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Japan and Germany in armed conflicts: the limits of constitutional provisions and perspectives of reform

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1. Introduction

This past year has been characterised by numerous headlines concerning Japanese Prime Minister Shinzo Abe's calls for a revision of the Constitution of Japan. This topic is particularly interesting due to the peculiar history of the Japanese Constitution and due to its "infamous" Art. 9, which prohibits Japan to have a military apparatus, with the exception of self-defence forces. If Abe's requests for an amendment of Art. 9 were to be satisfied it would mean that Japan would be able to own a complete military apparatus, much to the concerns of its neighbour.

Given the international implications which this revision would have, this dissertation aims at analysing whether it is possible that Japan will amend its constitution and what would in this case be the implications, or whether Japan will keep unamended its current constitution, continuing to interpreting it like it does now when it concerns the participation in international missions. This analysis will be conducted by comparing the historical and constitutional experience of Germany with the historical and constitutional experience of Japan. Germany has been chosen as a country due to the various communalities which the two countries share, namely the important American influence in the drafting of their respective constitution and their common past and position during WWII.

The hypothesis which this dissertation aims at proving is that on the one hand Germany will not further amend its Basic Law in order to obtain more control over its *Bundeswehr*, due to the political and constitutional condition in which Germany finds itself, which, despite the fact that both countries share commonalities in their history post-WWII, greatly differs from the Japanese one. On the other Japan will continue pursuing amending its constitution for it feels that Art. 9 is too restrictive and imposing on its sovereign and on its role in the international arena. The dissertation also predicts that due to this fierce quest, Japan will likely change its role to a more assertive player in the regional context,

among countries, like China and South Korea, which will witness its newly military status as a threat to their national interests.

As for what concerns the methodology, this dissertation has been based on the analysis of the Basic Law and the Constitution of Japan and of their implementation. It had analysed the constitutional implications of the relevant articles and it has applied it not only to the existing literature but also to the development of the Japanese quest for amending the constitution. Other sources of information have been the website of the UN and the websites of the respective Ministry of Defence and Foreign Affairs. Additionally, the UN website for peacekeeping operations has been used to collect the data on the respective participation in peacekeeping operations and armed conflicts.

As for what concerns the development of the relevant literature review, authors such as Tom Ginsburg, Tania Groppi and other relevant names in the field, such as Landau, McIlwain, Belz, Tushnet, Leyland and Kelsen, have been used in order to draft a comprehensive picture of the various types of Constitutionalism. Moreover, in addition to the relevant articles of the Basic Law and of the Constitution of Japan, to explain the constitutional and international context in which the two countries are inserted the relevant articles of the Treaty of the European Union (TEU) and the UN Charter has been analysed. This additional legal material has been used to complete the legal framework surrounding the constitutional and legal implications of owning a military apparatus on the Japanese end and participating into armed conflicts on the German end.

Before initiating with the analysis of the literature and the relevant articles, literature on armed conflicts, war and peacekeeping operations has also been analysed in order to give a clearer framing of the concepts which will be utilised in the dissertation. To this end Chapter 2 of this dissertation analyses and gives a definition of the terms war, armed conflict and peacekeeping, specifying their differences and their implications. It was necessary to provide these definitions

at the beginning of this dissertation as these terms allow the reader to understand the implications behind the concept of the use of military forces.

Chapter 3 deals with analysing the relevant literature concerning constitutionalism and its different kinds; Western or liberal constitutionalism will be analysed, followed by Asian constitutionalism, and lastly Islamic constitutionalism. This topic has been chosen for the literature review as it gives a better understanding of the traditions to which the two countries belong to. It also provides with an understanding of constitution-making and which are the relevant elements to each kind of constitutionalism. Although the latter is not useful to the purpose of this dissertation, it has been deemed important to analyse it nonetheless, for completes and furthers the literature on constitutionalism.

The analysis of the relevant articles of the Basic Law is developed in Chapter 4: here will be presented a comprehensive history to the genesis of the Basic Law and the key actors involved in its drafting. Moreover Art. 79 of the Basic Law, which concerns the constitutional revision, will be analysed. It is important to outline the methods for constitutional revision in order to give a comprehensive understanding of the dynamics which would be at play in a case of an amendment to the Basic Law. This article will in fact be analysed concerning the instances in which the Basic Law has been amended.

Given the constitutional focus of this dissertation Chapter 5 will analyse the relevant article regarding the military apparatus and the use of force, namely Art. 87(a). In the German case, however, commenting only on Art. 87(a) would be incomplete. It is in fact necessary to analyse also other articles in the Basic Law, as well as some articles of the TEU and the NATO Treaty, for they all contribute to understand the legal provisions concerning the German use of force. These other articles are Art.42-46 of TEU, Art 4 of NATO and Art. 24(2) and Art. 26 of the Basic Law which has been amended in 1956 when Germany joined NATO. Moreover, in Chapter 5 all the German Federal Constitutional Court (FCC)'s

rulings will be analysed for they give legal and historical context to the constitutional development of the Basic Law and its interpretation. All of these provisions have been deemed necessary for an analysis for they all contribute to understanding the constitutional and international provisions concerning the German use of force.

Chapter 6 will outline the missions to which Germany participated since its joining NATO. The missions will be presented in chronological order and their qualitative contribution will be outlined. After their presentation, an analysis of the international and the political context will be presented in order to provide an explanation of the context in which Germany was inserted whilst it participated into the peacekeeping operations. These explanations are fundamental also to explain the FCC's rulings and their rationale.

As it has been done for Germany, it will be presented the relevant constitutional provisions for the use of force in Japan. Chapter 7 will outline the historical background which led to the drafting and then implementation of the Constitution of Japan: references to the Meiji Constitution will also be provided Along with the history of the constitution, Art. 96, which deals with the methods of revision will also be analysed, for it provides with useful information for the understanding of the constitutional journey to amend the constitution.

Chapter 8 will analyse Art.9 and its implications over the capability of the Japanese military apparatus. In order to properly analyse it, a historical description of how the Art. 9 came to be will be presented. Additionally, it will be analysed the extent of Japan's participation in peacekeeping operations and the rationale behind its participation. The history of the constitutional and international development which led to the Japanese participation into various peacekeeping operations is fundamental to comprehend the rationale behind certain choices.

Chapter 9 will outline the missions to which Japan participated since 1992. The missions will be presented in chronological order and their qualitative contribution will be outlined. After their presentation, an analysis of the international and the political context will be presented in order to provide an explanation of the context in which Japan was inserted whilst it participated into the peacekeeping operations. These explanations are fundamental also to explain how Japan was able to participate to international missions even though it does not formally have a military apparatus. Additionally, in this chapter the importance that the Five Principles on Peacekeeping Operations has for the Japanese participation into international missions will be analysed.

Chapter 10 will aim at answering the research question of this dissertation. The analysis conducted will try to understand whether German and Japan can participate in international conflicts and to what extent, that is to say whether they will need/want a constitutional reform or will keep on basing their participation on the interpretation of relevant constitutional and legislative provisions in order to participate in future international missions. The answer will be provided within three distinct sections: the first section will analyse the issue from a constitutional point of view, the second section will present the sentiment of the political elite and public opinion, and the third section will look at the international context. Lastly Chapter 10 will draw the conclusions of this dissertation.

2. Definitions of war, armed conflict and peacekeeping operations

When talking about Article 9 of the Constitution of Japan (日本国憲法) and Article 87(a) of the Basic Law (*Grundgesetzfür die Bundesrepublik Deutschland*), it is necessary to specify what the concept of "the use of military force" entails. In this chapter, the difference between war, armed conflict and peacekeeping operations will be analysed so to provide a better understanding of the terminology that will be used when discussing about the above-mentioned articles.

2.1 A comprehensive definition of war

To understand the concept of war, one should start from the famous quote of Prussian philosopher Carl von Clausewitz who defined war as « a continuation of political intercourse, with the addition of other means ».[1]In other words, war can be explained as an actor – a state – trying to compel another actor – its enemy – to its will by the use of force. It can thus be argued that war could be understood as «a state of hostilities between nations characterized **by** the use of military force».[2]

However, despite the fact that the idea of the actualisation of an active conflict is within the definition of war, it does not mean that the use of military force is a necessary condition for it to be a war. There have in fact been instances where two countries were at war with one another but never actively engaged in an armed fighting – as it was the case when during the Second World War Turkey

[1] Buley B., *The new American way of war, military culture and the political utility of force*, New York, Routledge, 2008, 21.
[2] Dalton J. G., *What Is War - Terrorism as War after 9/11* in *ILSA J. Int'l & Comp. L.*, 2006, Vol. XII, 523.

joined the coalition against Germany, but no shot was ever fired between the two countries.[3]

Additionally, von Clausewitz's definition does not take into account the rationale and the culture behind a country's decision to go to war but focuses only on the idea of war as a tool to achieve a political end by more forceful means.[4] Thus, the definition that von Clausewitz gave might not be the best way to understand what war is, especially not the one that has been conducted from the beginning of the 20th Century until now.[5] The two World Wars, the Cold War, and more recently the war on terror gave a new, more fluid, meaning to the definition of war, changing it into a more dynamic and indefinite one.[6] Despite these arguments, von Clausewitz's interpretation of war, however, can still be considered relevant to the discussion as it sheds lights on the international climate that was in place when the two Constitutions – the Basic Law and the Constitution of Japan – were designed.

To understand, however, the different interpretations that were given to the ability to use military or self-defence forces both in Germany and Japan throughout the years, it is imperative to analyse what war is understood to be according to contemporary international law. If in a political sense war is to be considered a violent interaction between two states who consequently enter a «state of war», in a legal sense– in this case both international and domestic law will be considered – war incorporate specific legal consequences.[7]

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[3] Rumpf H., *The Concepts of Peace and War in International Law* in *German Y.B. Int'l L.*, 1984, Vol. XXVII, 434.
[4] Smith D., *Trends and Causes of Armed Conflict*, Berghof Research Center for Constructive Conflict Management, 2004, 8.
[5] *Ibidem*.
[6] Collins R. K. L. - Skover D. M., *What Is War: Reflections on Free Speech in Wartime* in *Rutgers L.J,* 2005, Vol. XXXVI, 841.
[7] Rumpf H., *The Concepts of Peace and War in International Law* in *German Y.B. Int'l L.*, 1984, Vol. XXVII, 434.

