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Declaring War on the Japanese Constitution: Japan's Right to Military Sovereignty and the United States' Right to Military Presence in Japan

BY DEREK VAN HOFTEN*

Introduction

On November 25, 2001, two Japanese naval ships left Yokosuka headed for the Indian Ocean. The forces had been sent to provide logistical support to the international war in Afghanistan, a response to the September 11 terrorist attacks on the United States. In the process, however, this seemingly innocuous event resurrected a pressing legal issue that has occupied Japan for the last half-century.

An analysis of the Japanese military and its relationship with the United States military necessarily involves an analysis of historical events, legal issues and international law. Specifically, it involves a detailed examination of the United States' post-war occupation of Japan and the new U.S.-drafted Japanese constitution that followed; of the intricacies of that constitution, including its renunciation of the right to belligerency or to maintenance of armed forces; of internal and external pressures to amend or reinterpret that constitution; of practical realities such as diplomacy, self-defense and economic growth; of the legitimacy of a document called a constitution, for both its own citizens and the international community; of the validity of international treaties; and of the character or existence of international law.

Such an endeavor would naturally fill volumes in a variety of journals. For purposes of this note, then, the analysis will focus primarily on two main topics: first, the right of Japan to amend its

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constitution or to maintain armed forces without amendment, and what that means for constitutional legitimacy; and second, the right of the United States to maintain a military presence in Japanese territory, and what that means for international treaties and international law. The difficulty in this study lies in the ramifications that follow approval of either path. On the one hand, to argue that Japan has the right either to maintain armed forces or to amend its constitution is to strip constitutions of their legitimacy, at least as far as international law is concerned. Yet, to endorse the contrary view is to contend that one military defeat submits a country to the whim of its conquerors in perpetuity. Perhaps there is a middle ground, although any approach invariably risks concluding with the ultimate international law maxim: "might makes right." This note concludes by arguing that in fact might does make right, at least insofar as it dictates the United States' right to continued military presence in Japan and the Japanese right to amend its constitution and maintain military forces.

I. The Japanese Constitution and its Origins

"Chapter II: Renunciation of War

Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

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."¹

Interpreted literally, the Japanese constitution precludes the nation from maintaining military forces of any kind. If "land, sea and air forces, as well as other war potential will never be maintained," it would be virtually impossible for the nation to develop and keep a military force of any kind. However, an historical account of the era shows that the constitution was not intended to be taken literally. As we shall see, it has been the ambiguous nature of Article 9 and the competing interpretations of it that have generated such controversy, and yet still allowed for the development and maintenance of a

1. JAPAN CONST., art. 9.

sizable Japanese military over the past 55 years.

When the constitution and Article 9 were being drafted and debated, those involved disagreed on its intended scope. Some saw it as a clear renunciation of all military capabilities, including the right of self-defense²; others saw it as prohibiting only aggressive war, but still preserving the right to defend the nation.³ To understand the context of Article 9, it is important also to understand the nature of the American post-war occupation of Japan. From unconditional surrender in the Fall of 1945 until April 1952, the United States occupied Japan. In attempting to characterize the sentiments of the era, one historian has described the occupation this way: "However high minded they may have been, General MacArthur and his command ruled their new domain as neocolonial overlords, beyond challenge or criticism, as inviolate as the emperor and his officials had ever been."⁴ Indeed, this quote illustrates the complete subjugation and capitulation of the Japanese following World War II.

This is important primarily to put Article 9 of the constitution in context. In addition to unconditional surrender, popular sentiment in Japan at the time was intense war weariness.⁵ One historian has described Article 9 as "possess[ing] a compelling psychological attraction to a shattered people sick of war and burdened by the knowledge that much of the world reviled them inherently militaristic and untrustworthy."⁶ The horrific scope of the war's devastation drives home this point: "All told, probably at least 2.7 million servicemen and civilians died as a result of the war, roughly 3 to 4 percent of the country's 1941 population of around 74 million."⁷ Just as significant, "[m]illions more were injured, sick, or seriously malnourished. . . . [T]he Allied assault on shipping and the bombing campaign destroyed one-quarter of the country's wealth."⁸ In addition, "[s]ixty-six major cities . . . had been heavily bombed, destroying 40 percent of these urban areas overall In Tokyo, the largest metropolis, 65 percent of all residences were destroyed. . . .

