (2005), 8.

50 Ibid.

51 Auer (1990), 178.

the Japanese economy in the 1960s and 1970s.⁵² In 1976, the Miki Cabinet introduced the so-called '1 percent rule' limiting the defense budget to 1 percent of the GNP 'for the time being.'⁵³

However, it became apparent in the early 1980s that it was going to be difficult for the successive Japanese government to limit the defense budget to 1 percent of the GNP. The growth of the Japanese economy slowed down while the country's defense policy became more ambitious. In 1981, Prime Minister Suzuki and United States President Reagan agreed to a US-Japan division of military responsibilities in the Western Pacific.⁵⁴ According to the new strategy, Japan would protect its territory, air and sea-lanes of communication to 1000 miles outside of the homeland. In order to be capable of doing this, the country required high-quality forces, which would necessitate further upscaling of its defense capabilities.⁵⁵

In the second half of the 1980s, Premier Nakasone directed a plan to develop a high-tech anti-invasion, air defense, and anti-submarine network. In order to keep this plan on track, the Cabinet replaced the 1 percent limit with a new non-quantitative guideline. In the government's view, as Auer explained,

'future defense programs would be limited by the international situation of the time, economic and fiscal requirements, Japan's peace-loving nature, and, of course, the spirit of the Constitution.'⁵⁶

A white paper approved the much more flexible limit, stating that the defense policy could be modified if the international situation required it.⁵⁷

In the first four decades of its existence, the capabilities of the SDF were therefore substantially expanded. However, in line with the government's interpretation of Article 9 and the strict definition of the notion of 'self-defense', the SDF were not sent abroad until the early 1990s.

3.2.3.2 *Deploying SDF troops abroad*

The 1990 Gulf War marked a turning point. Japan supported this war with substantial financial sums, but the country was criticized by the international community for not supporting international peace and stability by delivering a military contribution.⁵⁸ As a world economic leader, Japan was humiliated

52 Ibid, p. 180.

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Japan Defense Agency, 'Defense of Japan 1989'. Cited by *ibid*.

58 Hamura and Shiu (1995), 427.

by this criticism.⁵⁹ The Japanese people came to realize that their country could not be a full member of the international community through financial contributions alone.⁶⁰ Before the 1990 Gulf War, no Japanese politician had ever proposed sending SDF troops abroad, in accordance with a 1954 Diet Resolution.⁶¹ But things changed after 1990.

In 1992, backed by growing popular support, the government submitted a bill designed to allow the SDF to participate in international peacekeeping operations, breaching the decades old Diet-ban on deploying armed forces abroad.⁶² What would become the International Peace Cooperation Act passed the Diet in the same year.⁶³ The Act provides a legal basis for Japanese participation in United Nations peace keeping operations, international humanitarian relief operations, international election observation operations and the transfer of goods for these operations below market value.⁶⁴ Moreover, the Act puts forward five principles that aim to ensure that SDF participation in UN operations does not violate Article 9 of the constitution.⁶⁵ The Act allows for the commitment of SDF troops on certain pre-conditions; namely: (1) that the mission can be conducted without partiality to any of the parties to the armed conflict – that is, Japan can remain neutral; (2) that the parties to the armed conflict have agreed to cease fire; and (3) that the consent for the conduct of the operation has been obtained from the parties to the armed conflict as well as from the countries in which the operations are to be conducted.⁶⁶ During operations, moreover, (4), the SDF will withdraw if any of the pre-conditions for participation are undermined;⁶⁷ and, finally, (5) the Act stresses that the SDF can only use its weapons to defend its own personnel.⁶⁸

Initially, these principles were strictly observed. Throughout the 1990s, Japan did not join in operations that might have required the exercise of force

59 Matsui (2011), 250.

60 Shibata (1994), 310.

61 Royer (1993), 790.

62 Moore and Robinson (2002), 325.

63 Act on Cooperation with International Peacekeeping Operations of the United Nations and Other Operations (Act No. 79 of June 19, 1992). Translation available at: <http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=02&dn=1&x=39&y=15&co=01&ia=03&ky=act+on+cooperation+with+international+peacekeeping+operations+of+the+united+nations&page=1>. For a detailed analysis, see Shibata (1994), 318 et seq.

64 Article 1 International Peace Cooperation Act.

65 Shibata (1994), 325. Matsui (2011), 250.

66 Article 3 International Peace Cooperation Act.

67 Article 6(13)(1) and 8(1)(6) International Peace Cooperation Act.

68 Article 24(3) International Peace Cooperation Act states that SDF officials may only use their weapons 'within reasonable limits under the circumstances when unavoidably necessary to protect the lives of others or prevent bodily harm to themselves, other Self-Defense Force personnel, Corps Personnel who are with them, or individuals who have come under their control during the performance of their duties'.

such as the supervision of cease fires.⁶⁹ However, in 2001 the government more or less abandoned the fifth and most limiting condition, which held that Japanese troops could only use force to defend their own personnel. In that way, the government sought to make it legally possible for the SDF to play a more active role in peace-keeping operations and to also join peace-enforcing missions.⁷⁰ Moreover, in 2007, the SDF Act of 1954 was amended. In addition to the principal purpose of defending Japan, international peace cooperation was listed as one of the objectives of the SDF.⁷¹ Under the International Peace Cooperation Act, Japan has deployed troops to places such as Cambodia, Mozambique, Rwanda, the Golan Heights, and East Timor. Japan currently contributes to operations of the United Nations in the Republic of South Sudan and Mali, among other places.⁷²

In the new millennium, Japan also started to display international military activities outside a United Nations or peace-keeping context. Shortly after the 9/11 terrorist attacks in the United States, Japan enacted the Anti-terrorism Special Measures Act.⁷³ This Act purports to enable Japan

‘to contribute actively and on its own initiative to the efforts of the international community for the prevention and eradication of international terrorism, thereby ensuring the peace and security of the international community including Japan.’⁷⁴

Under the Act, Japan contributed to the War in Afghanistan by sending the MSDF to the Indian Ocean to supply the Allied Forces with fuel. Boyd and Samuels noted that the deployment was authorized in a situation when ‘Japan’s security was not directly threatened.’⁷⁵ The government justified the operation by stressing that it could be accomplished without using force. Furthermore, the government held that the mission did not violate the ban on collective

69 The Japanese government distinguished between cease fire observation groups, which have to observe cease fires and report breaches to the Security Council, and peacekeeping forces, which have the task of preventing conflict and maintaining internal security. Shibata explained that the distinction was used by the Japanese government to emphasize that activities of UN observation groups do not involve the use of force and are therefore allowed by Article 9 of the constitution. Shibata (1994), 313.

70 Matsui (2011), 250.

71 Ibid, p. 250. See also Self-Defense Forces Act (Act No. 165 of 1954) (the SDF Act is not translated). See also the website of the Ministry of Justice, ‘Fundamental Concepts of National Defense’. http://www.mod.go.jp/e/d_act/d_policy/dp02.html (9-2-2017).

72 See for a comprehensive list: <http://www.mofa.go.jp/policy/un/pko/> (9-2-2017).

73 Special Measures Act Concerning Measures to be Adopted by our Country Regarding Activities of Foreign Countries in Order to Accomplish the Aims of the United Nations Charter in Response to the Terrorist Attack in the United States of America on September 11, 2001, and Related Humanitarian Measures to be Adopted Based on Resolution of the United Nations (11 October 2001). http://japan.kantei.go.jp/policy/2001/anti-terrorism/1029terohougaiyou_e.html

74 Ibid, Article 2(2).

75 Boyd and Samuels (2005), 43.

self-defense – associated with Article 9 – since the deployment was a collective non-combat security operation, allowed by the preamble of the constitution that states that Japan should ‘strive for the preservation of peace.’⁷⁶ In 2007, the Special Measures Act was succeeded by the New Anti-terrorism Special Measures Act.⁷⁷ This Act was extended in 2008. The mission in the Indian Ocean was ended in 2010.⁷⁸

From 2003 to 2008, Japan was also involved in the Iraq War. The Iraq Special Measures Act allowed the SDF to provide humanitarian and reconstruction assistance as well as assistance to ensure security in Iraq.⁷⁹ Under the Act, Japan deployed GSDF troops in the province of Samawah, mainly for humanitarian and reconstruction purposes. The ASDF was also sent to transport coalition troops. The government argued that the operations were consistent with Article 9 because the rules of engagement did not allow the Japanese troops to use force to accomplish their mission.⁸⁰ It was held that, by 2003, Iraq was no longer a ‘combat zone’ (an argument that became increasingly controversial after the security situation deteriorated in the second half of that year).⁸¹

Furthermore, in 2009, the Japanese government sent the MSDF to the coast of Somalia under the Act to Punish and Prevent Piracy.⁸² The Act provides legal basis for MSDF officials to ‘use their weapons’ if perpetrators disobey warnings to deter and continue acts of piracy.⁸³ Note that the use of force was not limited to the protection of Japanese ships only, which could reasonably have been explained as national self-defense. Under the Act, the Japanese government could also send warships and maritime aircraft to protect vessels from other nations, regardless of their flag country.⁸⁴

By 2011, Japan was ranked as the fifth-largest military spender in the world.⁸⁵ At the same time, it was involved in multiple sorts of military activities, notably within and outside UN contexts.⁸⁶ Although the security shifts

76 Boyd and Samuels (2005), 43.

77 Special Measures Act Concerning the Implementation of Fuel Supply to Anti-terrorism Maritime Activities.

78 Matsui (2011), 252.

79 Special Measures Act Concerning the Implementation of Humanitarian Reconstruction Support Activities and Security Maintenance Support Activities in Iraq (Law nr. 137, 2003).