Such consequences may vary according to the case and can span from the neutrality of a third party, as it was the case of Switzerland, the breach of a treaty, as it was the case of the Molotov-Ribbentrop Pact, to the rupture of diplomatic relations. Given this legal nature of war, the definition given by H. Rumpf can be the best one to fully understand what modern warfare is understood to be:

> «State praxis has shown that a state of war as a legal condition does not depend consistently on the use of force but means the opposite of a state of peace which as a legal relationship is not conditioned on the absence of the use of force»[8]

With this definition, H. Rumpf incorporates the idea that war is no longer just the use of military force or the continuation of politics by other means, but it is a state where peace is no longer a condition and the use of force is conditioned on a case by case scenario. It can thus be argued that along with the evolution of warfare, the definition of war itself has evolved into a more comprehensive one.[9] It is, however, of the utmost importance to specify that within this definition of war concepts such as «international armed conflicts, internal armed conflicts and acts of violence committed **by** private individuals or groups», which definition has become harder to distinguish, are not included[10]. In this regard, the following chapter will analyse what conflicts are classified as armed conflicts.

2.2 A comprehensive definition of armed conflicts

Generally, an armed conflict is «a sign that opponents have reached a level of strength where they may challenge the government militarily - once that threshold is crossed, international humanitarian law applies, and domestic law is

[8] Rumpf H., 435.
[9] Dalton J. G., *What Is War - Terrorism as War after 9/11* in *ILSA J. Int'l & Comp. L.*, 2006, Vol. XII, 527.
[10] *Ibidem*.

circumscribed».[11] According to International Humanitarian Law there are two types of armed conflicts: international and non-international; whilst the former defines a situation where two states oppose one another, the latter is in place when there are armed clashes between «governmental forces and nongovernmental armed groups, or between such groups only».[12] In this regard it is imperative that, in order to be considered an armed conflict, the conflict has to reach a «minimum level of intensity and the parties involved in the conflict must show a minimum of organisation», along with showing some degree of continuity between the clashes.[13]

Non-international armed conflicts are further divided into different categories according to the Article 3 of the Geneva Conventions of 1949 and to Article 1 of Additional Protocol II: the non-international conflicts which occur «in the territory of one of the High Contracting Parties» fall under Article 3, whilst those «which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol» fall under Article 1 of Additional Protocol II.[14] It can be seen that whilst the conflicts which fall under Article 1 of Additional Protocol II are only those between a State's military forces and «dissident armed forces or other organised armed groups» those which fall under Article 3 are those which occur «only between non-State armed groups».[15]

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[11] O'Connell M. E., *Defining Armed Conflict* in *Journal of Conflict & Security Law,* Oxford University Press, 2009, Vol. XIII, No. III, 395.
[12] International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, March 2008, 1.
[13] International Committee of the Red Cross (ICRC), 5; Smith D., *Trends and Causes of Armed Conflict,* Berghof Research Center for Constructive Conflict Management, 2004, 3.
[14] International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, March 2008, 3-4; International Committee of the Red Cross (ICRC), The Geneva Conventions Of 12 August 1949.
[15] International Committee of the Red Cross (ICRC), *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, March 2008, 4.

Furthermore, the term “armed conflict” first appeared as a concept in the Geneva Convention, where it has been used as the replacement for the term “war”. This intentional and purposeful substitution has been made to ensure that a state which was to be involved in a type of conflict would not attempt to «deny the applicability of the law» claiming that it was engaged in «police action, rather than a war».[16]

If one is to follow this rational, it could be argued that any form of dispute between two or more actors – usually the states – where armed forces are involved can thus be classified as an armed conflict. This idea of giving a broader interpretation to armed disputes has been later confirmed by the «*Prosecutor v Tadićcase (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* IT-94-1-AR72 (2 October 1995)», also known as the Tadić Case, where «the *International Criminal Tribunal for the Former Yugoslavia (ICTY)*» stated that «an armed conflict exists whenever there is a resort to armed force between States (para. 70)».[17]

It, thus, appears clear that the Geneva Convention is applied whenever there is an armed conflict – whether international or non-international – and even in the case that the attacking party is faced with little or no resistance.[18] For it to be considered as an armed conflict, in fact, there is no need to declare a “state of war” in the place where the hostilities are taking place.

Along with conceptual differences, armed conflicts can be distinguished by the more traditional concept of war by their causes. Differently to the causes which may bring countries to declare war to one another, in fact, the causes of armed

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[16] Crawford E., Armed Conflict, International, in https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e429

[17] *Ibidem*.

[18] Gasser H.P., *International Humanitarian Law: an Introduction, in: Humanity for All: the International Red Cross and Red Crescent Movement,* in Haug H. (ed.), Paul Haupt Publishers, Berne, 1993, 510-511.

conflicts can be traced back to poor economic conditions, ethnic diversity – as it was the case for the massacre perpetrated by the Hutu-led government and other factions primarily against the Tutsi population in Rwanda in 1994-1995 – lack of political opening or even environmental damage.[19] Additionally, armed conflicts are different from war because in case of the former the International Committee of the Red Cross (ICRC) «may demand the right to visit detainees and to demand that certain standards applicable to detention are maintained», a condition which is not automatically applicable when two states declare war to one another.[20]

2.3 A comprehensive definition of peacekeeping

Generally, the term peacekeeping has been used in association to those UN operations which aim is to restore peace. UN peacekeeping operations, in fact, are in place to «create conditions for lasting peace» in those countries which are «torn by conflict».[21]With few exceptions – such as the one in Rwanda in the late 1990s – peacekeeping operations have «proven to be one of the most effective tools available to the UN to assist host countries navigate the difficult path from conflict to peace».[22]

Throughout its troops, UN peacekeeping provides security and the necessary support – mainly political – to help countries face the often-difficult transitioning process to peace. It is important to mention that UN peacekeeping forces may only be deployed when all the actors involved into a conflict agree to their

[19] Smith D., *Trends and Causes of Armed Conflict*, Berghof Research Center for Constructive Conflict Management, 2004, 13.
[20] O'Connell M. E., *Defining Armed Conflict* in *Journal of Conflict & Security Law,* Oxford University Press, 2009, Vol. XIII, No. III, 395.
[21] Malone D. M. – Thakur R., UN Peacekeeping: Lessons Learned, Global Governance, 2001, Vol. VII, 11-17; United Nations, *What is Peacekeeping*, in https://peacekeeping.un.org/en/what-is-peacekeeping
[22] United Nations, *What is Peacekeeping*, in https://peacekeeping.un.org/en/what-is-peacekeeping

presence.[23] Additionally, these forces can also be employed by the actors involved so to prevent a conflict from escalating.

Peacekeeping operations can be divided into two types of operations: «unarmed observer groups and lightly-armed military forces».[24] It is to be understood that lightly armed military forces are allowed to utilise the weapons at their disposal for situations of self-defence. In no case the peacekeeping troops can be utilised to engage in active conflict if not for self-defence purposes.[25] The observer groups, on the other hand, are utilised for gathering information on the conditions of the interested area – to say for example if the parties are respecting the agreements undertaken. On the contrary, the military forces' aim is to prevent the escalation into a conflict or to maintain the order in the interested areas.[26] These two types of operations can additionally be divided into two categories: «traditional peace-keeping operations» and «strategic peacekeeping».[27]

Whilst the former has as main objective the accommodation of the conflict, the latter aims at protecting human rights. In this regard, it is important to mention that along with the restoration of peace, UN peacekeeping operations aim at avoiding any human rights violation in the zones affected by the conflicts they have been sent to help resolving.[28] With delicate operations such as peacekeeping operations are, success is never guaranteed, but it can be argued that out of the totality of the peacekeeping operations which have been conducted the majority has been a success.

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[23] NobelPrize.org, *United Nations Peacekeeping Forces – History,* in https://www.nobelprize.org/prizes/peace/1988/un/history/
[24] *Ibidem.*
[25] *Ibidem.*
[26] *Ibidem.*
[27] Burk J., *What Justifies Peacekeeping?*, in *Peace Review*, 2000, Vol. XII, No. III, 468.
[28] *Ibidem*.

Currently, there are fifth-teen UN peacekeeping operations, the most known being UNIFIL[29], UNSMIL[30], and UNMIK[31] among others and they are divided between the two kinds of peacekeeping operations above mentioned.[32] These operations, regardless of their nature, follow a specific institutional *iter*. After the Security Council's deliberation, the UN peacekeeping forces are deployed, even though in some occasions the General Assembly can take the initiative in this regard. Operational controls of the troops and the mission is given to the Secretary-General and his secretariat.[33]

Another important feature of peacekeeping is that it is guided by three fundamental principles: (a) «consent of the parties», (b) «impartiality» and (c) «non-use of force except in self-defence and defence of the mandate».[34] These principles were firstly theorised after the UNEF (United Nations Emergency Force) – the first peacekeeping operation, which dealt with the Suez Canal crisis in 1956 – and they are continuously reaffirmed in UN documents concerning peacekeeping.[35] These three principles, especially principle (c) is of fundamental importance for the arguments of this thesis. This principle in fact will later be analysed in correspondence with the articles on armed forces in both constitutions to see how the two countries approached the duty of defending the UN mandate of maintaining peace and security (see Chapter 5 for the analysis of the German relevant articles and Chapter 7 for the Japanese one).