2. See OSAMU NISHI, *THE CONSTITUTION AND THE NATIONAL DEFENSE LAW SYSTEM IN JAPAN* (1987).

3. *Id.*

4. JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 27 (1999).

5. *See id.*

6. *Id.* at 398.

7. *Id.* at 45.

8. *Id.* at 45.

Close to 9 million people were homeless.”⁹

Thus, the Japanese themselves were eager to become a peace-loving nation free of war, and this colored their thoughts on the constitution and Article 9. The preamble of the constitution reads:

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth. We recognize that all peoples of the world have the right to live in peace, free from fear and want.¹⁰

However, this did not resolve the debate over whether Article 9 allowed self-defense forces or no forces at all.

At first glance, it seems odd to envision a constitution that precludes even the right of self-defense. However, many Japanese officials interpreted the constitution as doing just that: “The war renouncing article seems to justify the right of self-defense; however, I find it too dangerous to recognize such a right. Many recent conflicts have occurred under the guise of defense. Thus the recognition of self-defense will only invite war.”¹¹ Other officials interpreted the Article only slightly differently:

The war renouncing article does not directly reject the right of self-defense. However as Paragraph 2 of Article 9 denies all armaments and the right of belligerency of the state, wars based on the right of self-defense and the right of belligerency are renounced. By voluntarily renouncing the right of belligerency we establish the basis of world peace.¹²

9. *Id.* at 45-47.

10. JAPAN CONST., preamble.

11. NISHI, *supra* note 2, at 5 (quoting “A reply to a question posed by Sanzo Nosaka, Japan Communist Party, ‘Shouldn’t a rightful war of self-defense be recognized?’, House of Representatives, June 28, 1946.”).

12. *Id.* at 5 (quoting “A reply to a question made by Fujiro Hara, Japan

Some officials directly addressed the difficulty this presented regarding defending an attack: "Since we have renounced the right of self-defense, we are left without a means of defense in case of foreign attacks and are thus forced to entrust our faith to other nations for the security and survival of our state. Unable to maintain its existence without relying upon international good will our nation has lost its character as an independent state."¹³ At the same time, many Japanese understood Article 9 as a complete and permanent ban on military forces:

So as never to participate in a war again, our new constitution has made two decisions. The first prohibits maintenance of soldiers, warships and warplanes. Thus Japan will never have an army, navy or air forces. The second forbids us to carry our points across through wars with foreign nations. This is because wars are self-destructive. Japan will prosper if it is on good terms with other nations of the world and if they become good friends.¹⁴

Still, despite these viewpoints, the majority of those involved understood Article 9 to renounce only aggressive wars, and to preserve the right of self-defense. The strongest evidence comes from the enactment process of Article 9. MacArthur's first proposed draft included the language: "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. . . . No Japanese Army, Navy or Air Force will ever be authorized."¹⁵ However, the final, adopted draft of Article 9 did not include MacArthur's language regarding the right of self-defense. Charles Kades, the Deputy Chief of the Government Section at the time, explained why the language was removed:

Progressive Party, 'How should an independent nation cope with aggression?' House of Representatives Committee, June 26, 1946.").

13. *Id.* at 6 (quoting Tatsukichi Minobe, SHIN KEMPO GAIRON , AN OUTLINE OF THE NEW CONSTITUTION (Yuhikaku Co., Ltd., April 1947.).

14. *Id.* at 6 (quoting ATARASHII KEMPO NO HANASHI (TOPICS ON THE NEW CONSTITUTION) published by the Ministry of Education in February 1948.).

15. *Id.* at 7-8.