80 Hayashi (2004), 582.

81 Boyd and Samuels (2005), 46.

82 Law on Punishment of and Measures against Acts of Piracy (2009). Unofficial translations found at: https://www.sof.or.jp/en/topics/pdf/09_01.pdf (accessed 9-2-2017)

83 Ibid, Article 6 and 8(3).

84 Matsui (2011), 252. See also Ministry of Defense, ‘Defense of Japan 2013 (Annual White Paper)’, 244. http://www.mod.go.jp/e/publ/w_paper/pdf/2013/39_Part3_Chapter2_Sec3.pdf

85 Stockholm International Peace Research Institute, ‘SIPRI Fact Sheet April 2013’. <http://books.sipri.org/files/FS/SIPRIFS1304.pdf>

86 For a comprehensive list see: http://www.mod.go.jp/e/d_act/index.html (accessed 9-2-2017)

that had taken place during the past 65 years had not shown on the face of the constitution, their constitutional significance had become hard to deny.

3.2.4 Recent developments: asserting a right to collective self-defense

A new chapter in the story of Japanese national defense and pacifism began in early 2013. In February of that year, the Abe government instructed a special panel⁸⁷ to re-examine the legal basis for Japanese security and explore what reforms Japan should make in order to maintain the peace and security of the country.

3.2.4.1 *Advisory Panel on Reconstruction of the Legal Basis for Security*

On 15 May 2014, the panel issued its report.⁸⁸ The report starts by setting out the government's and CLB's interpretation of Article 9 that has been applicable since 1954, namely that it does not exclude a right to use of force for the purpose of self-defense and that Article 9 only prohibits the Japanese government from maintaining a military capability that exceeds the 'minimum necessary level' required to protect Japan from direct attacks. Subsequently, the report considers that, ever since this interpretation had been adopted, the security environment of Japan had changed dramatically. According to the report, among the most notable changes are technological progress, a changing inter-state power balance, the deepened and expanded Japan-US relationship, the development of regional frameworks, the increasing number of 'serious incidents' that 'the whole international community ought to address', and the SDF's operations in the international community. The report points to the 'remarkable scale and speed of these changes' and suggests that 'Japan is now facing a situation where adequate responses can no longer be taken under the constitutional interpretation to date in order to maintain the peace and security of Japan and realize peace and stability in the region and in the international community.'⁸⁹ Finally, the report advises the government to adopt a new interpretation of Article 9. The panel argued that the Japanese government should assert a right to 'collective self-defense' under the pacifist

87 The panel was composed of seven university professors, a (former) head of industry, a former military officer, and a retired minister who is now president of the International Tribunal for the Law of the Sea and a few directors of authoritative research institutes. See: The Advisory Panel on Reconstruction of the Legal Basis for Security, 'Report of the Advisory Panel on Reconstruction of the Legal Basis for Security', May 15, 2014, 54-55. http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf

88 Ibid.

89 Ibid, 16.

constitution, in addition to a right to self-defense.⁹⁰ Concretely, this would mean that:

[...] when a foreign country that is in a close relationship with Japan comes under an armed attack and if such a situation has the potential to significantly affect the security of Japan, Japan should be able to participate in operations to repel such an attack by using force to the minimum extent necessary, having obtained an explicit request or consent of the country under attack, and thus to make a contribution to the maintenance and restoration of international peace and security even if Japan itself is not directly attacked.⁹¹

The report explains how this change should be engineered. Interestingly, it starts by dismissing the view that asserting a right to collective self-defense would require a formal constitutional amendment.⁹² Instead, in the view of the panel, it would be sufficient to make the necessary policy shifts by reforming the existing body of security legislation.⁹³ More specifically, the report argues that the proposed transformations would be permissible under the text of the constitution as it is; as the report puts it: 'the method of this Panel has been derived from a literal interpretation of the provisions of the Constitution'.⁹⁴ Furthermore, the report appeals to the power of precedent. It emphasizes that, just as the constitution does not expressly provide the right to individual self-defense, neither does it provide the right to collective self-defense. Nonetheless, the report points out that the right to individual self-defense has been recognized in the past.⁹⁵ The report concludes that:

'In view of these facts, it should also be possible, by the Government setting out a new interpretation in an appropriate manner, to make a decision recognizing that the exercise of the right of self-defense to the minimum extent necessary encompasses the right of collective self-defense in addition to the right of individual self-defense. The observation that the amendment of the Constitution is necessary therefore does not apply.'⁹⁶

⁹⁰ Ibid, 27.

⁹¹ Ibid, 29–30.

⁹² Ibid, 48.

⁹³ Ibid, 45.

⁹⁴ Ibid, 48. Regarding section 1, the panel advised that it should be read as only prohibiting the use of force as means of settling international disputes *to which Japan is a party*. According to the panel, it should be interpreted 'as not prohibiting the use of force for the purpose of self-defense, nor imposing any constitutional restrictions on activities that are consistent with international law'. The panel also proposed changing the interpretation of section 2. This section states that 'in order to accomplish the aim of the preceding paragraph' war potential will never be maintained. According to the panel, this rule should be interpreted as 'not prohibiting the maintenance of force *for other purposes*' such as self-defense or 'contributions to international efforts'. Ibid, 22 et seq.

⁹⁵ Ibid, 50.

⁹⁶ Ibid.

3.2.4.2 Cabinet Decision on Development of Seamless Security Legislation

On July 1, 2014, the advisory panel published its report. Soon thereafter, the Japanese government issued the 'Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People.' The Decision takes up most of the recommendations of the advisory panel.

The Decision's preamble starts by recalling that Japan has consistently 'followed the path of a peace-loving nation under the Constitution'⁹⁷ and adhered to 'a basic policy of maintaining an exclusively national defense-orientated policy.'⁹⁸ However, it then asserts that, since the Constitution of Japan came into effect 67 years ago, 'the security environment surrounding Japan has fundamentally transformed.'⁹⁹ According to the Decision, the result of this transformation is that

[n]o country can secure its own peace only by itself, and the international community also expects Japan to play a more proactive role for peace and stability in the world, in a way commensurate with its national capability.'¹⁰⁰

The Japanese government announced that it would 'promptly' develop domestic legislation 'necessary for securing the lives and peaceful livelihood of its people.'¹⁰¹ This legislation was supposed to bring about three new basic security policies. The first new policy concerns possible responses to infringements that do not amount to an armed attack.¹⁰² Under this policy, the government will enhance the security agencies capabilities, including those of the SDF, in order to ensure sufficient responses to 'any unlawful acts' that do not amount to an armed attack. Among other things, this policy will enable the SDF to more actively cooperate with the United States in a situation where an attack occurs against American armed forces stationed in Japan. The second new basic policy makes it possible for Japan to provide further contributions to international peace and stability operations. Among other things, it elevates certain restrictions on logistical support to armed forces of other countries carrying out 'legitimate use of force' – that is, in accordance with a UN Security

97 'Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People', July 1, 2014, p. 1. http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afiedfile/2014/07/03/anpohosei_eng.pdf

98 Ibid.

99 Ibid.

100 Ibid.

101 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People, July 1, 2014. http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afiedfile/2014/07/03/anpohosei_eng.pdf. See also: Martin Fackler and David E. Sanger, 'Japan Announces a Military shift to Thwart China', *New York Times*, 1 July 2014.

102 Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People, July 1, 2014, 2.

Council resolution. It also creates restrictions with regard to the use of weapons by SDF officers that are deployed abroad more flexible. In this way, Japan should become able to deliver a more 'proactive contribution to peace' and to rescue Japanese nationals abroad by the use of weapons. The third new basic policy aims to broaden the scope of measures for self-defense that are permitted under Article 9. In this part of the decision, the government indeed asserts that 'in light of the current security environment', the 1954 official interpretation of Article 9 that only allowed for armed response in case of self-defense is no longer appropriate.¹⁰³ As a result:

'[...] the Government has reached a conclusion that not only when an armed attack against Japan occurs *but also when an armed attack against a foreign country that is in a close relationship with Japan occurs* and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measures for self-defense in accordance with the basic logic of the Government's view to date.'¹⁰⁴

Thus, in addition to a right to self-defense, the Japanese government will also assert a right to 'collective self-defense' under the Japanese constitution. That is to say, according to the Japanese government, Japan can henceforth come to the aid of friendly nations under attack if: (1) the attack on that country presents a clear danger to Japan's survival or could fundamentally overturn Japanese citizens' constitutional rights to 'life, liberty, and the pursuit of happiness'; (2) there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people; and (3) the use of force is limited to the minimum necessary.

In the remainder of the Decision, the government announced that it would soon submit draft legislation to the Diet that would (further) implement these changes.

103 In 1981 the CLB issued a formal interpretation in which it explicitly stated that Japan has the right to collective self-defense under international law, but that Article 9 of the constitution forbids to exercise it. Moreover, in 2004, the Japanese government informed other participants to military operations in Iraq that, because of Article 9, it could not come to the aid of other nation's forces if they were attacked. See: Boyd and Samuels (2005), 9-10.