[29] United Nations Interim Force in Lebanon
[30] United Nations Support Mission in Libya
[31] United Nations Mission in Kosovo
[32] United Nations, *Current Peacekeeping operations*, in https://peacekeeping.un.org/en/current-peacekeeping-operations
[33] NobelPrize.org, *United Nations Peacekeeping Forces – History,* in https://www.nobelprize.org/prizes/peace/1988/un/history/
[34] United Nations, *What is Peacekeeping*, in https://peacekeeping.un.org/en/what-is-peacekeeping
[35] Tsagourias N., *Consent, Neutrality/ Impartiality and the Use of Force in Peacekeeping: Their Constitutional Dimension*, in *Journal of conflict and security law,* 2007, Vol. XI, 465.

3. Constitution-making: Western, Asian, and Islamic constitutionalism

Before analysing the different types of constitutionalism, it is important to define what constitutionalism is and its historical development, in order to understand it. Constitutionalism is a legal and political doctrine which since its development has been focused on reaching tangible political ends, which ensures a limitation of the public powers and which affirms that the public authority is normatively divided into respective areas of competence and influence among different branches of government. Although fragments of constitutionalism can be found in societies which pre-date the modern one, such as feudal and medieval societies, it can be argued that constitutionalism developed in relatively recent times. Its birth can be connected to the international context which allowed the formation of the modern European state.[36]

With the development of the modern European state, a phenomenon such as constitutionalism developed with the purpose of limiting and shaping into legal norms the state's powers. The grounding idea was to limit the state's powers in a way that would have allowed it to function and face the international and domestic challenges that the creation of the modern European state would have posed to the development of the state itself and its society. Associated to the idea of a separation of powers, of limiting and creating legal norms to effectively regulate the society, is the idea of constitution.[37]

The constitution – whether a codified document or a more ephemeral one like the British one, which is uncodified and it is composed of different norms which wary from codified texts to customary law – is a concept closely linked to the idea of constitutionalism of the modern European state, which saw the constitution and the creation of a constitutionalist realm the basis for creating a

[36] Ginsburg T., *Comparative Constitutional Design*, in Cambridge University Press, 2012.
[37] Grimm D., *Constitutionalism: Past – Present – Future*, in *NOMOS 2 (Q*uadrimestrale di teoria generale, diritto pubblico comparato e storia costituzionale), 2018, 1-12.

complex and articulate political body. A body formed by different elements, each with a specific and separated power for it wanted to promote equilibrium and at the same time coexistence between the distinct and mutually necessary powers.[38]

It has been mentioned that a constitution can consist of both codified and uncodified norms and this is made possible by the fact that there are certain specific attributes which are core to a constitution, namely «a mix of aspirations and commitments expressive of a nation's past». Furthermore, typical of a constitution are elements which give it an identity: the wordings of many constitutions explicitly state, even if sometimes with a general stance, the identity of the constitution itself, which represents the historical and political context in which the constitution was drafted.[39]

This identity is protected by the drafters by the creations of constraints – more or less rigid – so to prevent the constitution from being easily amended and thus preserving the present identity against a possible – not necessarily plausible – future identity. As it has been seen with both Japan and Germany, and with many other countries which constitutions were created after a loss of a war opposed to a victory, the methods for constitutional revision tend to be more difficult compared to others, mainly because the drafters' intention is specifically aimed at preserving the constitution's identity in order to avoid repeating the mistakes from the past.[40]

As much as the constitution holds an identity, the process of constitution-making «must deal with certain basic questions of organisation and process». Part of

[38] Ginsburg, T., *Comparative Constitutional Design*, Cambridge University Press, 2012; Fioravanti M., *Costituzionalismo: Percorsi della storia e tendenze attuali,* Gius. Laterza & Figli Spa, 2009.
[39] Ginsburg T. - Dixon R., *Comparative Constitutional Law*, Edward Elgar Publishing Limited, United Kingdom, 129.
[40] Ginsburg T. - Dixon R., Comparative Constitutional Law, Edward Elgar Publishing Limited, United Kingdom, 129; Ginsburg T., *Bounded Discretion in International Judicial Lawmaking*, in *Va. J. Int'l L.*, 2005, Vol. VL, 631.

these questions is designating the actors to be involved in the drafting, the location and the procedures to follow to achieve the drafting of a constitution. «Constitution-making occurs in discernible stages, some of which resemble an ordinary legislative process familiar to many drafters in consolidated democracies». Despite this common foundation, the form which a constitution can take are various and are influenced by the historical, cultural, international, and political context in which a country is inserted.[41]

So far it has been mentioned how with the development of the modern European state, a phenomenon such as constitutionalism developed, and it has been outlined the general precepts which surround constitutional design and the constitution itself. In the history of constitutionalism, however, the real change was marked by the publication of the *Social Contract* by Rousseau for it defined the constitution as «no longer the fundamental norm of a political body, the guarantor of internal equilibrium and of the right balance between of all the powers within it», but as a legal act, an expression of sovereignty of a state. The most prominent difference between this primordial version of constitutionalism and the latter one is the principle of equality which founds its grounding in the French revolution.[42]

At this point it is important to mention that although not all forms of constitutionalism or constitutions carry the same characteristic, the ones which are post-French Revolution share the principle of equality. It is important to highlight, however, that Islamic constitutionalism and Asian constitutionalism, to a certain extent, view the principle of equality in different terms compared to the European constitutionalism. Nonetheless, it can be argued that the kind of

[41] Ginsburg T. – Elkins Z. – Blount J., *Does the Process of Constitution-Making Matter?* in *The Annual Review of Law and Social Science*, 2009, Vol. V, 201-203.
[42] Fioravanti M., *Costituzionalismo: Percorsi della storia e tendenze attuali*, Gius.Laterza & Figli Spa, 2009.

constitutionalism which formed after Rousseau's publication is characterised by said principle.[43]

The Constitutionalism which characterised the liberal age in Europe, however, although directly dependant on the revolutionist nature of the French revolution and on the kind of constitutionalism which followed it, moves away from the principle of equality towards the principle of the limit. To this concept the ideas of «laws of the land and rule of law» can be reconnected for they incarnate the idea of a physical limit and separation of a state's territory. It is in this context that the birth constitutionalism of the 19th Century can be traced, for the modern concept of sovereignty can be connected to the principle of sovereignty which developed from the precepts laid out by Locke and Burke.[44]

At this point it has to be mentioned that if the concept of constitutionalism finds its roots in the 18th Century, and arguably even before, the advent of the two World Wars, the creation of international organisations such as the UN and the processes of decolonisation have influenced the way constitution-making was approached in those countries which were characterised by authoritarian regimes. In this regard, the constitution-design which was and is characterising of the 20th and the 21st Centuries has been heavily influenced by the American tradition.[45]

In some cases, this influence resulted in successful examples, such as Singapore, which is characterised by what has been labelled as Authoritarian Constitutionalism, for it combines both elements of the liberal tradition with more authoritarian and restrictive elements. This might be perceived as a

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[43] Grimm D., *Constitutionalism: Past – Present – Future*, in NOMOS 2 (Quadrimestrale di teoria generale, diritto pubblico comparato e storia costituzionale), 2018, 1-12; Shaffer G. – Ginsburg T., Halliday T. C., *Constitution-Making and Transnational Legal Order*, Cambridge University Press, 2019.

[44] Rawlings R. – Leyland P. – Young A., *Sovereignty and the Law: Domestic, European and International Perspectives*, OUP Oxford, 2013; Frohnen B. P. – Reid C. J. Jr., *Diversity in Western Constitutionalism: Chartered Rights, Federated Structure, and Natural-Law Reasoning* in *Burke's Theory of Empire*, McGeorge L. Rev., 1997, Vol. IXXX, 27.

[45] McIlwain C. H., *Constitutionalism: Ancient and Modern*, in *The Lawbook Exchange*, 2005.

contradiction, but in this type of constitutional current, there is a perfectly balanced coexistence of the two natures: the liberal and the authoritarian one, forming a hybrid. In this hybrid kind of constitutionalism, the legal system is characterised by a rule of law which allows free and fair elections along with a rather moderate degree of control and mild repression of some personal freedoms.[46]

It has been argued that this analysis disproves the theories presented by McIlwain, who emphasised that whilst liberal constitutionalism is characterised by «a legal limitation on government» and it is the opposite of an arbitrary rule, a despotic government is characterised by the «government of will» and not by the «government of law», like the liberal one is. According to this analysis, apparently the two elements cannot coexist. It must be highlighted, however, that the fact that they are opposite, it does not necessarily mean that they cannot coexist. A country, such as Singapore, has in fact a structure based on the rule of law – it offers free and fair elections – and yet it still is characterised by a system which limits some personal freedoms, which is characteristic of an authoritarian system.[47]

On the contrary, in some other cases, when a country was facing a regime change and needed to renew its constitution, the pre-existing constitutionalist perspectives, especially the one embodied by the Americans, tried to impose their version of constitution-design, sometimes without taking into account that that particular state did not have the philosophical and political upbringing which Europe had. This meant that this implanted constitutionalism could potentially fail, not because its principles were wrong per se, but because they were introduced to a reality which was not ready or accustomed to them and thus

[46] Tushnet M., *Authoritarian Constitutionalism*, in *Cornell Law. Review*, 2015, Vol. C, 391; Kelsen (M. Hartney trans.), *General Theory of Norms,* Oxford, 1991, 440–454.
[47] Tushnet M., *Authoritarian Constitutionalism*, in *Cornell Law. Review*, 2015, Vol. C, 391.

struggled to adapt them to its historical layout. In this regard, many instances can be found in the Middle Eastern region, namely Iraq Afghanistan.[48]

These instances show that along with the following types of constitutionalism, namely the Western, the Asian and the Islamic one, which will be analysed below, there are many other kinds of constitutionalism which find their origins from various sources, sometimes even apparently contrasting from one another. Although sharing some communalities, these types of constitutionalism vary from one another due to the cultural and historical context in which they flourished. Following is an analysis of these three types of constitutionalism.