The reason why I omitted the words 'even for preserving its own security' is that it seemed to me it was not realistic to say that if Japan were attacked, it could not defend itself. I felt that every country has the right of self-preservation. Even if they didn't have arms and ammunition, they could fight with bamboo sticks. . . . If some foreign force landed on the shores of Japan, they didn't need to lie down and let invaders walk over them.¹⁶

The final draft of Article 9 included the words at the beginning of the clause: "Aspiring sincerely to an international peace based on justice and order."¹⁷ This so-called Ashida amendment has given great weight to arguments that Japan may maintain military forces for the purpose of self-defense. Hitoshi Ashida, author of the amendment and chairman of the committee on constitutional revision, has commented: "The wording of this amendment lacks clarity. However, this proposal contains much significance. By inserting the words, "For the above purpose," to [sic] the original draft, we may clearly recognize that it does not indicate an unconditional renunciation of military force."¹⁸

From the standpoint of constitutional analysis, Article 9 has indeed been subject to competing interpretations. The Japanese government's interpretation is most instructive:

[The government] approves defensive wars but does not recognize maintenance of war potential even for the purpose of self-defense. How then is a defensive war to be conducted? It is through the possession of a self-defense force not exceeding the capacity of war potential. . . . The government explains that war potential is 'one which exceeds the minimum requirement for self-defense' and as today's SDF (Self Defense Forces) do not exceed this limit, Japan does not maintain war potential, which the constitution prohibits.¹⁹

16. *Id.* at 9.

17. JAPAN CONST., art. 9.

18. NISHI, *supra* note 2, at 10.

19. *Id.* at 12.

(The important element through the years has been the evolving definition of “war potential,” allowing for greater and greater expansion of the SDF.²⁰) Nishi groups the various interpretations into six different categories, ranging from no maintenance of military forces whatsoever to shaping Article 9 to meet the needs of the nation at a given moment.²¹

Regardless of the variety of interpretations, the most important fact to have emerged is that Japan has built a formidable military force under the name of the “Self-Defense Forces.”²² Inaugurated in 1954, the SDF does not violate the constitution, according to the Japanese government.²³ The government’s stance on the SDF is as follows: “

The Constitution renounces wars. However, it does not renounce wars for purposes of self-defense. Obstruction of armed interventions from abroad is in itself self-defense, and its essence differs from that of solving international disputes. Thus defending the nation through the use of arms in case of foreign attacks does not violate the Constitution. Article 9 recognizes the right of self-defense of Japan, an independent nation. Hence the Self-Defense Forces, whose mission is to defend the nation, and the establishment of a capable corps with the necessary limits to serve the purpose of self-defense do not violate the Constitution in any way.²⁴

In addition, the government issued detailed explanations of what is and is not authorized under Article 9 with regard to the SDF, including dispatching troops overseas, enemy base attacks, the maintenance of nuclear arms and the right of collective self-defense.²⁵ Most notably, “overseas dispatches with the purpose of sending

20. Matthew J. Gilley, Comment: *Japan's Developing Military Potential Within the Context of its Constitutional Renunciation of War*, 14 EMORY INT'L L. REV. 1681 (1998).

21. NISHI, *supra* note 2, at 13.

22. *Id.* at 15.

23. *Id.*

24. *Id.*

25. *Id.* at 16-17.

troops who do not resort to arms, are not prohibited under the Constitution.”²⁶ This interpretation allowed for the deployment of the naval vessels to assist the international war inside Afghanistan following the September 11, 2001 terrorist attacks.

The developments over the years demonstrate that Article 9 is certainly not static, and that Japan does not interpret the Article to preclude maintenance of military forces. A cursory glance at the country’s military stature reveals a status in stark contrast with that contemplated, even by the most hawkish officials, in 1947. Japan currently spends roughly the same amount as Britain on its military,²⁷ an amount which places the country third in the world behind only the United States and Russia.²⁸ In addition, Japan’s ground forces total over 150,000, also roughly equivalent to Britain.²⁹ More impressive, though, is Japan’s rapid evolution to modern military power: “The Ground Self-Defense Force now has 1,150 tanks, the Maritime Self-Defense Force over 50 destroyers and 15 submarines, and the MSDF and Air Self-Defense Force together have 473 combat aircraft.”³⁰ Together, this makes Japan one of the most modern and powerful military forces in Asia.³¹