104 Cabinet Decision of July 1, 2014, 7 (emphasis added).

3.2.4.3 *Two new security Acts*

On May 15, 2015, the Japanese government submitted two security bills to the Diet: the 'Bill for the Development of Legislation for Peace and Security'¹⁰⁵ and the 'International Peace Support Bill.'¹⁰⁶

The former brings about a number of changes with regard to the existing body of national security law.¹⁰⁷ First, it revises the Self-Defense Forces Law; among other things, it introduces provisions concerning defense operations, provisions that allow for measures to rescue Japanese nationals overseas, and provisions that allow SDF forces to protect equipment of military units of other countries' forces. Second, it revises the 'Law Concerning Measures to Ensure Peace and Security of Japan in Situations in Areas Surrounding Japan.' It replaces the phrase 'in areas surrounding Japan' with the phrase 'in situations that will have an important influence on Japan's peace and security.' In its new form, this law makes it possible for Japan to extend the Japanese support activities to military forces of other countries. Third, it revises the 'Ship Inspection Operations Law.' Fourth, it amends the International Peace Cooperation Act. Among other things, it adds tasks that can be implemented during SDF UN peace-keeping operations and other international operations. Fifth, it reforms the 'Armed Attack Situation Response Act' and the Self-Defense Forces Law. These laws now include provisions for actions that amount to collective self-defense and, more specifically, provide a legal basis for the SDF to respond to situations in which an armed attack against a foreign country threatens the existence of Japan and the lives and liberties of the Japanese people.¹⁰⁸ Finally, the bill revises the Act for Establishment of the National Security Council

105 Bill for Partial Amendments to the Self-Defense Forces Law and Other Existing Laws for Ensuring Peace and Security of Japan and the International Community (no translation available). See 'Defense of Japan 2015 (Annual White Paper)' for an outline in English. http://www.mod.go.jp/e/publ/w_paper/2015.html

106 Bill Concerning Cooperation and Support Activities to Armed Forces of Foreign Countries, etc. in Situations where the International Community is Collectively Addressing for Peace and Security. See 'Defense of Japan 2015 (Annual White Paper)' for an outline in English.

107 Defense of Japan 2015 (Annual white paper), 141.

108 See Article 76 of the SDF Act. Section 1 of this Article provides the Japanese government to exercise a right to individual self-defense. Section 2, added as part of the latest policy shifts, provides the government the power to exercise a right to collective self-defense. The Article reads as follows (Translation: Defense of Japan 2015, 145.):

'The Prime Minister may, in responses to the situations listed below, give the whole or part of the Self-Defense Forces the Defense Operations Order when necessary to defend Japan. In this case, the approval of the Diet must be obtained pursuant to the provisions of Article 9 of the Act on the Peace and Independence of Japan and Maintenance of the Nation and the People's Security in Armed Attack Situations etc. and Situations where an armed attack against a foreign country results in threatening Japan's Survival (Act No. 79 of 2003).

1. A situation where an armed attack against Japan from the outside occurs, or a situation where imminent danger of an armed attack against Japan from the outside occurring is clearly perceived

in such a way that expanded the number of issues about which this council can deliberate.

The purpose of the latter bill is to enable Japan to contribute to ‘securing the peace and security of the international community’ by implementing cooperation activities to armed forces of other countries and by joining collective security operations under the auspices of the UN Security Council.¹⁰⁹ The Act should allow Japan, ‘as a member of the international community’, to ‘independently’ and ‘proactively’ contribute to international operations.¹¹⁰ The Diet passed the two Bills on September 19, 2015.

3.2.5 Conclusion: Has Article 9 ‘died’?

Proponents of a more assertive Japanese defense policy have suggested that they want Japan to become a ‘normal country’ again with the capacity to defend its interests and citizens wherever they are threatened.¹¹¹ One thing Japan must do in order to reach this goal, or so it seems, is to get rid of the Article 9 and Article 9-associated limitations to the maintenance and deployment of its military – indeed, limitations that many other countries are not subject to. Has Japan (already) come this far, even though it has not formally amended its constitution?

Some observers have argued that the 70-year-evolution of national defense policy has effectively ‘beaten [Article 9] down into irrelevance’, even though this irrelevance does not show on the face of the formal constitution.¹¹² Others contend that Article 9 effectively ‘died’ as a consequence of the defense shifts that have taken place in recent decades.¹¹³ However, even if we agree that the hollowing out of Article 9 is plain, this does not mean that this provision has entirely lost its significance.¹¹⁴ On the contrary, Article 9 seems to have had a substantial shaping force over the years. First of all, Article 9 has been an important source of inspiration for those who have sought to realize the ‘peace state’¹¹⁵ and form a Japanese pacifist identity.¹¹⁶ Furthermore, even

2. A situation where an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan’s survival and poses a clear danger to fundamentally overturn people’s right to life, liberty and pursuit of happiness.’

109 Defense of Japan 2015 (Annual White Paper), 147.

110 Ibid.

111 Cortazzi, ‘Is Japan a ‘normal’ country simply trying to stick out?’, *Japan Times* 21 April 2014. Metzl, ‘Japan’s military normalization’, *Japan Times* 6 March 2015.

112 Repeta (2015). Kato, ‘Japan’s Break With Peace’, *New York Times* July 16, 2014.

113 Feffer, ‘Is Japan’s Peace Constitution Dead?’, *Inter Press Service*, July 2014. Snow, ‘The Tragic Death of Japan’s Pacifist Brand’, *Foreign Policy Focus*, September 29, 2015. Leupp, ‘The Death of the ‘Pacifist’ Constitution: Japan’s Return to Its Martial Roots’, *Counterpunch*, September 29, 2015.

114 Hook and McCormack (2001), 21.

115 Ibid.

though the Supreme Court has consistently refused to enforce Article 9, deeming issues surrounding it as 'political questions', the provision has not entirely been ineffective as a legal norm either. Most notably, the CLB has used its institutional power quite effectively to enforce its reasonably consistent interpretations.¹¹⁷ For example, Article 9 has contributed to the development of a number of additional pacifist norms, such as the 1 percent rule, the non-nuclear principles, the ban on the export of weapons, and the ban on conscription for military service.¹¹⁸ Furthermore, Article 9 has arguably prevented Japan from direct involvement in Cold War conflicts, such as the Korean War and the War in Vietnam. During the Gulf War, the government was quite willing to respond to international pressures to participate, but Article 9 and the associated pacifist norms operated pretty effectively to constrain its ability to act.¹¹⁹ The Japanese contribution to the Iraq War was very limited as a consequence of what still appeared to be an efficacious pacifism principle.¹²⁰ Also in the post-9/11 era, as Martin noted,

'the fact remains that Japan has not used force, been directly involved in any armed conflict, or deployed armed forces as combatants in a theatre of armed conflict since the promulgation of its constitution'.¹²¹

Even after the 2014–2015 redefining measures, there is room to argue that Article 9 functions effectively as a constraint.¹²² The recent defense shifts arguably show that Article 9 still significantly constrains policy-makers who seek to restore the military as a legitimate instrument of state policy. The instruments that have brought these shifts carefully specify the conditions under which Japanese forces may and may not engage in actions pertaining individual and collective self-defense.¹²³ apparently, the further departure from the principle of pacifism demanded elaborate justification on behalf of those who sought to engineer defense shifts. Besides that, while the 2014–2015 redefining measures are sometimes perceived as another major departure from pacifism, the new powers the Japanese government asserts still seem to be relatively measured compared to the powers claimed by governments of truly

116 One thing that illustrates that the pacifist identity is still very much alive in Japan is the 2014 nomination of Article 9 for the Nobel Peace Prize. Notably, a group of Diet members explicitly supported this nomination, probably not accidentally while Abe was pushing through major security shifts. See: 'Japanese lawmakers say war-renouncing Constitution deserves Nobel Peace Prize', *The Japan Times*, 22 July 2014.

117 Martin (2008), 340.

118 Ibid. Hook and McCormack (2001), 21.

119 Martin (2008), 342.

120 Hayashi (2004).

121 Martin (2008), 356.

122 Ibid, 327. See also Martin (2012), 54 *et seq.*

123 See, e.g., 'Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People', July 1, 2014.

'normal' countries.¹²⁴ Add to this the fact that even when Japan increases its defense spending to 'record high budgets' in the years to come,¹²⁵ the relative amount of money the country spends (as a percentage of GDP) on defense is still below the amount its neighbors spend, below the NATO average, and far below the relative amount of money the United States spends.¹²⁶ In sum, even after 70 years of defense reforms, Article 9 still makes a significant difference for anyone who seeks to expand the capacity and scope of activity of Japan's Armed Forces.

On the other hand, the evolution of national defense has had consequences for a meaningful description and explanation of the import Article 9 has had over time. Taking a historical institutional view, we can observe that developments in the field of national defense have seriously called into question the original (and, perhaps, textual) meaning of this provision. The evolution of constitutional practice has deviated substantially from the original pacifist precept of the formal constitution. It seems unlikely that the establishment of the SDF and the expansion of its activities will be reversed any time soon. In fact, the opposite seems more likely, especially at a time when the (perceived) security environment surrounding Japan is deteriorating and when an American president is suggesting that he will not automatically come to the aid of Japan in case of an armed attack;¹²⁷ and the larger part of the community of constitutional actors have accepted the legal validity (or constitutionality) of the defense shifts.

Even in those circumstances, it is of course theoretically possible to hold on to a strictly legal-doctrinal understanding of the development of Article 9 and argue that, despite profound real-world change in the area this provision seeks to regulate, as a normative matter, its meaning has not changed, since it has not been subject to formal constitutional amendments or judicial decisions. However, especially in the case of Japanese pacifism and self-defense, it is clear that such a depiction does not adequately reflect how the normative content of Article 9 has changed. Instead, recognizing that Article 9 has not operated in a vacuum enables us to see that defense shifts taking the form of government and CLB interpretations, treaties, ordinary legislation, or other legal and non-legal mechanisms outside the formal constitutional amendment procedure have shaped and reshaped the import Article 9 has had in the real world.

That is not to say that the new material meaning of Article 9 has entirely crystalized. Especially with regard to the latest developments, the relationship

124 Joseph Nye, 'Japan's Self Defense', Blog Entry, 7 August 2014.

<http://joenye.com/post/94090601526/japans-self-defense-defense>

125 'Defense Ministry eyes record-high budget request of over ¥5 trillion', *The Japan Times*, 24 August 2014.