3.1 Western Constitutionalism

Before the breaking of the Second World War, the most common political system across Europe and the US was liberal constitutionalism, which has been often associated with the more general concept of Western Constitutionalism. This type of constitutionalism is characterised by a written – or codified – constitution which enunciates various principles and rights, a commitment to the rule of law, in certain cases the renunciation of war – such as in the case of the Constitution of the Italian Republic and of the Basic Law, to mention a few – secularism of the executive, legislative and judicial powers, the methods for constitutional revision and more in general the identity itself of the constitution, which has to be maintained and preserved.[49]

It is thus why Western constitutionalism has been associated with European constitutionalism due to its historical development. However, there are other forms of Western constitutionalism, which shares many common elements with the European one but present variations from it, namely the American

[48] Belz H., *Changing Conceptions of Constitutionalism in the Era of World War II and the Cold War*, in *The Journal of American History*, 1972, Vol. LIX, No. III, 640-669.
[49] Ginsburg T. - Aziz Z. H. – Versteeg M., *The Coming Demise of Liberal Constitutionalism?,* in *The University of Chicago Law Review*, 2018, Vol. LXXXV, 239-255.

Constitution. The variations can be considered in the fact that the for certain aspects the American Constitution can be considered as the «important, substantial adaptation of the constitutional order to contextual, historical demands» which in a way make the American constitution as an evolution of those European constitution which predated it. Furthermore, the American Constitution can be seen as a contributing source of constitutional design to those emerging democracies around the world. In this regard, both the Japanese Constitution and the Basic Law contain references to the structure and constitutional design of the American one.[50]

There are other forms of western constitutionalism, which are to a certain extent different from the European and American one and it is characterised by the constitutional development in Eastern European countries after the fall of the USSR and its rule of law. These countries had to face the fallout not necessarily of liberal constitutionalism itself, but more a variation of it as they had to change the approach to their economy – from communist to capitalist – and had to deal with a changed balance between the three constitutive powers of a state, namely the judicial, the executive and the legislative.[51]

When the USSR fell, these countries had thus to face their reconstruction also under a constitutional point of view: they decided to return to the constitutional structures which were characteristic of their country before the communist regime overtook and replaced them. This return to their original forms of constitutionalism has been defined as a restoration constitutionalism, for it is meant to restore the pre-existing constitutional characteristics. Despite this attitude, it can be argued that due to the prolonged and invasive communist rule, the eastern European countries maintained some of those characteristics and integrated them into the restored constitutional layouts. As a consequence, it can

[50] Franklin D. P. - Baun M. J., *Political Culture and Constitutionalism: A Comparative Approach: A Comparative Approach*, Routledge, 2016.
[51] Richards D. A. J., *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative Law*, in *N.Y.U. J. INT'L L. & POL.*, 1993, Vol. XXVI.

be argued that their liberal constitutionalism became a hybrid between their own traditional constitutional design and the soviet and communist design.[52]

Despite these different forms of Western constitutionalism, it can be argued that there are certain commonalities shared by all liberal constitutional design, namely the principle of dignity, the principle of equality and the recognition of fundamental human rights to the citizens and non-citizens. These elements represent the durable and stable backbone of liberal constitutions. Furthermore, it can be argued that there is another dimension to the western constitutionalism, namely the political dimension, which celebrates democracy – the rule of the majority – and the safeguards of the minorities. Given these characteristics, it can be argued that at the foundation of the liberal constitutionalism lay the principles of dignity, of safeguard of the fundamental human rights which are thus considered as fundamental and irremovable principles for they are the identity of the constitution itself.[53]

Along with these fundamental principles, western constitutionalism argues that the relation between the state and its citizens and non-citizens within its territories should be structured according «certain superior legal principles that constitute and constrain the exercise of public power», which are exemplified by the democratic or republican rule. The political authority should in fact be a reflection and an expression of its popular sovereignty and as such it requires that said authority is to be established following the laws of democratic – either majoritarian or representative – legislative processes. Furthermore, said political authority should be subject to the law, meaning that although the guarantor of

[52] Son B. N., *Restoration Constitutionalism and Socialist Asia*, *Loy. L.A. Int'l & Comp. L. Rev*., 2015, Vol. XXXVII, 67; Frohnen B.P. – Reid C. J. Jr., *Diversity in Western Constitutionalism: Chartered Rights, Federated Structure, and Natural-Law Reasoning*, Burke's Theory of Empire, in *McGeorge L. Rev.*, 1997, Vol. IXXX, 27.

[53] Alicino F., *Il diritto fondamentale "a togliersi la fame". Banco di prova per il costituzionalismo contemporaneo*

the correct functioning of the system, it cannot, especially due to its role, be above the law and must be subjected to the judicial review.[54]

As one can see from this analysis, the characteristics of the Western constitutionalism are shared by the majority of the states in the world and are the result of centuries of intellectual developments, namely phenomena such as Illuminism. However, along with this somewhat historical form of constitutional design, there are other forms of constitutionalism which must be analysed, namely Asian constitutionalism and Islamic constitutionalism.

3.2 Asian Constitutionalism

If liberal or western constitutionalism developed in Europe and has been influenced by the intellectual and revolutionist developments of the European history, the Asian countries, such as China, South Korea and Japan to mention a few, have been characterised by the Confucian tradition. The merging of theories such as the Confucian one and the Constitutionalist one gave birth to what is known as Confucian constitutionalism, in which values such as meritocracy, respect and family relationships – to be intended in the Confucian sense and not in the traditional sense – are the foundations.[55]

In this regard, Confucian constitutionalism – due to both the more despotic structure preached by the Confucian teachings and by the historical political development that the majority of the Asian states experienced –has been associated with the idea of stiffness and Oriental despotism, which, as such,

[54] Bernhard Z. C. - Kreuder-S., *Which post-Westphalia? International organizations between constitutionalism and authoritarianism*, in *European Journal of International Relations*, 2015, Vol. XXI, 568–594.
[55] Ginsburg T., *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, in *Law& Social Inquiry,* 2002, 763-799.

obstructs the liberal development of democracy and individual rights or freedoms. It is thus why it has been argued that the union of Confucian experiences with the concept of constitutionalism «reflects a desire to level and normalize East Asia within privileged Western epistemological constructs».[56]

Typical of the Confucian tradition is the idea that there cannot be an intergovernmental check on the highest power for this highest power benefits from the idea that his mandate has been given by the heavens. For this reason, power is indivisible and «there is no human force that can check the emperor's power» for there is no human who can question the heavens' design. As a consequence, the emperor is the only power figure as it is in his role that lay all the «jurisdictional claims over the social-political life of the people».[57]

There was only one instance where the emperor was pseudo-constrained in its powers and that instance was represented by the so-called duty of scholars-officials, which had the sometimes-dangerous task of informing the emperor when his politics or rule were wrong. This approach has been mistakenly associated with a sort of modern power check or system of check and balances. This practice, however, must not be mistaken with said system of power balance, as ultimately the power laid in the hands of the emperor and the role of the scholars-officials was of mere advisors, not powerful supervisors.[58]

As it can be seen, this concept of centralisation of the powers in the hand of a single entity is foreign and perceived as dangerous by the precepts of western constitutionalism. In this regard, it has to be highlighted that, although it can be

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[56] Ginsburg T., *East Asian Constitutionalism in Comparative Perspective*, in Chen A.H.Y. (ed.), *Constitutionalism in Asia in the Early 21st*, Century Cambridge University Press, 2014

[57] Ginsburg T., East Asian Constitutionalism in Comparative Perspective, in Chen A.H.Y. (ed.), Constitutionalism in Asia in the Early 21st, Century Cambridge University Press, 2014; Carrai M. A., *Confucianism reconstructed: The violence of history and the making of constitutionalism in East Asia,* in *I•CON*, 2018, Vol. XVI, 664–671.

[58] Ginsburg T., *Constitutionalism: East Asian Antecedents*, Chi.-Kent L. Rev., 2012, Vol. LXXXVIII, 11.

said that in reality the emperor was the guarantor of all the political, judicial and legislative power for there was no separation of powers, it was not unconstrainedly sovereign. The Confucian tradition itself posed on the emperors some constraints – some universal truths – such as the rules on good governance, which the emperor was somewhat forced to follow in order to be a proper ruler.[59]

Moreover, the ruler had the sacred Confucian duty of creating a harmonious society under the Confucian precepts and doing so meant that he could not be completely authoritarian in the sense that it could not unjustifiably move away from the «norms of proper behavior appropriate to [its] social role».It must be specified, however, that these rules of behaviours were not official constraints to the power of the emperor for there was no institutional meaning behind this norm. These norms were only part of the Confucian traditions and were thus only customary, for they were by no mean enforceable.[60]

Under the Confucian theory, the state and the society were an organic unity which relationship was characterised by a cooperative and not adversarial relationship. In this regard the emperor had the power to rule over its people because the heavens gave him this prerogative, but according to the Confucian tradition, they gave him this prerogative for its role was considered to be the «legitimate voice of the people as a collectivity», another fundamental value the Confucian society. The successfulness of fulfilling this heavenly mandate was not measured on the approval or disapproval of the people, but was materially measured, meaning with a poor economic growth, losing wars, and decadence, all factors which were considered to be the direct consequence of a negative cosmic judgement on the emperor's ruling.[61]

[59] Ginsburg T., *East Asian Constitutionalism in Comparative Perspective*, in Chen A.H.Y (ed.), *Constitutionalism in Asia in the Early 21st*, Century Cambridge University Press, 2014.
[60] *Ibidem*.
[61] *Ibidem*.