The slow but steady growth in Japan’s military industry reflects a tension that has plagued the country since occupation ended. On the one hand, there has been growing international pressure to assume the military responsibility that comes with being an economic power in the world, despite any perceived constitutional limitations.³² On the other hand, there are those who would lend more legitimacy to Article 9, and who remember Japanese aggression in World War II more clearly, who remain steadfastly opposed to what historian John Dower has called Japan’s “creeping remilitarization under America’s nuclear umbrella.”³³ Internally as well, there has been a palpable conflict over what role the Japanese military should play. One faction resents the omnipresent U.S. military on Japanese soil and would hasten a quicker return to national sovereignty,³⁴ while the other

26. *Id.*

27. REINHARD DRIFTE, JAPAN’S FOREIGN POLICY 34 (1990).

28. *Id.*

29. *Id.* at 35.

30. *Id.*

31. *Id.*

32. See Gilley, *supra* note 20.

33. DOWER, *supra* note 4, at 29.

34. Toni M. Bugni, Note, *The Continued Invasion: Assessing the United States Military Presence on Okinawa Through 1996*, 21 SUFFOLK TRANSNAT’L L. REV. 85

faction appreciates the security that American forces provide as well as the economic benefits of not having to allocate an even larger percentage of GNP to the military.³⁵

These disagreements are best understood within the context of the various U.S.-Japan security treaties over the past half-century. While the specifics of the treaties vary, the general theme is that the United States provides military support for Japan in turn for Japan allowing the United States to use Japanese soil for bases.³⁶ Historian Reinhard Drifte has characterized the relationship as such:

In the security area, it was assumed that a very gradual increase of defense expenditures would be sufficient to ensure the continuity of the two-track model; that is, Japan would be able to concentrate on the economy, while the United States would take the ultimate responsibility for Japan's security. In exchange, Japan would support the major goals of American foreign and security policies and provide bases in Japan.³⁷

Even U.S. interests have not been so clear. On the one hand, the initial goal was to prevent remilitarization of Japan so as to avoid repeats of World War II aggression.³⁸ However, as early as 1950, with the onset of the Korean War, the U.S. began to rethink its policy and encouraged the Japanese to establish troops for its self-defense.³⁹ MacArthur himself – who had advocated a draft of the constitution which would have precluded even self-defense forces – phrased it this way in an address to the Japanese on New Year's Day 1950: “Article 9 is based upon the highest of moral ideals, but by no sophistry of reasoning can it be interpreted as complete negation of the inalienable right of self-defense against unprovoked attack.”⁴⁰ MacArthur added, “[i]t is a ringing affirmation, by a people laid prostrate by the sword, of faith in the ultimate triumph of

(1997).

35. DRIFTE, *supra* note 27, at 36-37.

36. *Id.*

37. *Id.* at 28.

38. *See* NISHI, *supra* note 2.

39. *Id.* at 14-15.

40. *Id.*

international morality and justice without resort to the sword.”⁴¹

Forty years later, the United States had company in calling for an increased role in Japanese military participation in international affairs.⁴² With the outbreak of the Persian Gulf War, Japan received wide criticism for its failure to commit troops to the coalition, resorting instead to financial support.⁴³ David Leheny notes that “American requests for increased Japanese military commitments under the U.S.-Japan Security Treaty have not fallen on deaf ears, but they have sometimes seemed to reverberate off political issues linked only tangentially to questions of national defense.”⁴⁴ In regards to specific events, Leheny adds, “although Japan’s commitment of \$13 billion to the Allied effort in the Persian Gulf War dwarfed that of most other nations, its perceived dithering over constitutional issues left many convinced it was unprepared to accept a genuine political role in the post-Cold War world.”⁴⁵ In addition, “critics both at home and abroad referred derisively to the nation’s ‘checkbook diplomacy’ and its unwillingness to risk lives even to support collective security arrangements.”⁴⁶