126 Stockholm International Peace Research Institute, SIPRI Fact sheet April 2013.

127 Editorial Board, 'Editorial: Mattis' Japan visit welcome, but Trump policy worries remain', *The Mainichi*, February 4, 2017.

between Article 9 and real-world developments in the field of national defense remains unclear. True, the larger part of the community of constitutional actors have accepted and indeed endorsed the validity of the latest security shifts. However, consensus over the new meaning has not been achieved.¹²⁸ Moreover, it is arguably too early to say whether these shifts will be persistent. Especially with respect to the latest security shifts, counter-forces may not yet entirely be written off.¹²⁹ Even if it seems unlikely that the government will give up its claim to a right to collective self-defense anytime soon, we cannot predict what will happen in the (near) future.

3.3 WHY DID JAPAN NEVER AMEND ARTICLE 9?

From the moment Japan rearmed, commentators have argued that Japan should amend its constitution to (explicitly) allow the country to have a military to defend itself.¹³⁰ Nevertheless, Article 9 has never been subject to formal constitutional amendment. It is not the case that governments have not attempted to amend the pacifist provision. Between 1955 and 1960, successive Japanese governments, led by the Japan Democratic Party and the Liberal Democratic Party (LDP), have aimed to amend article 9, but opposition from the JSP prevented the coalitions from obtaining the necessary two-thirds majority in the Diet.¹³¹ Furthermore, since the beginning of the 1990s, multiple proposals have been made to amend Article 9. However, even during the period of office of Prime Minister Koizumi (2001–2006), who has been described as Japan's 'most pro-revisionist Prime Minister' and who met an unprecedented pro-revisionist Diet (according to one poll, no less than 80 percent of the house of commons was in favor of formal constitutional revision of Article 9¹³²), the text of Article 9 has not been changed.¹³³ This section seeks to explore why this is the case. What reasons or factors may explain why Japanese defense shifts have solely been effected by alternative mechanisms of change, despite the fact that these shifts have substantially deviated from the text and original meaning of Japan's written constitution?

Without purporting to be comprehensive, this section will put forward six possible explanations of what we may call 'textual stickiness.' These are: amendment difficulty, polarization, judicial deference, the role of the CLB, the

128 Fisher (1999), 414–415.

129 Jiji, 'Democratic Party, other opposition forces to continue working to scrap security laws', *The Japan Times*, 19 September 2016. Jiji, 'Lawsuit challenging controversial security laws filed by group at Hiroshima Prefecture Court', *Japan Times*, 17 September 2016.

130 Matsui (2011), 262.

131 Ibid, p. 262–263.

132 A March 2004 poll cited by Boyd and Samuels (2005), 48.

133 Ibid, 27 et seq. and 48 et seq.

rejection of 'American-style' constitutionalism, and the rejection of an 'imposed' constitution.

3.3.1 Amendment difficulty

A first factor that might explain why Article 9 has never been amended – despite the fact that the evolution of Japanese national defense policy has substantially deviated from pacifism and despite the fact that many governments have sought amend this article to formally allow Japan to have a military – is that of all the constitutions, the Japanese Constitution is one of the most difficult ones to amend.¹³⁴

One important source of amendment difficulty is the Constitution of Japan itself. According to Article 96 of this document, formal constitutional amendments have to be initiated by the Diet through a concurring vote of at least two-thirds of all the member of each House. Subsequently, the proposal has to be submitted to the people by holding a nationwide referendum. If the proposal is then approved by a majority of voters, the emperor will promulgate the amendment and it will become an integral part of the constitution. Compared to formal amendment procedures of other constitutions in the world, this procedure is extremely rigid. On Lijphart's index of formal amendment difficulty in liberal democracies, the Japanese procedure receives the highest possible value.¹³⁵ Further proof is the Japanese Constitution's extremely low formal amendment rate: despite the fact that several proposals have been passed in review, in 70 years no proposal has ever been adopted.

A second, more informal source of the difficulty of amending Article 9 is an unwritten doctrine that deems the principle of pacifism unamendable.¹³⁶ That is, some Japanese constitutionalists believe that even though the Japanese constitution does not provide any explicit eternity clauses – as, for instance, the German Basic Law¹³⁷ does – the constitutional legislator cannot alter the three fundamental principles of the Japanese constitution: the popular sovereignty principle, the protection of fundamental human rights, and the pacifism principle.¹³⁸ With regard to Article 9, a number of varieties on this unwritten doctrine of unamendability exist. Some argue that Article 9 cannot be altered or abolished, because it is the most fundamental provision of the Constitution of Japan. Others are of the opinion that the renunciation of (aggressive) war

134 Berger (2012), 14. Boyd and Samuels (2005), 10. Matsui (2011), 264–265.

135 Lijphart (2012), 208.

136 Matsui (2011), 260.

137 See Article 79(3) German Basic Law.

138 The idea of an 'unconstitutional constitutional amendment' is not typically Japanese. The existence of substantive limitations – explicit or implicit – on amendment power is being recognized in more and more constitutional systems around the world. See Passchier and Stremler (2017). Roznai (2013).

is key, but that the ban on armed forces could be amended by allowing for the maintenance of armed forces for the purpose of self-defense.¹³⁹ Both of these doctrines make it harder to actually amend Article 9, even if only a small part of the community of constitutional actors recognize its existence. The mere suggestion that an amendment of Article 9 would be an 'unconstitutional constitutional amendment' may delegitimize the revisionist effort and enhance the rigidity of this provision.

3.3.2 Polarization

However, even if it would have been easier to amend Article 9, the polarization of the debate surrounding the formal revision of Article 9 would still make it especially hard to change the text of this provision because there is hardly consensus in politics or society about the question what a new Article 9 should look like.¹⁴⁰ Since the early 1950s, the Japanese have been extremely divided on the issue of constitutional revision of Article 9.¹⁴¹ There have been roughly three different camps.¹⁴² Camp one, the 'nationalists', have advocated for the abolition of Article 9 and have sought to restore a strong and independent 'big Japan' that was capable of taking care of its own security and concluding conventional military alliances. Camp two, the 'progressives', viewed Japan as a 'peace nation' and have bitterly opposed any attempt to amend Article 9. Camp three has been the 'centrists' or the 'pragmatists', who have been open to limited reforms, such as recognition of Japan's right to individual self-defense, but have opposed *sweeping* amendments. The centrists have viewed Article 9 as an ideal instrument to deflect pressure from the United States to upscale defense capabilities and participate in international military operations and have held that the provision protected Japan's interests in the unequal security relationship with the US. During the past 70 years, these strong and contradictory forces have made it virtually impossible for a coalition to formally amend or abolish the pacifism clause, even if they agreed on the general point that Article 9 had to be amended.¹⁴³ Polarization has also divided major political parties internally. Within the LDP, for instance, pragmatists have restrained the revisionists for decades. According to Boyd and Samuels, it is this 'deep internal division' within the dominant conservative party 'that most protected Article 9 from formal change.'¹⁴⁴ Furthermore, public opinion has been divided. While revision of Article 9 has never been

139 Matsui (2011), 260.

140 Berger (2012), 15.

141 Moore and Robinson (2002), 321.

142 Berger (2012), 15.

143 Ibid.

144 Boyd and Samuels (2005), 26.

supported by more than 40 percent of the people, principle of pacifism has always been supported by substantial majorities of the Japanese public.¹⁴⁵ Today, approximately two-thirds of the people are opposed to any formal change at all. Of those who favor revision, only 38 percent believe that the SDF should have a 'normal' military status. Fifty-six percent of the revisionists take the view that the status of the SDF as force for the purpose of individual self-defense should be written into the constitution.¹⁴⁶ Also, this polarization in society makes it more difficult to amend Article 9, if only because ultimately a proposed amendment has to be approved by the people in a referendum.

3.3.3 Judicial deference

Another factor that may explain why Article 9 has never been amended – despite the awkward tension that has mounted between the text of the provision and the reality on the ground – is judicial deference: as the Japanese judiciary has never stood in the way of the government's defense plans, it has never been really necessary for the government, at least not from a legal point of view, to amend Article 9. If the judiciary had univocally declared the SDF or its activities unconstitutional, the government could probably have not continued to develop a more assertive defense policy without first overturning this declaration by way of formal constitutional amendment. However, while the lower courts were occasionally willing to declare the SDF unconstitutional,¹⁴⁷ a final Supreme Court judicial denunciation of the SDF and its activities remains forthcoming. In each of the (few) cases that have addressed the pacifism and national defense issue, the courts have ultimately refused to answer the principled questions, ruling that the question of the SDF's constitutionality is better dealt with by the political branches.¹⁴⁸

3.3.4 The role of the CLB

The fact that the Japanese judiciary has not made it legally necessary for the Japanese government to amend Article 9 before establishing or expanding the activities of the SDF should perhaps not be a surprise. Although the Japanese courts have the formal power to review the constitutionality of government

145 Berger (2012), 16.

146 See for an overview of public opinion surveys Nishikawa (2009), 70–75.

147 See, for example, the *Naganuma case*, Supreme Court, 1st petty bench, 9 September 1982, 36 Minshu 1679. Explained in Matsui (2011), 241 and in Hamura and Shiu (1995), 436. Hamura and Shiu, 'Renunciation of war as a universal principle of mankind', p. 437. See also the *Sunagawa Case*, Supreme Court, grand bench, 16 December 1959, 13 Keishu 3225. Explained by Matsui (2011), 241 + 246 and by Hamura and Shiu (1995), 433.