As it can be seen from this analysis of the Confucian elements, it is possible to argue that concepts such as the rule of law theorised by Locke, or any sort of liberal-western approach to the separation of powers and to the relationship between the ruler and the people were missing from Confucian teachings. After the events of the Second World War, however, and the spreading of the American format of constitutionalism the Asian countries which had been born out of the Confucian tradition, started to merge these two apparently conflicting traditions thus creating what has been called Confucian constitutionalism.[62]

It is thus why it can be argued that if one is to look at the majority of modern Asian societies, however, it would be misleading to define Confucian constitutionalism as characteristic of despotic or authoritarian societies. Despite the fact that more authoritarian elements can be found in Confucian societies, it can be argued that the western and liberal influences have reduced this characteristic. Modern societies such as South Korea and Japan have been able to merge the two traditions in more democratic way and created more decentralised form of checking and balances by creating specified bodies for judicial review.[63]

Although in this thesis Islamic Constitutionalism will not be analysed, it is important to mention it, for it is another variant of Constitutionalism and for it carries important implications in the development of the literature on Constitutionalism.

[62] Groppi T. – Piergigli V. – Rinella A., *Asian Constitutionalism in Transition: A Comparative Perspective*, Giuffrè Editore, 2008.

[63] Davis M. C., *Strengthening Constitutionalism in Asia,* in *Journal of democracy*, 2017, Vol. XXVIII, No. IV.

3.3 Islamic Constitutionalism

Islamic constitutionalism diverges immensely from the above-analysed types of constitutional traditions, namely Western and Asian, for it encompasses the idea of the divinity in the rule of law. In the Islamic constitutionalism the constitutional system is based on the idea that the citizens must commit to both the Islamic religious precepts and to the constitutional principles, which are based on the religion of Islam, thus forming a «bi-polar system of constitutional and sacred texts and authority». This model has been defined, along with Islamic constitutionalism, as theocratic constitutionalism, for the religious elements are as important and the constitutional values.[64]

Characteristic of this kind of constitutionalism are four key elements, namely the presence of a single religion which is defined as the state religion, «the constitutional enshrining of the religion, its texts, directives and interpretations as a or the main source of legislation and judicial interpretation of laws», which means that the laws created must not collide with the precepts of the state religion, a system of religious bodies which benefit of official jurisdictional power over the judicial rulings of the state, and «adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority». Atypical example of this theocratic constitutionalism is the constitution adopted in Iran after the 1979 revolution.[65]

Not all countries characterised by Islamic constitutionalism, however, are as strict as the Iranian one. Despite having declared the Shari'a as the primary source of legislation, many Islamic countries, such as Iraq, Egypt and Afghanistan, present in their constitution also «principles of human rights, constitutional law and popular sovereignty». On the contrary, countries such as

[64] El Fadl K. A., *Constitutionalism and the Islamic Sunni Legacy*, Ucla J. Islamic & Near E. L., 2001, Vol. I, 67; Ginsburg T. – Dixon R., *Comparative Constitutional Law*, Edward Elgar Publishing Limited, United Kindgom, 2011.
[65] Ginsburg T. – Dixon R., *Comparative Constitutional Law*, Edward Elgar Publishing Limited, United Kindgom, 2011.

Saudi Arabia presents a stronger religious model, where most of the law is religious or deeply connected to the Islamic religion. In this system, there are, however, some aspect of the law, such as those connected to the economic realm, which are isolated from the religious influence.[66]

Given these premises it can thus be argued that Islamic constitutionalism is based on the precepts and principles characteristic of Islam. One, however, cannot talk about Islamic constitutionalism without mentioning the developments in the Arab World after the phenomenon of the Arab Spring. The countries which had been interested by this phenomenon are various and differ on how they structured their institutions. Despite the fact that this movements wanted more freedom and the liberation from authoritarian regimes, it can be argued that for what concerns the drafting of the new constitutions, the result has been a more "islamisation" of their constitution. The role or space given to Islam in these constitutions, however, varies and it depends on the cultural heritage of the country.[67]

More generally, the role that the Shari'a has in the different Islamic constitutions is significantly different among the Islamic states. A commonality among them all, however, is represented by the idea that any law which is contrast with the Shari'a or its precepts is invalid. It is important to analyse this aspect as in this sense the Shari'a becomes the only source of law, thus making a religious element the foundation of the constitutional design and structure. The majority of the constitutions of the Islamic countries in fact state that the head of state and in some instances also the head of the government should be Muslim. This means that the Islamic culture and religious precepts cover a fundamental role in the structure of the state.[68]

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[66] Ginsburg T. – Dixon R., *Comparative Constitutional Law*, Edward Elgar Publishing Limited, United Kingdom, 2011.
[67] Gouda M., *Islamic Constitutionalism and Rule of Law: A Constitutional Economics perspective,* in *Constitutional Political Economy*, March 2013, 1-31.
[68] Mayer A. E., *Conundrums in Constitutionalism: Islamic Monarchies in an Era of Transition*, Ucla J. Islamic & Near E. L., 2002, Vol. I, 183.

Moreover, the majority of the Muslim community believes that Islam is not merely a religion, a mere theological system, but it is an all-encompassing way of life, for «Islam, we are told, is not mere religion: it is a way of life, a model of society, a culture, a civilization». Furthermore, since the Shari'a is the foundation of the Islamic teachings for what concerns the state and its structure, its application into the state affairs has been considered as an indicator of the religious affiliation a certain country has with the teachings of Islam.[69]

If one is to analyse Islamic constitutionalism comparing it to the western one, Shari'a gives the sovereignty to Allah and not the people, as it would be in a western constitutional country. It thus transpires that in the Islamic constitutionalism, ideas such as popular will would be considered as inappropriate, for the sovereignty resides within the religious realm and not within the secular one.[70]

Given the religious aspect of the Islamic constitutionalism, it can be argued that the judicial review might come as problematic for the religious members would have complete power over all the state apparatus. In most constitutions of Islamic countries, however, it is allowed a sort of Muslim jurist whose job is to «exert reasoning and to interpret God's laws, the sovereignty of God actually translates in the Islamic constitution into guardianship of chosen clergy to interpret God's divine laws».[71]

Given this analysis, one might understand that a constitutionalism based on religious precepts might be a contradiction. It can, however, be argued that this

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[69] Gouda M., *Islamic Constitutionalism and Rule of Law: A Constitutional Economics perspective,* in *Constitutional Political Economy*, March 2013, 1-31.
[70] Grote R. - Röder T., *Constitutionalism in Islamic Countries: Between Upheaval and Continuity,* Oxford University Press, 2012.
[71] Rabb I., *The Least Religious Branch: Judicial Review and the New Islamic Constitutionalism*, Ucla J. Int'l L. Foreign Aff., 2013, Vol. XVII, 75; Gouda M., *Islamic Constitutionalism and Rule of Law: A Constitutional Economics perspective*, in *Constitutional Political Economy*, March 2013,1-31.

is not the case as constitutionalism itself presents some similarities with religion, for, as Kelsen theorised, the «normative structure of religion is very similar to that of law». They follow the same logic: as constitutionalism offer some rules one has to follow, so does religion. Additionally, both offer normative validity only for those who recognise them as basic norm and thus decide to abide by them, for in the case of the law an anarchist can decide not to believe in the state's rule and in the case of religious precepts one might not believe in that specific religion.[72]

As for what concerns the use of force and peace, these three kinds of constitutionalism find both commonalities and differences among them. For what concerns the differences, these traditions tend to differ the most from one another on the idea of the use of force. On the one hand the Islamic constitutionalism tends to view the use of force as a tool which can be employed in the process of conversion of the infidels. Regarding this use of force, however, there have been contradictions on what it means as the *jihad* might not necessarily mean violent actions, but only a forceful struggle to spread Islam. On the other, Liberal constitutionalism and Asian constitutionalism do not mention the use of force towards other countries but are more focused on the rights or on the Confucian structure which the state should have. This difference could be based on the idea that the Islamic constitutionalism must defend the religion for it is the core of the power structure.[73]

As for what concerns the similarities, it can be argued that these three kinds of constitutionalism present commonalities when it comes for peace.

[72] Wedberg A., *General Theory of Law and State*, New York: Russell & Russell, 413.
[73] Grote R. - Röder T., *Constitutionalism in Islamic Countries: Between Upheaval and Continuity,* Oxford University Press, 2012; Ginsburg T., *East Asian Constitutionalism in Comparative Perspective*, 32-51, in Chen A.H.Y. (ed.), *Constitutionalism in Asian in the Early 21st Century,* Cambridge University Press, 2014

Although some argues in favours of the use of force, they all generally tend to see peace as a mean to achieve in order to defend the integrity of the power structure they champion. [74]

3.4 Taxonomy outlined in chapter 3 applied to Germany and Japan.

As it has been analysed in the subchapters above, it is clear that both historically and formally the German Basic Law belongs to the tradition of Western Constitutionalism. It holds all the characteristics common to this tradition and it can be argued it is a successful example of a modern, post-war constitutional design which has been created on the core principles of the most ancient and durable constitutions of the liberal constitutionalist tradition.

Contrary to Germany, Japan traditionally belongs to the Asian type of constitutionalism. It can however be argued that given the immense contribution that the Americans made to the development and drafting of the Constitution of Japan, the constitution itself belongs more to the western kind opposed to the Asian one. Nonetheless, due to its culture, its history and the relationship between the political elite and the imperial structure, it can be argued that Japan is characterised by a hybrid of the two types, and not just by the Asian one. It, in fact, presents elements of the Asian constitutionalism for its historical connection to the Confucian tradition, but it also presents western elements due to the substantial influence which the American forces had in the drafting of the constitution.[75]

Although it has been argued that the two Constitutions belong to different types, it can also be argued that the two constitutions share a common birth and nature.

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[74] Grote R. - Röder T., *Constitutionalism in Islamic Countries: Between Upheaval and Continuity,* Oxford University Press, 2012

[75] Franklin D.P. - Baun M.J., *Political Culture and Constitutionalism: A Comparative Approach*, Routledge, 2016.