In many respects, Japan cannot win. When it has expanded its SDF forces, the country has been subject to harsh criticism from its Asian neighbors, to say nothing of the domestic defenders of Article 9.⁴⁷ In addition, Japan has faced competing pressures regarding the amount it spends on its military. Until 1987, the country officially observed a cap of one percent of GNP on its defense budget.⁴⁸ When it finally abandoned this limitation, it once again received a harsh response from internal opponents as well as wary neighbors.⁴⁹ (This occurred in spite of the fact that the removal of the spending cap was more ceremonial than anything else; in fact spending failed to exceed one percent over the ensuing years.⁵⁰)

The critical element of these historical developments is the gradual growth and evolution of the Japanese military in spite of

41. *Id.* at 15 (quoting DOUGLAS MACARTHUR, *Reminiscences*, 304, 1964).

42. David Leheny, *Tokyo Confronts Terror*, POLICY REVIEW, December 2001 & January 2002.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 38.

47. *Id.* at 40.

48. DRIFTE, *supra* note 27, at 34.

49. *Id.*

50. *Id.*

Article 9. Up to this point, although debate has continued, resolution has evaded the parties involved. The Japanese courts have done their best to avoid the political question of constitutional interpretation.⁵¹ The government's approach has been to reinterpret Article 9 in a manner that satisfies as many parties as possible without upsetting the balance.⁵² While this strategy has sufficed up to now, it is doubtful that Japan can continue indefinitely without a serious and resolute consideration of the constitutional implications of its military growth. The latest developments in the U.S.-Japan treaty relationship highlight this point.⁵³

II. U.S.-Japan Security Treaties

If the general trend since the end of occupation has been expansion of Japanese forces and a reduction in the U.S. presence in Japan,⁵⁴ the 1997 Guidelines for U.S.-Japan Defense Cooperation represent the continuation of that theme.⁵⁵ The initial U.S.-Japan security treaty in 1951-52 established the theme that has characterized the relationship between the countries ever since: "The Japanese-U.S. Security Treaty . . . provided Japan with cost-effective security protection, in return for which the country had to provide the United States with military bases in Japan and to shoulder rearmament commitments of its own, tailored to U.S. needs."⁵⁶

The 1997 Guidelines, though, introduce more substantial change in the form of increased roles for Japanese forces, than any of the previous treaties.⁵⁷ In particular, the Guidelines create a more pronounced role for Japanese forces in two main areas: "expanding the idea of self defense to situations in areas surrounding Japan" and "expansion of the areas in which the Japanese military may operate."⁵⁸ As far as the first area is concerned, the Guidelines state that "situations in areas surrounding Japan will have an important

51. NISHI, *supra* note 2, at 19-29.

52. LEHENY, *supra* note 42, at 39.

53. *Id.*

54. *See* Gilley, *supra* note 20.

55. Joint Statement on Review of Defense Cooperation Guidelines and Defense Cooperation Guidelines, Sept. 23 1997, U.S.-Japan, 36 I.L.M. 1621 XXXX [hereinafter Defense Cooperation Guidelines].

56. DRIFTE, *supra* note 27, at 6.

57. *See* Gilley, *supra* note 20.

58. *Id.* at 1716.

influence on Japan's peace and security."⁵⁹ This presents a potentially expansive role for the SDF, which previously was authorized only to repel attacks on Japanese territory.⁶⁰

The potential danger with the new guidelines is in allowing liberal interpretations of what constitutes an area surrounding Japan. For example, is a Chinese invasion of Taiwan considered an area surrounding Japan such that the SDF would be authorized to intervene in the interests of self-defense? What about perceived Chinese aggression that falls short of an actual invasion? After all, when Japan attacked Pearl Harbor in 1941, it did so under the auspices of self-defense.⁶¹ It was precisely this loose logic that many feared in 1947 when they argued against allowing even self-defense forces for fear that they could eventually be extended to aggressive forces.⁶²

In other words, "The 1997 Guidelines are significant in that they appear to provide for an expanded role of Japan's military in the defense of the Japanese Home Islands. Stated differently, the Guidelines provide for an expanded notion of what it means to defend Japan – extending the concept of defense beyond the Home Islands."⁶³ The purported goal is slightly more restrained:

The aim of these Guidelines is to create a solid basis for more effective and credible U.S.-Japan cooperation under normal circumstances, in case of an armed attack against Japan, and in situations in areas surrounding Japan. The Guidelines also provide a general framework and policy direction for the roles and missions of the two countries and ways of cooperation and coordination, both under normal circumstances and during contingencies.⁶⁴

The drafters of the Guidelines were not unaware of the potential

59. *Id.*

60. *Id.*

61. See DOWER, *supra* note 4.

62. NISHI, *supra* note 2, at 5 (quoting "A reply to a question posed by Sanzo Nosaka, Japan Communist Party, 'Shouldn't a rightful war of self-defense be recognized?', House of Representatives, June 28, 1946.").

63. Gilley, *supra* note 20, at 1708.

64. See Defense Cooperation Guidelines, *supra* note 55.

constitutional implications that might result:⁶⁵ “Japan will conduct all its actions within the limitations of its Constitution and in accordance with such basic positions as the maintenance of its exclusively defense-oriented policy and its three non-nuclear principles.”⁶⁶ However, as history has shown since 1947, Japan has been willing to be flexible in interpreting its constitution to avoid conflict.

An additional section of the 1997 Guidelines poses a different problem in light of the constitution: Japan's Support for U.S. Forces.⁶⁷ While the Guidelines claim to restrict Japan's military scope to its own territory, they clearly introduce the possibility of expansion into new and un-chartered waters.⁶⁸ The Guidelines state: “By its very nature, Japan's rear area support will be provided primarily in Japanese territory. It may also be provided on the high seas.”⁶⁹ Again, the terminology presents potential problems regarding the precise definition of “high seas.” As Matthew Gilley notes:

Instead of being confined to the territorial sea or the contiguous zone, Japan recognizes the possibility that it may need to conduct naval operations on the high seas (more than 200 nautical miles from the coastal baseline). In addition to providing rear area support on the high seas, Japan is bound to bilaterally conduct operations in ‘surrounding waters’ to protect sea lanes of communication. At the very least, the explicitly stated possibility of conducting or even supporting operations in such areas is a marked departure from prior notions about Japan's role in providing for its own defense.”⁷⁰

The new Guidelines also grant Japan the right to use international airspace in responding to perceived threats, a significant advancement in the scope of its military range, one that also suggests potential constitutional conflicts.⁷¹

As the United States and Japan continue to develop their

65. Gilley, *supra* note 20, at 1709.

66. Defense Cooperation Guidelines, *supra* note 55 at 1625.

67. *Id.* at 1630.

68. Gilley, *supra* note 20, at 1711.

69. Defense Cooperation Guidelines, *supra* note 55 at 1632.

70. Gilley, *supra* note 20, at 1711.

71. *Id.* at 1712.

increasingly interdependent military relationship in the form of revised Guidelines and treaties, both countries have also seen increased agitation calling for American withdrawal from Japanese territory.⁷² As mentioned above, many Americans have grown frustrated with Japan's refusal to assume greater military responsibility, in spite of the American role in creating the Japanese constitution.⁷³ More important, though, has been the growing Japanese hostility toward the American presence in Japan.⁷⁴ In particular, a series of incidents in recent years, including a well-publicized 1995 rape of a 12-year old Japanese girl by three U.S. servicemen, has generated animosity toward the American troops.⁷⁵ These events have "inflamed public opinion against the U.S. forces, provoking anger in Okinawa, Tokyo, and Washington over the role of the United States in the region."⁷⁶ In addition, "when the Japanese and American governments renegotiated the guidelines surrounding the treaty in 1997, issues like these played a heavy role in extracting American guarantees of cooperation in the event of criminal behavior by its troops, and also Japanese promises of an expanded SDF role in the event of a crisis near Japan."⁷⁷ Yet the U.S. presence in Japan remains remarkably large.⁷⁸ Together, there are more than 50,000 troops using over 100 military facilities, and employing over 20,000 Japanese in the process.⁷⁹ With the recent closures of American bases in the Philippines, Japanese bases remain key strategic sites in Asia for the United States.⁸⁰

III. Amending the Japanese Constitution

The question of amending the Japanese constitution raises two concerns: first, what are the reasonable prospects for doing so and, second, what does that mean for the legitimacy of constitutions in the first place? Specifically, Japan's constitution requires a two-thirds vote for revision.⁸¹ Amendments must be initiated in the Diet

72. See Leheny, *supra* note 42, at 39.

73. *Id.*

74. Bugni, *supra* note 34, at 85.

75. Leheny, *supra* note 42, at 40.

76. *Id.*

77. *Id.*

78. See DRIFTE, *supra* note 27.

79. *Id.* at 38.