148 Matsui (2011), 243.

action and legislation, they have never been a major constraint on the legislative and executive branches. In fact, the judiciary of the country is known as the most conservative in the world.¹⁴⁹ In scrutinizing the constitutionality of governmental and legislative action, the Cabinet Legislation Bureau (CLB) seems to have played a much more prominent role.¹⁵⁰ While the CLB is formally part of the executive, students of Japanese constitutionalism have recognized that 'no administrative agency of the Japanese state enjoys higher prestige or greater independence than the CLB.'¹⁵¹ They even see the institution as a 'quasi-constitutional court'.¹⁵² Indeed, 'in practice, the CLB has been a far more influential arbiter of the law than the Supreme Court', as Samuels put it.¹⁵³

In the field of national defense and pacifism, however, the CLB has played different roles. In the early 1950s, as we have seen, the CLB made it possible for the government to sweepingly change the meaning of Article 9 of the constitution without formal amendment.¹⁵⁴ In later decades, however, the institution has been an important constraint on governmental ambition.¹⁵⁵ Most remarkably, the CLB upheld the 1954 proscription of collective self-defense until 2014, even though the Japanese government clearly wished to contribute more actively to international military operations and wanted a more equal security relationship with the US, certainly after 1990. Furthermore, the CLB actively blocked Japanese participation in the Gulf War in 1991, and in 2004 it forced the Japanese government to inform other participants in peace-keeping operations that Japan could not come to their aid in case they were attacked.¹⁵⁶

Also, when the Abe government unfolded its plan to assert a right to collective self-defense under Article 9 of the constitution in 2013, the CLB initially stood in its way. The CLB Director-General Yamamoto believed that in order to realize the right to collective self-defense of the type the prime minister wished for, 'it would be more appropriate to amend the Constitution.'¹⁵⁷ However, the CLB would ultimately not make it legally necessary for the government to amend Article 9 before bringing about new defense reforms. In order to neutralize the opposition from the CLB, Prime Minister Abe promoted Yamamoto, somewhat ironically, to the less powerful Supreme Court and replaced him with Ichiro Komatsu, who was known to be a supporter of a broader interpretation of Article 9 allowing for collective self-

149 Law (2008). See also: Sakaguchi (2014).

150 Samuels (2004).

151 Ibid.

152 Ibid.

153 Ibid.

154 Ibid.

155 Ibid.

156 Ibid.

157 Ibid.

defense.¹⁵⁸ As we have seen, it was then possible for the government to bring about new defense reforms outside the formal constitutional amendment procedure, without being hampered by the CLB.

3.3.5 The rejection of 'American-style' constitutionalism

Another explanation for the fact that Article 9 has not been amended, despite major changes in the field this provision seeks to regulate, may be found by showing how the Japanese government treated the constitutional system that was largely designed by the Americans during the post-WWII occupation. As Murphy explained, in the years after the adoption of the 1947 written constitution, not many sophisticated Japanese believed that the document would long survive the American occupation.¹⁵⁹ However, as we have seen, the 1947 written constitution still operates today. Murphy believes that this longevity

'is largely due to the government's policy of treating the system as more a representative than a constitutional democracy and the Supreme Court's acquiescence in that piece of constitutional interpretation'.¹⁶⁰

In other words, Japan did not follow the American model of constitutional democracy, but has arguably developed its own version. Japan has, at least partly, rejected the idea that the constitutional charter is both a source and measure of legitimacy.¹⁶¹ Instead, Japan has developed its constitutional system in the direction of 'Westminster' representative democracy in which the (elected) government and the parliament have the primary say. Assuming that this characterization makes sense, the 'informal' way in which Japanese self-defense developed may not be that odd after all. It is probably considered less problematic to bring about constitutional transformations by using alternative methods of constitutional change if the constitutional text does not (always) play a central role in the broader constitutional context.

3.3.6 The rejection of an 'imposed' constitution

A final factor that may explain why Article 9 has never been amended, despite major change and despite an often recurring debate about constitutional revision, is the fact that many Japanese see their written constitution as an 'imposed' constitution. Nishikawa suggested that persistence to formal change

158 'For 'no war' Article 9, any reinterpretation will do', *The Japan Times*, 20 November 2013.

159 Murphy (2007), 208.

160 Ibid.

161 See: Ibid, 199.

is triggered by attitudes toward modern constitutionalism itself.¹⁶² He reported that a group of conservative revisionists has always maintained that the post-war constitution was imposed or even forced upon Japan by the Allied occupiers. Article 9 in particular has annoyed those who do not see why Japan could not be a 'normal' nation (again). The same group has also tried to downgrade the significance of popular sovereignty – which is, besides pacifism, a central principle of the modern Japanese constitution – by arguing that the sovereignty of Japan belongs to the emperor.¹⁶³ Therefore, it is perhaps no surprise that the members of this group are happy to pursue a defense policy under a supposedly pacifist constitutional document that they deem illegitimate.

3.4 ALTERNATIVE MEANS OF CONSTITUTIONAL CHANGE AS FUNCTIONAL SUBSTITUTES?

Section 1 of this chapter has revealed that constitutional shifts in the field of national defense and pacifism have come about outside the formal constitutional law-making of the Constitution of Japan. Instead, they have been effected by executive interpretations, treaties, and ordinary legislation, among other mechanisms. This section aims to give a sense of the extent to which these alternative mechanisms of constitutional change have been able to functionally substitute the formal amendment procedure of the Constitution of Japan.

Without purporting to give a comprehensive overview of all the functions of the formal amendment procedure of the Japanese Constitution that have or have not been substituted by the alternative mechanisms of change that have effected change in the field of national defense and pacifism, this section will explore four main questions. First, whether and to what extent alternative means of change have been able to substitute the constitutional amendment procedure in generating support for reform in the field of national defense. Second, whether and to what extent alternative mechanisms of change have been effective in bringing about structural change in the field of national defense. Third, whether informal constitutional change in one field has also had implications for the way constitutional change has taken place in other fields. Fourth, whether and to what extent informal constitutional change in the field of national defense and pacifism has had wider implications for the basic tenets of constitutional democracy.

162 Nishikawa (2009), 63.

163 Ibid.

3.4.1 Support for change

As we have seen, the most important Japanese constitutional actors have, either explicitly or implicitly, supported change in the interrelated fields of national defense and pacifism, even though this change has come about without any amendment to Article 9 explicitly allowing this change. Nevertheless, ‘the national defense and pacifism issue’ is known as the most controversial issue created by the Japanese constitution.¹⁶⁴

The lack of support for informal constitutional change that has come about in the related fields of national defense and pacifism is striking. Particularly the lack of support for these change among scholars stands out. During the first decades of the SDF’s existence, most constitutional scholars held that Article 9 prohibited the Japanese government from maintaining any military forces.¹⁶⁵ The recent 2014–2015 security shifts have even been more contested. Martin argued that ‘this [the 2014 government Decision] so-called reinterpretation is entirely illegitimate and poses dangers to Japan’s democracy.’¹⁶⁶ His main concern was that the Decision circumvents the amendment procedure, which he deems a ‘crucial element ... [of the] constraining characteristic of constitutions.’¹⁶⁷ Martin held that the fact that Prime Minister Abe used a Cabinet Decision to change the meaning of Article 9 is ‘by its very nature’ invalid:

‘[i]t not only stands in direct violation of the explicit constitutionality mandated amendment procedures, but it also violates democratic principles, given that the Diet and the public are cut out of the process.’¹⁶⁸

On Friday June 19th, 2015, no fewer than 225 Japanese constitutional scholars signed a joint statement condemning the government reinterpretation of Article 9 and the new security legislation – at that time bills – as unconstitutional.¹⁶⁹ In an interview in the *Kochi Shimbun*, Yasuo Hasabe, professor of constitutional studies at Waseda University and one of the leading figures in the national debate, was asked whether the constitution could be revised in such a way that it would become possible to exercise a right to collective

164 Matsui (2011), 254.

165 Yoshida, ‘Japan security bills reveal irreconcilable divide between scholars, politicians’, *The Japan Times*, June 12, 2015.

166 Martin, ‘“Reinterpreting” Article 9 endangers Japan’s rule of law’, *The Japan Times*, 27 June 2014.

167 Ibid.

168 Ibid. See also Martin (2017).

169 Yoshida, ‘Japan security bills reveal irreconcilable divide between scholars, politicians’, *The Japan Times*, June 12, 2015.

self-defense.¹⁷⁰ His answer was that that kind of revision would indeed be possible:

'After all, the US, UK, and France all exercise a right to collective self-defense. Some might even say that so long as it remains very limited, a right to collective self-defense is compatible with the basic principle of pacifism. If they want to obtain consent through a national referendum, then they should try their utmost to explain matters in a way that reflects the history of past wars. If, after that, we end up exercising a right to collective self-defense, then there's nothing for constitutional scholars to say against it.'¹⁷¹

But what about 'trying to skip this next step, and *de facto* revise the constitution by re-interpreting it [?]', the interviewer asked. Yasuo Hasabe said:

'A constitution should not be altered willy-nilly according to the thoughts of whoever happens to be the Prime Minister at the time. That's precisely why it's a constitution. It's designed to be rather difficult to change.'¹⁷²

Ginsburg agreed, arguing that a statute cannot substitute constitutional amendment if the statute is

'understood as an effort to achieve what cannot for the moment be accomplished by a formal constitutional amendment. [...] Simply because constitutions must change with the times does not mean that every proposed change is acceptable.'¹⁷³

Ginsburg also argued that Japan's constitutional commitment to pacifism can only be adjusted with broad public support, or at least elite consensus with popular acquiescence. However, given that neither seem to be present, 'this suggests that a true change in the Japanese Constitution will require more than simply a passing a statute.'¹⁷⁴

The overwhelming majority – 99 percent, according to Hasebe Yasuo – of constitutional scholars in Japan seem to be of the opinion that the government's assertion a right to collective self-defense is unconstitutional.¹⁷⁵

170 'Hasebe Yasuo Interview with the Kochi Shimbun', *International Journal for Constitutional Law Blog*, June 30, 2015. At: <http://www.icconnectblog.com/2015/06/hasebe-yasuo-interview-with-the-kochi-shimbun/>

171 Ibid.

172 Ibid.

173 Tom Ginsburg, 'Rearmament and the Rule of Law in Japan: When Is it OK to Change the Constitution With a Statute?', *Huffington Post* 23 July 2015.