Both were developed after their loss of WWII and both are the result of the loss of the previous identity – the imperialist and supremacist one –that the two countries held. Both in fact are not the result of an evolutionary process like the unwritten constitution of the United Kingdom, the result of a popular revolution, or the result of a war of independence like the American Constitution. They were created after their defeat in the Second World War and after having been under the "dominion" of a foreign country.[76]

On the one hand, Germany had to declare an unconditional surrender which led, afterwards also due to the Cold War, to the separation between East and Western Germany and early administration of Germany by the Allied Powers: the US, the UK, France and the USSR. Out of this seemingly disastrous situation, the Basic Law was born, and it marked an «unprecedented era of constitutionalism in Germany».[77] On the other, Japan also had to declare an unconditional surrender after the bombings of Hiroshima and Nagasaki but it can be argued that it was never occupied formally occupied by a foreign state. The imperial structure of the post-war Japan remained intact and the Constitution, although with core differences, was born out of the profound re-adaptation of the traditional Meiji Constitution.

With these two historical differences we can see the reasons why the articles concerning the armed forces were dealt with so differently in the two countries. In the case of Germany, the complete annihilation of the previous regime and the separation of the country into two opposite ideologist states, could be somewhat considered as a reassuring feature of the unwillingness and impossibility of the German people to rearm once again in an aggressive optic. On the contrary, the historical negative reputation of Japan, the distance from

[76] Franklin D.P. - Baun M.J., *Political Culture and Constitutionalism: A Comparative Approach*, Routledge, 2016.
[77] Broehmer J., *The Genesis Of The German Constitution - From Total Devastation To The Dawn Of A New Era, Schriftenreihe Öffentliches Und Internationales Recht*, Peter Lang Publishing Group, 2010, 2.

Europe and the fact that it could maintain its political structure intact, could be argued to be a more pressing reason as to why the Americans decided to forcefully limit the Japanese ability to offensively rearm themselves. For clarity's sake, the historical backgrounds of both Constitutions will be deeply analysed in the following chapters.

To this idea it reconnects the fact that both the Basic Law and the Constitution of Japan were created in a period of foreign "occupation" – although it can be argued that Japan was never formally occupied by the Americans. This foreign occupation was under the Allied Powers (minus the USSR) in one case and under the US – a key figure for the drafting of the new Japanese Constitution was General MacArthur – on the other.[78]

However, despite having the said commonalities, the two Constitutions present important differences: their historical context; the cultures they are inserted in, their method of constitutional revision and, important for this dissertation, the articles related to armed conflicts and the use of military forces – see Art. 87(a) of the Basic Law and Art. 9 of the Constitution of Japan. To better understand why the two countries, despite having many commonalities, have such different constitutional approach to the armed forces, their historical development and their methods for constitutional revision will be analysed in the following chapters.

[78] Franklin D.P. - Baun M.J., Political Culture and Constitutionalism: A Comparative Approach, Routledge, 2016.

4. The Basic Law and the German method for constitutional revision

4.1 History of the Basic Law

After having lost WWI, the new Constitution of the German Empire was the Weimar Constitution – drafted by Hugo Preuss, a prominent lawyer and liberal politician. This new Constitution was perceived by the German citizens as an imposition from above, a sort of punishment for having lost WWI. [79] Its democratic layout ensured that the National Assembly overlooked the constitutional process and that the pre-existing bicameral parliamentary system were to be maintained, which consisted of the Reichstag – elected via a «proportional representation system» and «a regionally representative *Reichstrat*».[80]

Due to the advent of the Great Depression in 1929, the growing discontent among the monarchist and the harsh peace conditions imposed by the Treaty of Versailles in 1918, the political and popular trust into the Weimar Constitution started to fade. It is in this historical context that Adolf Hitler was nominated Chancellor by the then President Paul von Hindenburg. Under the Third Reich, the Weimar Constitution ceased to exist as it was dramatically changed to accommodate the authoritarian nature of the government.

After having lost WWII, Germany found itself once again at the mercy of the victors, but, aware of their past mistakes, the Allied Powers – the United States, the United Kingdom, the USSR, and France – decided to avoid imposing war reparations on Germany, so to avoid a repetition of the sentiment which

[79] ConstitutionNet, *Constitutional history of Germany – Background*, in http://constitutionnet.org/country/constitutional-history-germany
[80] *Ibidem*.

eventually led to Hitler's rise to power.[81]It was decided that Germany would be divided into two: the German Democratic Republic (GDR) under the influence of the Soviet Union and the Federal Republic of Germany (FRG) under the remaining Allied Powers. The separation was to be temporary, but with the growing tensions between the US and the Soviet Union, which eventually escalated into the Cold War, it was impossible to obtain a peaceful unification and it was decided that the two Germanies had to remain separate. It is in this occasion that the Basic Law was drafted.

It is important to mention that the current Basic Law – which «is a slightly amended version of West Germany's 1949 Constitution»– was never meant to become the official constitution of the Federal German Republic post reunification in 1990.[82] The original idea was in fact that the two Germanies were to reunite fairly swiftly and that in that occasion a new Constitution would be drafted, hence why the German term *Grundgesetz* does not translate into the term Constitution, but into the term Basic Law.

Thus, when the Basic Law was written, the drafter's aim was to create a temporary "constitution" which would be in place until the reunification and was meant to lead the FRG until then. As it may seem obvious, the experiences of the failure of the Weimar Constitution, of the war and of the Third Reich had a tremendous influence on the Basic Law: it was created to avoid a fragmented democracy like Weimar had been and at the same time a too much centralised authority like the Nazi Regime.[83]

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[81] Broehmer J., *The Genesis Of The German Constitution - From Total Devastation To The Dawn Of A New Era, Schriftenreihe Öffentliches Und Internationales Recht*, Peter Lang Publishing Group, 2010, 2; ConstitutionNet, *Constitutional history of Germany – Background*, in http://constitutionnet.org/country/constitutional-history-germany

[82] ConstitutionNet, *Constitutional history of Germany – Background*, in http://constitutionnet.org/country/constitutional-history-germany

[83] *Ibidem*.

It is of the utmost importance to specify that at the time the Basic Law did not receive much support from the German people: on one hand the memories of the failure of the Weimar Constitution were still fresh, on the other it was perceived as a document created under the occupiers' orders and that was never submitted to a referendum. These antagonistic sentiments slowly started to fade leading up to the decision of making the Basic Law, after a few amendments, the official constitution of the reunited Federal Republic of Germany.[84]

4.2 Art. 79 and the Constitutional revision of the Basic Law

Aware of the easiness with which Hitler could change the Weimar Constitution, the drafters of the Basic Law decided to insert an article specific to the methods of constitutional revision, namely Art.79.

Following are the key extracts from Art.79:

> « **(1)** This Basic Law may be amended only by a law expressly amending or supplementing its text. (...)
> **(2)** Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat».[85]

As it can be seen from Art. 79 (2), it is quite hard to amend the Basic Law and this feature has to be dated to the times of the Weimar Constitution, which in many regards has been used as a negative example in the drafting of the Basic Law.[86] According to Art. 76 of the Weimar Constitution, a constitutional revision could be actuated with a legislation and with the presence of two-thirds of the members of the *Reichstag*. This meant that the Weimar Constitution could be

[84] Broehmer J., *The Genesis Of The German Constitution - From Total Devastation To The Dawn Of A New Era, Schriftenreihe Öffentliches Und Internationales Recht*, Peter Lang Publishing Group, 2010, 2.
[85] The Basic Law
[86] Preuss U.K., *The Implications of Eternity Clauses: The German Experience*, in *Isr. L. Rev.*, 2011, Vol. XXXXIV, 435.

easily amended with less than fifty per cent of the members of the Lower Chamber. The *Reichsrat*, the *Lander* representative, was in this sense completely disregarded as it held no decisional power over matters of constitutional revision.

It has to mentioned that these requirements for amending the constitution were not rare at the time: there were in fact many other constitutions, such as the Polish one of 1921, which had even fewer restricting requirements.[87]Given the easiness of amending the Weimer Constitution and the tragic event that followed it, the drafters of the Basic Law made sure that any new amendments were to be hard to be implemented.

Additionally, they divided the structure of the Basic Law into two components: amendable and immutable. In Art. 79 (3)

> «Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be *inadmissible*. »[88] (emphasis added)

is highlighted how certain principles, such as the ones concerning the preservation of life, human rights and human dignity to mention a few, should never be able to be amended, even in a case of a supermajority in both the *Bundestag* and the *Bundesrat*.[89] This immutable characteristic has also been associated to the term "eternity clause", which embodies the idea that said principles may never be removed or amended by the traditional channels, but can only be amended «**by** the extra-constitutional power of the German people (i.e., the constituent power)».[90]

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[87] Preuss U.K., *The Implications of Eternity Clauses: The German Experience*, in *Isr. L. Rev.*, 2011, Vol. XXXXIV, 429-448.
[88] The Basic Law
[89] Preuss U.K., *The Implications of Eternity Clauses: The German Experience*, in *Isr. L. Rev.*, 2011, Vol. XXXXIV, 439.
[90] Preuss U.K., 440.

It is important to notice that it is harder to amend the Basic Law compared to the Weimar Constitution, not only due to the majority that is required, but also for the specific intentions for amending it which have to transpire from the law. Art. 79 (1), in fact, states that a law cannot produce constitutional amendments, «even if it has enacted with a two-thirds majority in both houses of parliament», unless it specifically expresses the intention of amending it.[91]

As for what concerns armed conflict, the Basic Law has only been amended in a few specific occasions so to allow Germany to participate in them. The article on the limitations on the use of force (Art. 87a), which will be profusely analysed in Chapter 5, is not as specific and limiting as Art.9 of the Constitution of Japan, thus it does not entail a direct amendment to the Basic Law for Germany to participate into active conflicts, and the Constitutional Court's rulings can be considered enough for the interpretation of specific articles. Additionally, the German membership to NATO (North Atlantic Treaty Organisation) and the American need of an additional European ally during the Cold War, and after, immensely helped the German cause when it came to the participation in armed conflicts, which as it will be seen in the following chapters, has been extremely rare. These elements, along with Art. 87(a) will be discussed in the following chapter.