80. *Id.*

81. JAPAN CONST. art. 96.

followed by the two-thirds approval in both houses.⁸² The most difficult hurdle, though, is that an amendment finally requires a simple majority of the public in a special referendum.⁸³ As a result of these obstacles, there have been no such revisions since the constitution was adopted in 1947.⁸⁴ Interestingly, when the constitution was first ratified after World War II, Japan could have amended it once the occupation ended.⁸⁵ However, the citizenry's solid anti-war sentiment at the time prevented any such attempts.⁸⁶

Moreover, although the occupation technically ended in 1952, it was not immediately clear what the American response would have been had the Japanese attempted to revise the constitution to significantly alter the provisions of Article 9. After all, the United States only became involved in the process by a default of sorts; it was only when MacArthur learned of Japanese efforts to draft a new constitution that he insisted the United States (MacArthur) take the lead role.⁸⁷ Of course, with the onset of the Korean War, the United States came to be one the biggest proponents of revising Article 9 to grant Japan more military sovereignty.⁸⁸ Since then, it has been the Japanese populace itself that has resisted revision more than anyone else.⁸⁹

Despite the fact that the Japanese constitution technically requires a two-thirds vote for revision, it may not be so easy in the case of Article 9.⁹⁰ Still, one scholar has done a study of various constitutions and determined that Japan's is actually easier to amend than most other countries, including the United States.⁹¹ Matthew J. Gilley notes that:

[Donald] Lutz has devised a complex, multi-factor index for gauging the relative difficulties in amending

82. *Id.*

83. *Id.*

84. *Id.*

85. DOWER, *supra*, note 4, at 561.

86. *See* DOWER, *supra* note 4.

87. *See* KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION, A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING (1991).

88. DOWER, *supra* note 4, at 548.

89. *Id.* at 562.

90. Gilley, *supra* note 20, at 1708.

91. *Id.* (quoting Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 237, 261 (Stanford Levinson ed., 1995)).

several different national constitutions. . . . In this index, Japan rates a 3.25 score. . . . By way of comparison, the United States, with a more difficult amendment process, scores 5.10. . . . The average of all thirty countries polled, plus the average score of all American states' constitutions, produced an index of 3.26."⁹²

Regardless of the relative ease of amendment, however, it simply has not happened with Article 9, a direct result of lingering public sentiment.⁹³ Dower notes: "The constitution may well be revised in the near future, but the issues involved still tell a great deal about popular political consciousness in contemporary Japan."⁹⁴ Indeed, as Dower notes, the constitution has been creatively interpreted, but as yet not officially amended:

Although Article 9 has been battered and bent to permit an increasingly expansive interpretation of what is permissible in the name of maintaining a 'self-defense' capacity, it has survived (together with the strong anti-war language of the preamble) as a still-compelling statement of the ideal of nonbelligerency. The 'no-war' vision touched the hearts of people all over the world in the wake of World War II, but it was never encoded in another nation's constitution or laws. . . . In such unplanned ways, the early occupation ideals of 'demilitarization and democratization' have remained a living part of popular consciousness for over a half-century.⁹⁵

At the same time, Article 9 might not be subject to amendment at all.⁹⁶ Many commentators have noted that the Article is too fundamental and central to the constitution as a whole.⁹⁷ This issue summons the age-old question of whether a constitutional amendment can be unconstitutional. Imagine if Americans