174 Ibid.

175 As Yasuo Hasabe put it in an interview with the Kochi Shimbun: 'The overwhelming majority – about 99% of scholars – are of the opinion that it [the reinterpretation of Article 9] is unconstitutional. Or, at least, they think that a right to collective self-defense is unconstitutional. Who comprise the remaining 1%? I can't say. I don't have any personal relations with anyone who holds that opinion, and I haven't met any at academic conferences. The

‘Scholars don’t understand security issues at all’, one government official found.¹⁷⁶ Indeed, in conservative circles, constitutional scholars acquired a bad reputation for rigid adherence to theory during the Cold War. ‘Sixty years ago, when the SDF was established, most constitutional scholars said the SDF was unconstitutional’, LDP Vice President Masahiko Komura told *The Japan Times*.

‘If we had followed what they said, we wouldn’t now have neither the SDF nor the Japan-U.S. security treaty. [...] It is highly doubtful that the peace and stability of Japan would have been maintained.’¹⁷⁷

Security reforms have always met fierce opposition in society too. Some polls have indicated that as many as 60 percent of the Japanese people are opposed to the latest shifts.¹⁷⁸ Even conservative newspapers register clear majorities in opposition to asserting a right to collective self-defense under Article 9 of the constitution.¹⁷⁹ At the same time, enough people seem to have supported Abe’s moves. As Kato argued,

‘in each case [of security reform], the media focused on popular opposition to these actions, emphasizing dips in Mr. Abe’s popularity. But the crucial point is that even with these dips, the Prime Minister has consistently drawn more support than opposition. If this had not been the case, he would almost certainly have decided not to rush ahead with his overbearing plan to alter the interpretation of Article 9.’¹⁸⁰

Thus, mechanisms of change outside the formal constitutional amendment procedure seem to have been able to generate sufficient support for constitutional change in the fields of national defense and pacifism – sufficient in the sense that changes have been supported by the most prominent constitutional actors and the larger part of public – but they have not generated the amount of support for constitutional reform a permissive constitutional amendment of Article 9 presumably would have. Indeed, it appears that, in the absence of a universal ‘objective’ doctrine of informal constitutional change, only a formal constitutional amendment would be able to convincingly answer the most pressing constitutional issues the evolution of national defense policy

opinion of the scholarly community leans pretty heavily to one side on this.’ See: ‘Hasebe Yasuo Interview with the Kochi Shimbun’, *International Journal of Constitutional Law Blog*, June 30, 2015. At: <http://www.iconnectblog.com/2015/06/hasebe-yasuo-interview-with-the-kochi-shimbun/> (accessed 13-4-2017).

176 Yoshida, ‘Japan security bills reveal irreconcilable divide between scholars, politicians’, *The Japan Times*, June 12, 2015.

177 Ibid.

178 Craig and Wakefield (2014).

179 Ibid.

180 Kato, ‘Japan’s Break With Peace’, *The New York Times*, 16 July 2014.

has raised (although, in the case of Article 9, even a formal amendment may not suffice to end the debate over the permissibility of change, because, as we have seen, some students of Japanese constitutional law hold that Japan's constitutional commitment to pacifism is so fundamental that it substantively limits the amendment power of the Japanese constitutional legislator¹⁸¹).

3.4.2 The effectiveness of reform: a 50 dollar bottle of water

By reforming the country's national security policy, the Japanese government, among other things, intended to make it possible for Japan to defend itself in case of an armed attack by another country or foreign organization and deliver a more 'pro-active' contribution to international military operations. According to some, including the current Prime Minister Abe, the defense reforms have sought to 'normalize' Japan's defense policy and legal framework for national security. Have alternative means of constitutional change, such as executive interpretations and ordinary legislation, produced the desired or intended result, or would truly effective change have required a formal constitutional amendment?

It could be that, in the Japanese case of pacifism and national defense, alternative mechanisms of change have indeed functionally substituted the formal amendment procedure in bringing about the desired structural policy shifts. Without formally amending the pacifist precepts of the formal constitution of Japan, successive Japanese governments have been able to establish and maintain what is now one of the largest and most modern militaries in the world. Moreover, security shifts outside the formal amendment procedure have enabled Japan to play an increasingly prominent role in international development and security operations since the early 1990s. There have been suggestions that, in absence of a formal amendment to Article 9, Japan should disband its SDF.¹⁸² However, the larger part of the defense shifts that have come about during the past 70 years seem to have the kind of staying power that may be associated with a formal constitutional amendment. As Martin noted, '[i]t is entirely unrealistic for proponents of Article 9 to think that the clock can be turned back with some radical disbandment of the SDF.'¹⁸³

While this answer is true, it ignores the fact that the way in which the Japanese have reformed their defense policy – namely, without amending Article 9 of their constitution – has caused some very specific problems and difficulties in governance.

For example, the dual – and often conflicting – commitments to pacifism and national defense have made it very difficult for Japanese rule-makers to

181 See par. 3.3.1.

182 See e.g. Port (2005).

183 Martin (2012), 55.

bring about an effective framework for taking decisions regarding the use of military force. More specifically, it has been unclear who exactly can order the SDF to commence hostilities and when. For example, a 1968 CLB statement reaffirmed that the SDF can only act 'when there is a sudden unprovoked attack on Japan and there are no other means available to protect the lives and safety of the people.'¹⁸⁴ At the same time, it has been clear that any use of force by SDF personnel needs to be approved by the prime minister himself. In his turn, the prime minister needs unanimous cabinet approval before he can authorize an officer to fire. However, the Japanese cabinet meets only twice a week, which meant, as Boyd and Samuels showed, that 'it was hard to imagine a timely authorization for a Japanese soldier who finds himself under fire.'¹⁸⁵

Contradictions in the Japanese legal security framework have also made it harder – relative to other countries – to pursue an effective foreign security policy. An especially complicated issue was the ban on collective self-defense that existed until 2014.¹⁸⁶ In the late 1940s and 1950s, it was doubted whether Article 9 allowed Japan to join the United Nations.¹⁸⁷ It has also been impossible for Japan to conclude mutual security arrangements, such as NATO. Furthermore, until the 1980s, the CLB interpretation of Article 9 was so strict that it prohibited the SDF from reacting in case US forces came under attack while defending Japan.¹⁸⁸ As a result, mutual security negotiations with the US have been ponderous. It was not until 2014 that the Japanese government expressly asserted the right to collective self-defense, still, albeit with a lot of accompanying reservations that will continue to make it significantly harder for Japan to define a foreign policy and negotiate beneficial mutual security arrangements.

Sending the Japanese SDF abroad has been a particularly complicated enterprise in the ambiguous legal framework that has evolved during the past 70 years. As we have seen, sending troops abroad was considered impossible until the 1990s. When the Japanese government wanted to participate in the efforts to liberate Kuwait from Iraqi occupation in 1990, it was effectively obstructed by the CLB, which insisted upon compliance with a strict interpretation of Article 9. In response, the government issued the International Peace Cooperation Act that provides a legal basis for participating in United Nations peacekeeping missions. Shibata has described this Act as 'a clearly opportunistic piece of legislation, more concerned with domestic political problems than with Japan's effective participation in U.N. operations.'¹⁸⁹

184 Samuels (2004).

185 Boyd and Samuels (2005), 6. See also Samuels (2004).

186 Boyd and Samuels (2005), 9.

187 More and Robinson (2002), 169.

188 Ibid.

189 Shibata (1994), 345.

Shibata was especially critical of the five¹⁹⁰ preconditions and requirements the Peace Cooperation Act stipulates that have to ensure that SDF participation in UN operations does not violate Article 9 of the constitution.¹⁹¹ One of the principles entails that Japan may only participate in peace-keeping operations in which the parties to the armed conflict have agreed to cease fire.¹⁹² Shibata explains that such a norm may make sense legally, but from a policy perspective it is far from sound:

'[p]eacekeepers are generally sent to areas where it is impossible to predict whether a cease-fire will be maintained. Should sporadic cease-fire violations occur, as they often do, and SDF and Corps personnel are not able to participate, Japan will come to be known as a very limited player in the international community. After all, if there were a complete and permanent cease-fire with no possible violations, peacekeepers would be unnecessary.'¹⁹³

Shibata has severely criticized the cease-fire requirement, the consent of the hosting state principle, and the suspension and termination rule.¹⁹⁴ However, the most striking problem he addressed is the Japanese sensitivity to the use of weapons by SDF personnel conducting a military operation. According to Shibata, the Peace Cooperation Act restricts the use of arms by Japanese servicemen to such an extent that Japanese participation is 'at best rendered ineffective, and at worse, damaging to U.N. operations.'¹⁹⁵ Article 24(3) provides that SDF officials may only use their weapons

'within reasonable limits under the circumstances when unavoidably necessary to protect the lives of others or prevent bodily harm to themselves, other Self-Defense Force personnel, Corps Personnel who are with them, or individuals who have come under their control during the performance of their duties.'