[91] Preuss U.K., *The Implications of Eternity Clauses: The German Experience*, in *Isr. L. Rev.*, 2011, Vol. XXXXIV, 441.

5. Art.87(a)and Art. 24(2) of the Basic Law: historical background and legal implications

Art. 87(a) of the Basic Law deals with the use of the military forces or *Bundeswehr.*
Following are the relevant passages of said article:

> « (1) The Federation shall establish *Armed Forces for purposes of defence*. Their numerical strength and general organisational structure must be shown in the budget.
>
> (2) *Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law*».[92] (emphases added)

As it can be seen, Art. 87(a) emphasises that the German armed forces must be used for self-defence purposes and only to the extent permitted by the Basic Law itself. In no article of the Basic Law it is expressed the idea that Germany can declare war or use its military forces to engage in an active offensive conflict. In this regard, it has been argued that the original intent of Art. 87(a) was exclusively alluding at a ban on the domestic deployment of the *Bundeswehr*, rather than a more general kind of deployment, resulting in a de facto no obstacle to a non-defensive military intervention outside of the German border.[93]

As one can discern from the simple wording of said article, however, it does not expressively specify that the ban on the military deployment is to be referred only to the domestic one, and as such it can also be extended, more generally, to the idea that the Basic Law prohibits all kinds of offensive military deployments. The general understanding of Art. 87(a) has in fact been the mainstream

[92] The Basic Law
[93] Miller R.A., *Germany's Basic Law and the Use of Force*, in *Ind. J. Global Legal Stud.*, 2010, Vol. XVII, 202.

interpretation that has been followed in regard to the German participation into peacekeeping operations and armed conflicts.

This strict behaviour towards German participation into armed conflict is a direct consequence of the atrocities committed by the Third Reich prior and during the WWII. It should thus come as no surprise that the drafters of the Basic Law, especially since it was designed a few years after the end of the war, were determined to minimise the activity of the *Bundeswehr.* If this is the constitutional layout, however, how was Germany able to participate in active operations, such as the UN peacekeeping ones, without falling into a constitutional contradiction? Answers to this question can be found in the historical developments of the period following WWII.

During the early years of the Cold War, many political and social factors helped in spreading the idea that the *Bundeswehr* was supposed to be *exclusively* used for the "purpose of defending NATO territory" as laid out in NATO itself, which the Federal Republic of Germany (hereon FRG) joined in 1956 after the debacle of the European Defence Community.[94] In the occasion of joining NATO, the Basic Law's Art. 24(2)

– the following article is already the amended version –

> «With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as will bring about and secure a lasting peace in Europe and among the nations of the world. »[95]

[94] Miller R.A., *Germany's Basic Law and the Use of Force*, in *Ind. J. Global Legal Stud.*, 2010, Vol. XVII, 202.
[95] The Basic Law

was amended in order to allow the West German state to actively contribute to NATO's operations against communist forces, in the case of aggression, without having to incur into issues of unconstitutionality of the participation or deployment of German troops.[96] This instance was the first time the Basic Law was amended in regard to the use of its armed forces, whether it to be inside or outside of the German territory. Despite this change to the Basic Law, however, the FRG did not start to defensibly participate in a conflict and continued with its pacifist and non-engaging attitude.

In 1968, the Basic Law's provisions on the use of military forces were once again amended in the «context of drawing up a so-called constitution on the state of emergency». [97] This new amendment was supposed to allow the FRG to participate more freely in North Atlantic Treaty Organisation and United Nations (hereon UN) operations in the case of a communist invasion, which at the time – after the Korean War and the beginning of the Vietnam War – seemed to be more likely than ever before. Having amended the Basic Law, one would assume that the German engagement into military conflicts started to rise. This scenario, however, never occurred and one has to wait until the 1990s to see a German involvement into peacekeeping and humanitarian operations. This apparent incoherence between the legal realm and the foreign policy one can be explained also by the strong pacifist and anti-engage sentiment which characterised the FRG at the time and arguably still characterises it today.[98]

This sentiment, which declared that the only way for Germany to engage in active conflict was to participate with other nations only in defensive missions was also supported on one hand by the continuous reminder of the atrocities

[96] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 246-294; Baumann R. – Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001, Vol. X, No. I, 61-82.
[97] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 246-247
[98] *Ibidem*.

committed by the Third Reich – which continued to scare of a possible offensive involvement of the *Bundeswehr* – and on the other by the constitutional provision which entails that every German citizen had the right to object to the compulsory military service or conscription for matters of conscience.

This pacifist attitude towards any kind of German involvements also finds its roots in the widespread anti-militarist sentiment which was characteristic of the German society right in the aftermath of the Second World War as well as during the Cold War. The *Bundeswehr* was in fact created as a mean of deterring war and general warfare rather than as a mean of actively engaging in conflicts and fighting wars.[99] Given the structure of Art. 87(a), in fact, the *Bundeswehr* was not legitimised as an offensive mean to the end of making war, but as a mean to prevent the «outbreak of war in Europe», and thus serving in it was considered to be a «service for peace».[100]

This idea of rejecting war was cultivated in the *Bundeswehr* itself, by the promotion, via the educational system of the troops themselves, that German disarmament was the only salvation for mankind as war itself represents its defeat. It has to be mentioned, however, that this idea of a pacifist *Bundeswehr* was challenged in the early 1980s. In 1982, the Federal Security Council, following an interpretation of the Foreign Office, declared that the *Bundeswehr* deployment – including the ones outside of German territory – were to be considered constitutional only in the case of an attack against the FRG and only if it is «executing its right of self-defence», whether it to be on its own or as a part of a coalition of other states which are simultaneously being attacked.[101]

This decision recalls the defensive provisions laid out in Art 87(a) of the Basic Law and it can be argued that it furthered it as it clearly states that, at the time,

[99] Hoffmann A. – Longhurst K., *German Strategic Culture and the Changing Role of the Bundeswehr,* in *WeltTrends,* Vol. XXII, 1999, 145- 162.
[100] Hoffmann A. – Longhurst K., 148.
[101] Hoffmann A. – Longhurst K., 149.

Germany could constitutionally participate to a defensive action of a coalition of states opposed to just its territorial defence, as it was before. This opening attitude can be considered as the first change in the foreign policy agenda of the FRG almost twenty years after the amendment to Art. 24 of the Basic Law.

Additionally, the pacifist sentiment which characterised the population at the time and which arguably still characterises it today – this concept will better be examined in Chapter 6 – was slightly challenged by the events which characterised the early 1990s. With the crises in Bosnia-Herzegovina and Somalia to mention a few, Germany had to show its NATO allies its willingness to actively participate into the conflicts by deploying its forces also in situations which were outside the purpose of defending Germany or a NATO member's territory.[102]Its first participations into these armed conflicts were characterised with a support to NATO and UN peacekeeping operations in Somalia, Bosnia Herzegovina and Serbia-Montenegro.

The German decision to participate into these types of conflicts, which were drastically diverging from the constitutional dogma on armed conflicts, was declared by the Federal Constitutional Court (hereon known as Court or FCC)'s decision, which upheld the constitutionality of said deployments by reiterating the government's obligations to uphold the promises made in international treaties such as the UN Charter and the NATO Treaty.[103] After the Court's decision, other two judgements – one delivered in 1993 and the other in 1994 – by the Second Chamber' of the German Federal Constitutional Court (FCC) in Karlsruhe, helped in further clarifying the German role in the international context.[104]

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[102] Miller R.A., *Germany's Basic Law and the Use of Force*, in *Ind. J. Global Legal Stud.*, 2010, Vol. XVII, 201

[103] Miller R.A., 202.

[104] Wiegandt M.H., *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, in *U. J. Intl L. &Pol'y*, 1995, Vol. X, 889.

The 1994 AWACS[105] I judgement (also known as Armed Forces judgment) specifically dealt with the deployment of the troops in the UN peacekeeping operations in Somalia and ex-Yugoslavia and it was regarded as a green light to allow Germany to be fully engaged in such operations while providing the foundations for a more engaged role in the post-Cold War era and rendering Germany equal to its European neighbours once again.[106]

These rulings are extremely important under a constitutional point of view, for they allowed Germany to constitutionally participate into foreign operations without having to amend the core nature of Art. 87(a) of the Basic Law. On a more technical note, the FCC could pursue with its decision as Art. 24(2) itself allows room for such interpretation. Since the article states that «with a view to maintaining peace, the Federation may enter into a system of mutual collective security», it was interpreted that this provision allows for a de facto «constitutional authorization to enter into such a defensive system(as it)constitutes the basis for fulfilling the tasks typically connected with such a system, such as the deployment of troops.»[107] In this regard, the FCC officially stated that both the UN and NATO are considered to be defensive systems and as such fall under the provisions laid out in Art.24(2). It is thus why the German participation in the UN Security Council resolutions 713, 724 and 757 (Yugoslavia) and resolutions 781 and 816 (Bosnia Herzegovina) were declared constitutionally admissible by the FCC.[108]

[105] Airborne Early Warning and Control System

[106] Ziegler K.S., Jennings R., *Parliamentary War Powers, The Constitutional Framework of Military Deployment Decisions in Germany*, University of Leicester School of Law Research Paper, 1.

[107] Wiegandt M.H., *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, in *U. J. Intl L. &Pol'y*, 1995, Vol. X, 905-906

[108] Wiegandt M.H., 906-907.

At this point in can be argued that although Art. 24(2) allowed for said interpretation, it never explicitly stated that Germany *had* to deploy its troops in order to maintain peace, only that it could join collective defensive systems if so were to wish. This lack of clearness is in direct contrast with the provisions laid out in Art.87(a), as the extent of the deployment is not *expressly* permitted in Art. 24(2).[109] This contrast should thus make the FCC's decision void as it renders its interpretation unconstitutional. However, due to external political pressures on the German political elite to be a more participating country and due to the political sentiment itself – the Parliament unanimously voted for the deployment – the FCC decided that the above mentioned constitutional issues were not to be raised as such and thus decided to leave the interpretation of Article 87(a) open.