92. *Id.*

93. NISHI, *supra* note 2, at 15.

94. DOWER, *supra* note 4, at 562.

95. *Id.*

96. NISHI, *supra* note 2, at 15.

97. *Id.*

attempted to adopt a 28th amendment to the constitution that gave the government the right to seize private property without paying just compensation. Such an amendment would clearly violate the 5th amendment to the constitution. Could the subsequent amendment merely purport to repeal the 5th amendment, then? The constitution does not directly address this issue. Still, most commentators believe that certain portions of a constitution are so fundamental and integral to its existence that amendment of those portions would be unconstitutional. If there were no such protections, minority interests would truly be subject to the tyranny of the majority.⁹⁸

In Japan's situation, after 55 years, the public has come to identify with the non-belligerency implicit and explicit in their constitution.⁹⁹ As a result, much of the public may consider Article 9 to be inviolable. This perspective indicates that the constitution cannot be amended as far as Article 9 is concerned, and that Japan shall never have the right to maintain a military for anything other than self-defense, a characteristic many Japanese have come to see as uniquely Japanese.¹⁰⁰

If the Japanese constitution cannot be amended, what does that portend for the role of the United States military in the region? Without the United States' protection, the SDF in its current state would most likely be incapable of protecting Japanese interests in the region, at least in conformity with the confines of Article 9. As a result, it renders two positions incompatible: resisting amendment to the constitution and advocating withdrawal of U.S. military forces from Japanese territory.

This issue then leads to the question of what the treaties between the United States and Japan amount to. As a sovereign nation, Japan has the right to abrogate any treaties into which it enters, subject of course to the diplomatic ramifications that would result. However, its relationship with the United States is unique. After all, as the victorious nation in World War II, the United States was in a position to dictate the terms of surrender to Japan, and they did so in a way that both drafted the terms of the Japanese constitution and maintained a significant American military presence in the area. But how long are those terms valid? It is a long-standing political and diplomatic maxim that one should not hold historical grudges; this

98. See Federalist Papers No. 51.

99. See DOWER, *supra* note 4.

100. *Id.*

logic may apply in this situation. But what if Japan had attempted to kick out American forces in 1953, the year the occupation officially ended? At that time, the United States still controlled Japan for all intents and purposes, sufficient at least to be able to refuse the order. But 50 years have now passed; does the same logic apply? And if not, when did it change? It may be illustrative that when told to leave the Philippines, the United States packed up its bags and left. It is doubtful, though, that the same response would be as forthcoming in Japan, given the specifics of the history of the past half-century.

IV. Conclusion

A sovereign country is accountable only to itself with regard to its own system of laws. In that respect, Japan undoubtedly has the right to amend or replace its constitution, just as the United States replaced the Articles of Confederation with the Constitution in 1789. When the United States ended its occupation of Japan in 1953, it effectively left to Japan the power to govern itself, which necessarily includes decisions regarding its own structure of laws. Certainly, any decisions Japan may have made at the time would have been subject to international pressure or even military response; this, however, merely reinforces the “might makes right” maxim, and says nothing of a country’s natural right to amend its own constitution. Thus, Japan does have the *right* to change Article 9 and its constitution, even if it does not have the inclination, and even if international pressure might preclude such an event.

However, amending the constitution will not necessarily lead to a removal of United States troops from Japanese soil. From one perspective, a nation once-conquered need not remain conquered forever. In that regard, Japan has at least a moral right to dictate to the United States whether it can or cannot maintain military troops on its territory. But from another perspective, morals have never won wars; might has. And international law, if there is such an entity, is enforceable, like any system of laws, only at the butt of a gun. As a consequence, it cannot be said that the United States does not have a “right” to maintain a military presence in Japan, until they are forced to leave.

Moreover, the historical record only gives more weight to the argument. Article 9 of the Japanese constitution may not be subject to amendment, and Japan continues to recognize mutual security treaties with the United States. More importantly, both the United

States and Japan recognize the mutual benefit the two countries have derived from their post-World War II relationship. Just as many Japanese appreciate the importance of American protection, many Americans understand the strategic necessity of a military presence in Japan. As long as those facts remain, the United States military likely will remain in Japan as well.