As a result, the SDF may be unable to come to the aid of peace-keepers from other states when they are under attack. In reality, however, peace-keeping contingents are seldom completely separated when operating; they usually help one another in case of danger. As Shibata commented,

'[t]he Peacekeeping Law's use of the domestic law concept of legitimate individual defense to legitimize the use of arms by U.N. peacekeepers is fundamentally flawed given the international character of the peacekeepers and the inherently collective nature of their actions.'¹⁹⁶

190 See par. 2.2.3.

191 Shibata (1994), 325.

192 See: Article 3 International Peace Cooperation Act.

193 Shibata (1994), 327. Hayashi agreed and made a similar comment. See: Hayashi (2004), 581.

194 Shibata (1994), 325 et seq.

195 Ibid, 330.

196 Shibata (1994), 332.

Lummis wrote, perhaps with a slight exaggeration, that, as a consequence of the organizations' limited right to use force, 'nothing is more dangerous than to send the SDF.'¹⁹⁷ However, Lummis has a point when he holds that it may be dangerous to send into a warzone people who 'look like soldiers, act like soldiers, dress like soldiers and are equipped like soldiers', but have no right to fight under their country's law.¹⁹⁸

Indeed, the fact that the Japanese legal framework for sending troops abroad is in two minds has had repercussions for the effectiveness of operations overseas. An example is the first (1992) SDF deployment abroad in Cambodia. Lummis wrote that Japanese troops

'were in Cambodia for political reasons, made no contribution to actual peacekeeping, which sometimes requires military action [i.e. the active use of force], and were in fact a major headache for the commanders.'¹⁹⁹

As the story goes, the Australian general who commanded the Cambodia operation said that he had to 'wrap' the participating SDF troops 'in Cotton wool.'²⁰⁰

SDF deployments outside of a UN context that were executed after 9/11 were arguably even more problematic. The Peace Cooperation Act did not provide a legal basis for such operations and it proved to be impossible to achieve a comprehensive and permanent law that could. Therefore, the government had to resort to *ad hoc* legislation for each deployment and was forced to defend the constitutionality of each operation separately.²⁰¹ The Iraq Special Measures Act of 2003,²⁰² for instance, provides a legal basis for the dispatch of SDF troops to Iraq for humanitarian and reconstruction purposes. Hayashi characterized the Act as 'highly specific and strictly limited in purposes and duties.'²⁰³ Like other Japanese defense laws, the Act provides that 'the implementation of the activities based on this Law shall not be tantamount to the threat or use of force.'²⁰⁴ Therefore, it would even have prohibited the SDF, among other things, from carrying out rescue missions of Japanese citizens taken hostage in Iraq.²⁰⁵ Boyd and Samuels consider the awkward situation that Prime Minister Koizumi was in when he had to inform the

197 Lummis (2013), 5.

198 Ibid.

199 Ibid.

200 Ibid.

201 Hayashi (2004), 581.

202 Special Measures Act Concerning the Implementation of Humanitarian Reconstruction Support Activities and Security Maintenance Support Activities in Iraq (Law nr. 137, 2003).

203 Hayashi (2004), 581.

204 See: Article 2(2). Special Measures Act Concerning the Implementation of Humanitarian Reconstruction Support Activities and Security Maintenance Support Activities in Iraq (Law nr. 137, 2003).

205 Hayashi (2004), 583.

'coalition of the willing' that Japanese troops could not come the aid of fellow participant's forces if they were attacked.²⁰⁶ Also during the operation, countries that occupied neighboring provinces have reportedly complained about having to defend the Ground-SDF troops that were deployed in Samawah.²⁰⁷ Since the operation, the overall effectiveness of the Japanese activities in Iraq has been seriously questioned. McCormack pointed out that Japan sent a 'numerically insignificant' force of 550 servicemen, of which only one-third was devoted to humanitarian reconstruction support activities.²⁰⁸ It did not help that the SDF troops were housed in what has been described as 'one of the most formidable military camps planet earth has ever seen.'²⁰⁹ According to the *Asian Times*, the Japanese camp, which was located about 10 kilometers outside of the city of Samawah, was an isolated, heavily fortified, and luxurious compound (it reportedly had its own karaoke bar, massage parlor, and gymnasium). Furthermore, the humanitarian operation was considered to be very cost-inefficient compared to other ways of providing aid. The Japanese troops provided 80 tons of water for 16,000 people daily and gave assistance to local schools and hospitals for approximately half a year at the expense of around US\$360 million (this amounts to \$50 per half-liter bottle). By comparison, the Japan-financed French NGO Agency for Technical Cooperation and Development (ACTED) provided services in gas, health, sanitation, and 550 tons of water daily to 100,000 people in the Iraqi province of Al-Muthanna at the expense of less than half a million US dollars a year. Therefore, Japan spent almost 1000 times as much on the military mission as it spends on aid to ACTED, while the latter was at least five times more effective in terms of aid provided.²¹⁰ McCormack commented that

'where the NGO operation was low cost, low profile and high impact, the money going mostly on rental for tanker and virtually all the labor being provided by local Iraqi's, the SDF operation was high cost, high profile and low impact.'²¹¹

He added that the operation 'was certainly not a model that could be expended or reproduced anywhere else but one in which political purpose trumped economic sense or humanitarianism.'²¹²

Thus, the fact that the evolution of Japanese defense policy has come about through ordinary legal and socio-political processes, but not by way of formal

206 Boyd and Samuels (2005), 10.

207 Ibid.

208 McCormack (2004), 2.

209 J. Sean Curtin, 'Japan's 'Fortress of Solitude' in Iraq – plus karaoke', *Asia Times Online*, 19 February, 2004. Quoted by Ibid.

210 McCormack (2004), 2. Nao Shimoyachi, 'SDF vs. NGO – an Iraqi tale of cost-effectiveness', *The Japan Times*, 16 May, 2004.

211 McCormack (2014), 2.

212 McCormack (2014), 2.

amendment, has sometimes resulted in quite bizarre, ineffective, and unsound policy outcomes. The tension between Article 9 and the evolution of national defense appears to have translated itself into dysfunctional government and ineffective policies on the ground. If Japan had amended Article 9, it would probably have been able to bring about a much more functional and less complicated policy framework for national defense, not a breeding ground for 'continuous hairsplitting' that 'makes for contested politics and messy policy', as Boyd and Samuels put it.²¹³

3.4.3 The provocative effect of using alternative means of constitutional change

Students of Japanese constitutional law have also claimed that the use of alternative means of change in the related fields of national defense and pacifism has provoked the use of such means in other fields as well. Ackerman and Matsudaira warned that

'if [Prime Minister] Abe unilaterally modifies the constitution, and threatens the referendum procedure with contempt, it would create a terrible precedent for further constitutional coups.'²¹⁴

Jeff Kingston, director of Asian Studies at the Temple University Japan, has similar thoughts. In his view, Prime Minister Abe has been 'ramming through a reinterpretation of the constitution, cynically undermining the rule of law and the constitution by sneaking in the back door like a thief in the night.' Kingston believes that this 'is undemocratic, setting a dangerous precedent in bypassing and making of constitutional procedures.'²¹⁵

Let us ignore for the moment the unease of these authors with the way Japanese security policy has evolved. Our concern is not the normative content of their claims, but the empirical one; namely that the use of alternative means of change in one field has furnished a precedent that influences modes of change in other fields as well. At least one example confirms that informal constitutional change in the field of national defense and pacifism has indeed had such an effect. According to Jones, the recently enacted State Secret Act will likely be used to restrict a number of constitutional liberties – without foregoing constitutional amendment.²¹⁶ Matsui explained that the government has recently reinterpreted Article 89 in such a way that it allows for public

213 Boyd and Samuels (2005), 8.

214 Ackerman and Matsudaira (2014).

215 Jeff Kingston, 'Abe hijacks democracy, undermines the Constitution', *The Japan Times*, 21 June 2014.

216 Colin P.A. Jones, 'Japan's Constitution: never amended but all too often undermined', *The Japan Times*, 26 March 2014.

funding of private universities, despite the fact that the provision quite plainly prohibits the expenditure of public money for the benefit of educational enterprises that are not under the control of public authority.²¹⁷ Matsui wryly reported that 'not many people felt the compelling necessity to amend the constitution.'²¹⁸

Furthermore, the power of precedent has presumably been reinforced by the stalemate debate about formal constitutional revision of Article 9. Constitutional actors have deeply entrenched themselves in this fight, which also seems to make it harder to adapt the constitutional text of other provisions. Indeed, those who oppose the transformations and formal constitutional revision of Article 9 are often opposed to any formal amendment of the constitution.²¹⁹ This is not because they believe as a doctrinal matter that the constitution is untouchable in its entirety, but because they are afraid that any amendment will pave the way for formal constitutional revision of Article 9. In that way, the national defense and pacifism issue also makes it hard to settle other constitutional issues or bring the constitutional document up-to-date. In turn, the polarizing effect on politics and the subsequent constitutional paralysis may also cause informal constitutional transformations in other fields, even ones that are not particularly controversial. Prime Minister Abe has pointed to the difficulty of constitutional amendment in Japan and the fact that the constitutional document has not been amended for seven decades as evidence of a 'constitutional defect.'²²⁰ Abe allegedly employs this defect as a justification for a more general use of alternative means of constitutional change.²²¹ Martin reports a more general belief that 'the formal amendment procedure is simply too difficult, and that other means of revision are thus justified.'²²²

217 Matsui (2011), 265. Article 89 provides that '[n]o public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.'

218 Matsui (2011), 265.

219 Nishikawa (2009), 66 and Matsui (2011), 264.

220 Colin P.A. Jones, 'Japan's Constitution: never amended but all too often undermined', *The Japan Times*, 22 July 2014.

221 According to Jones, the fact that the 1947 Japanese constitutional document has never been amended is actually a sign of 'how successful the process of unwritten amendments has been'. See: Ibid.

222 Craig Martin, 'Reinterpreting' Article 9 endangers Japan's rule of law', *The Japan Times*, 27 June 2014.

Martin deems this belief a 'myth' that is 'untrue' because 'recent comparative analysis of the relative difficulty of constitutional amendment in many democracies has found that at least eight countries, including that of the United States, are more difficult to amend than that of Japan, and yet they have been amended many times'. Here, Martin probably (correctly) refers to Donald Lutz' research (....), but he forgets that also in the US and in other countries, with a rigid constitution most formal amendments have been relatively unimportant and that also in these countries fundamental changes have often taken place without formal constitutional amendment. See chapter 1.

Again, the stalemate revision process of Article 89 may serve as an example. Despite the fact that Article 89 (which is about education) has nothing to do with security issues, Matsui links complications in the revision of this Article directly to the controversies surrounding the pacifism and national defense.²²³

3.4.4 A general irony for constitutionalism and democracy?

Finally, it has been noted that alleged undermining effects of informal constitutional change in the fields of national defense and pacifism may affect the functioning of the whole constitutional document. Martin, for example, held that ‘a constitutional provision [Article 9] that is in a constant state of violation erodes the credibility and normative power of the entire constitutional framework.’²²⁴ Boyd and Samuels observed that failed attempts to bring about changes to Article 9 according to the formal constitutional amendment procedure of Article 96 led to ‘an encouraging irony for democracy in Japan.’²²⁵ Matsui noted that

‘the existence of the SDF, despite the relatively clear provision prohibiting armed forces even for the purpose of self-defense, may undermine the rule of law and the basic assumptions of constitutionalism.’²²⁶

To what extent do these claims make sense? It is presumably true that the pacifism and national defense issue does not do the rule of law and democracy any good: it erodes the normative force of Article 9; it has created the most controversial issue of Japanese constitutional law; it undermines effective government in the field of foreign policy; and it triggers the use of alternative means of constitutional change in other fields. On the other hand, according to the 2016 country report of Freedom House, Japan should still be counted among the freest countries in the world, receiving a 1 out of 7 (1=best, 7=worst) for both civil liberties and political rights.²²⁷ The report mentions the controversies over the 2014 and 2015 policy shifts. It notes that ‘[t]he measure prompted significant opposition in the parliament and inspired mass protests’ and that ‘[t]he parliamentary and public confrontation over the legislation unleashed an unexpected vibrancy in Japanese politics and civil society.’ However, the report does not suggest in any way that the issue of defense and pacifism undermine the rule of law or constitutional democracy. Rather,

223 Matsui (2011), 264.

224 Martin(2012), 55. Martin has also written very critically about earlier attempts of Abe to revise Article 9 by using alternative means of constitutional change. See: Martin (2007).

225 Boyd and Samuels (2005), 60.

226 Matsui (2011), 255.

227 Freedom House (2016), ‘Freedom in the World – Country Report – Japan’. <https://freedomhouse.org/report/freedom-world/2016/japan> (accessed 14-2-2017).

the electoral process in Japan scored 40 points out of 40 in the 2016 Freedom House report and gained one point compared with the previous year. Japan scored 15 out of 16 points in 'political pluralism and participation', 12 out of 12 in 'the functioning of government', 16 out of 16 in 'freedom of expression and belief', and 11 out of 12 in 'associational and organizational rights'. In 'the rule of law' category, Japan scored 15 out of 16 points, with the report noting that 'Japan's judiciary is independent and fair, and the rule of law prevails'.²²⁸ Finally, Japan scored 14 out of 16 points in the 'personal autonomy and individual rights' category. Considering these records, perhaps we should not be too dramatic about the general effects of informal constitutional developments in the field of national defense and pacifism.

3.5 CONCLUDING OBSERVATIONS

Article 9 of the Constitution of Japan (1947) stipulates that 'land, sea, and air forces, as well as other war potential, will never be maintained.' The original intention of this provision was to prohibit Japan from establishing or maintaining armed forces for any purpose, even self-defense. In the first years, constitutional practice more or less remained congruent with this plan. However, since the early 1950s, the Japanese government has established and built up a modern military, called the Self-Defense Forces (SDF). Since the 1990s, the government has also gradually broadened the scope of the SDF's activities. In more recent times, the SDF has participated in multiple international military operations both within and outside a UN context. Some recent legislative moves and assertions on behalf of the government have laid the basis for the Japanese government to deploy the SDF to come to the aid of friendly nations under attack in the (nearby) future.

Some have argued that 70 years of national defense shifts have made Article 9 irrelevant. However, as we have seen, such a claim seems hardly accurate. Even if we agree that the evolution of constitutional practice in the field of national defense substantially deviates from the original meaning of Article 9, the article itself and norms derived from it have significantly influenced the development of Japanese defense policy. Even today, Japan is not (yet) a 'normal' country in this sense because the unique constitutional Pacifist Clause still makes a significant difference for anyone wishing to expand the size and scope of activity of the SDF.

At the same time, the evolution of national defense has clearly had important implications for the import of Article 9 in the real world. If we accept that constitutional law and constitutional practice ultimately have an interdependent relationship (or that formal constitutional provisions do not operate in a vacuum), we can appreciate that the original meaning of Article 9

228 Ibid.

has seriously been called into question: it seems that the evolution of constitutional practice has substantially and persistently departed from the idea that Japan cannot have a military, even for the purpose of self-defense; and some of the most prominent constitutional actors, such as the government, the CLB and the legislator, have quite explicitly accepted, if not endorsed, the constitutional validity of this evolution. The judiciary, for its part, has not had not much to say about what is sometimes called the 'pacifism and national defense issue.'

All of this is not to say that the contemporary meaning of Article 9 is entirely clear or even crystalized. The battle for the Japanese government's right to maintain a military for the purpose of self-defense seems to have been fought. In other words, it seems unlikely that the executive, the legislature, or the judiciary will plead for a disbandment of the SDF any time soon. On the other hand, it is probably too early to tell the extent to which Article 9 will ultimately also allow for practices that amount to collective self-defense. This right has been asserted by the government and was endorsed by the legislature in 2014–2015. It has arguably been exercised in measured forms since around the early 1990s, when Japan started to send the SDF abroad. However, only the future will tell what kind of activities amounting to collective self-defense will be persistent and durably accepted.

Why has Article 9 only changed informally – and not by way of formal constitutional amendment? In this chapter I have pointed to six possible factors that might explain Article 9's 'textual stickiness': amendment difficulty, polarization, judicial deference, the role of the CLB, the rejection of 'American-style' constitutionalism, and the rejection of an 'imposed' constitution.

This chapter has also explored whether and to what extent alternative mechanisms of constitutional change have functionally substituted the formal constitutional amendment procedure. As I have discussed, the 'official' interpretations, ordinary laws, treaties and other policy instruments that have been used in the fields of national defense and pacifism, seem to have been unable to generate the amounts of support for change as a formal constitutional amendment would presumably have had, because defense shifts have been extra-ordinary controversial in Japan. The use of alternative means of change seems to have also had repercussions for the effectiveness of constitutional change in the field of national defense. Although it seems unlikely that the SDF will be disbanded or that Japan will scale down its defense capacity and activities any time soon, a constitutional commitment to pacifism and an ambitious defense policy appear to have been hard to combine in practice.

Finally, this chapter has also noted that, other than a formal constitutional amendment probably would have had, the use of alternative means of change in the field of national defense seems to have triggered the use of such means in other field as well. It also appears to have generated a more general irony for constitutional democracy, although this general irony should not be exaggerated, or so this chapter has argued. Even though the national defense

and pacifism issue raises the eyebrows of many constitutionalists, Japan has been – and still is – widely recognized as one of the best functioning constitutional democracies in the world.

Would it be a good idea for constitutional legislators to amend Article 9 and answer at least some of the most pressing constitutional questions the evolution of national defense has raised? There is much room to argue that it would, even – or perhaps especially – if one wants to preserve Japan's constitutional commitment to pacifism. It seems that only a formal amendment would be able to ease the tension that has mounted between Japan's national defense policy and its constitutional commitment to pacifism, even though this commitment has proven to be extraordinarily flexible. Indeed, it appears that only a formal amendment would be able to convincingly answer the constitutional questions that have arisen during 70 years of national defense shifts in the direction of 'becoming a normal country again'. Moreover, it appears that only after a formal constitutional amendment would Japan be able to develop a truly effective policy framework for sending its military abroad. And, more generally, it would be a good idea for Japan to adapt the text of its constitution to changing circumstances and demands in order to make sure that, in the longer run, Article 9 – and the entire document for that matter – do not become dead empty letters with no shaping force at all.

These are probably some of the considerations that recently inspired Prime Minister Abe to launch another effort to formally amend Article 9.²²⁹ However, although Abe seems to have sufficient support for constitutional amendment in the Diet, his chances of success again seem quite small.²³⁰ Again, it has appeared to be much more difficult to agree upon a specific constitutional text than to agree upon the general idea that Article 9 should be amended.²³¹ Moreover, if the Diet would approve, the amendment proposal still has to be approved by in a referendum by a people who still seem to widely support Japan's constitutional commitment to pacifism.²³² And then the Emperor suddenly made a bold move by announcing his wishes to abdicate – thereby ensuring that, at least in the coming few years, the constitutional actors have to give an entirely different constitutional matter priority.²³³

229 See: Kyodo, 'Abe explicit in call for amendment to Constitution's Article 9', *The Japan Times*, 3 February 2016. Tomohiro Osaki, 'As Diet opens, emboldened Abe sets sights on constitutional revision', *The Japan Times*, 25 September 2016.

230 Jiji, 'LDP vice chief negative about revising Article 9', *The Japan Times*, 26 July 2016.

231 Kyodo, 'Diet Panel reopens talks on constitutional revisions for the first time since February', *The Japan Times*, 16 November 2016.

232 <http://www.japantimes.co.jp/news/2017/04/30/national/japanese-divided-revising-article-9-amid-north-korea-threats-poll/>

233 Ilaria Maria Sala, 'The real reason Japan's emperor wants to abdicate', *SCMP*, 14 Aug 2016. <http://www.scmp.com/week-asia/article/2003034/real-reason-japans-emperor-wants-abdicate> (accessed 14-2-2017).