Another important step into allowing Germany to participate into said peacekeeping operations was the Court's decision, in a seminal judgement in 1994[110], to acknowledge «a constitution-based requirement for each military deployment to have parliamentary approval», meaning that not only Germany had the obligation to fulfil its duties as a member of the UN and NATO, but it also needed the permission of the parliament to do so.[111] This constitutional declaration became so important that in 2005 it was decided to codify it into a statute, thus rendering even more compelling the Parliament's authority over said matters. This involvement of the Court holds an important constitutional meaning as it legally represents another improvement of the constitutional dogma regarding the German involvement into armed conflicts without having directly amended the constitution: the Basic Law in fact remains unamended in this regard, but is nonetheless influenced by the Court's provision.[112]

[109] Wiegandt M.H., 908-909.
[110] Decisions of the Federal Constitutional Court] 90, 286, Judgment of 12 July 1994
[111] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 246.
[112] *Ibidem*.

The Court faced another constitutional dilemma in 2008, four years after the adoption of the Statute on Participation in the context of the 2003 Iraq War. At the time, fearing that it might become a target of Iraq, Turkey requested NATO's consultations following Art. 4:

> «The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened».[113]

Having proceeded with said consultations the Defence Planning Committee of NATO argued that actions were necessary and in February 2003 initiated Operation Display Deterrence, which objectives were to deter any kind of territorial threat to Turkey conducted by Iraq. Fear which will prove to be unfounded as, before and after the start of the Iraq War, the Iraqi air force never violated the Turkish airspace.

However, as a result of the consultation, Germany – along with other countries – provided its planes to guarantee Turkey's airspace surveillance, which was perceived by the German Court, among others, to be the prelude of a possible collective defence operation under NATOs Art. 5's aegis:

> «The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary,

[113] NATO Treaty

including the use of armed force, to restore and maintain the security of the North Atlantic area.»[114]

To achieve this German participation, the then German Chancellor Gerhard Schröder had to explain to its parliament that the decision of aiding Turkey under Art. 4 and Art. 5 of the NATO Treaty did not directly implied any kind of German involvement into the conflict against Iraq – seen as an offensive war and thus constitutionally precluding any German involvement – and as such it did not require the approval of the *Bundestag*.[115]

His statement, however, was to be disputed – four years later – by a faction of the FreieDemokratischePartei, (FDP), which criticised the overstepping decision of the executive in a matter that constitutionally belonged to the legislative. The Court aligned its decision with the complaint's claims and declared that the abovementioned airspace's surveillance was to be classified as a "deployment of armed forces" and thus required the *Bundestag*'s approval, even if the German troops were never effectively engaged in a combat.[116]Once again, the Court's ruling holds important constitutional implications: on one hand it highlighted that more clarity was needed as to discern in which occasion parliamentary approval was need, on the other it «offered a new rationale for the involvement of Parliament» further strengthening its role in this regard.[117]

The role of the Parliament is, however, strengthened up to a point, for although the Court's ruling states that the decision lays in the hand of the *Bundestag*, it

[114] NATO Treaty
[115] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 255; Aust P.H. – Vashakmadze M., *Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, in *German L.J.*, 2008, Vol. IX, 2226.
[116] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 255.
[117] *Ibidem*; Aust P.H. – Vashakmadze M., *Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, in *German L.J.*, 2008, Vol. IX, 2226.

never specified that «the modalities, the dimension and the duration of the operations, nor the necessary coordination within and with the organs of international organizations» were to be decided by the *Bundestag* itself.[118] Furthermore, the increasing German participation to international military operations and defensive systems (i.e. EU's PESCO's operations), represents in itself a challenge to the Parliamentary supremacy in matters of military deployment. In many operations, rapid responses are a core requirement, an element which, for obvious bureaucratic reasons, a parliamentary decision is not able to provide. Nonetheless, the FCC still classifies the Parliamentary authority over the deployment of the *Bundeswehr* as of the utmost importance.[119]

An exemplary instance in which the Parliament held a fundamental role in deciding whether to participate in a conflict was when in 2015 the *Bundestag* ruled with 445 positive votes (146 votes were negative and there were 7 abstentions) to deploy 1200 troops to fight against ISIS (Islamic State) after the German Government's formal request, in which it justified the German involvement in the fight against ISIS in line with the «exercise of collective self-defence» under Art. 51[120] of the Charter of the United Nations which is «covered by resolution 2249 (2015)».[121]

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[118] Aust P.H. – Vashakmadze M., *Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, in *German L.J.*, 2008, Vol. IX, 2226; Hakimi M., *Techniques For Regulating Military Force,* University Of Michigan Public Law And Legal Theory Research Paper Series Paper, 2018, No. 622, in Bradley C. (ed.), *The Oxford Handbook Of Comparative Foreign Relations Law*.

[119] Aust P.H. – Vashakmadze M., *Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case*, in *German L.J.*, 2008, Vol. IX, 2223.

[120] "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."* Taken from Chapter VII — Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, Charter of the United Nations

[121] *German Parliament decides to send troops to combat ISIS − based on collective self-defense "in conjunction with" SC Res. 2249*, in

The constitutionality of the German participation into the fight against the Islamic State, however, is being currently review by the Court, which will have to declare whether the German participation into various operations as a member of specific coalitions can be considered as constitutional or unconstitutional. Additionally, it is of the utmost importance to specify that due to the recent German participation in various coalitions, doubts have been raised if this provision also covers said operations or only some of them.

Regarding the legal and constitutional implications, these FCC's judgements, especially the 1994 one, can be considered fundamental due to various reasons: firstly, it has declared that the German Constitution allows for a German deployment outside of its immediate territory, specifically in the case when such deployment is conducted as part of a collective defence system operation.[122] Secondly, despite some instances which have been previously mentioned, it established the necessary role that the *Bundestag* must have in deciding whether to deploy the troops or not; thirdly, this FCC's judgement greatly contributed to the interpretation of the Basic Law and allowed Germany to have a more international and interventionist role. Lastly, it is important as it legally declared whether certain types of deployment of the German forces outside of its territory were to be considered constitutional or unconstitutional, a debate which was highly controversial at the time.[123]

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http://www.ejiltalk.org/german-parlament-decides-to-send-troops-to-combat-isis-%E2%88%92-based-on-collective-self-defense-in-conjunction-with-sc-res-2249/; BT Drs. 18/1866, p.3.

[122] Hoffmann A. – Longhurst K., *German Strategic Culture and the Changing Role of the Bundeswehr*, in *WeltTrends*, 1999, Vol. XXII, 145-162.

[123] Hakimi M., *Techniques For Regulating Military Force,* University Of Michigan Public Law And Legal Theory Research Paper Series Paper, 2018, No. 622, in Bradley C. (ed.), *The Oxford Handbook Of Comparative Foreign Relations Law*.

5.1 Other relevant constitutional provisions: Art. 26 of the Basic Law

Along with Art 87(a) and 24(2) there are many other provision – inside the Basic Law and in other treaties which Germany has signed (i.e. NATO Treaty and UN Charter) – which are important for the understanding of all the legal elements which help in determining the constitutionality of a possible German deployment and involvement in international military operations. For instance, Art. 26, which deals with the ban on an aggressive war, is also relevant to show how Germany deals with the issue of initiating or participating in an offensive conflict, rather than defensive. This article is important because, along with Art. 87a and Art. 24(2), it helps in giving a more holistic understanding of the German sentiment and legal approach to the use of its military forces.
Art. 26, in fact, is concerned with the practices to follow in order to secure international peace and thus is linked to the German unconstitutionality of preparing a war of aggression:

> «(1) Acts tending to and undertaken with intent to disturb the *peaceful* relations between nations, *especially to prepare for a war of aggression, shall be unconstitutional.* They shall be criminalised. »[124] (emphasis added)

The fact that the word "peaceful" is specifically inserted in the article highlights once more the importance that renouncing war and maintaining peace have for not only the drafters of the Basic Law, but also for the German people.

[124] The Basic Law.

5.2 Arts. 42-46 of The Treaty on the European Union[125]

Another important article which has an influence on the constitutionality of German's participation into armed conflict is Art. 42(1) of the TEU (Treaty on the European Union).[126] This article, along with Art. 43, 44, 45 and 46, can be inserted in the European scheme for a Common Security and Defence Policy and helps in determining the constitutionality behind a possible German participation into a conflict. Art 42(1) states that:

> «The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. *The Union may use them on missions outside the Union for peacekeeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.* The performance of these tasks shall be undertaken using capabilities provided by the Member States. »[127](emphasis added)

As one can see from the article, the European Union itself requires that the member states, of which Germany is not only a member but also one of the founding fathers, provide it with an operational capacity which will draw on civilian and military assets and which will be used in territories outside of the European boarders for peacekeeping and conflict resolution operations. This provision in itself would be contradictory to the ones stated in the Basic Law which have been discussed before, if the FCC had not ruled in multiple occasions the circumstances in which a German participation can be considered constitutional.

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[125] Consolidated version of the treaty of the European Union
[126] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, 246-294.
[127] Consolidated version of the Treaty on European Union (2012/C 326/01), in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT

Furthermore, since this article somehow obliges the member states to participate in peacekeeping operations if the EU were to require them to, and in no circumstance allows the member states to refuse to provide with what the EU needs, the provisions of the Basic Law are to be considered "secondary" to the European Union's legal framework as it is dictated by the constitutional supremacy of the European Laws over the national ones – for further reference see the Art. 23 GG which states that the EU law has primacy over German Law.[128]

It is important to notice, however, that although this provision somewhat obliges Germany to contradict article 87(a) of the Basic Law it also states that a country has to contribute to the required "operational capacity" in a way which has been decided by the member state itself – «the performance of these tasks shall be undertaken using capabilities provided by the Member States» – meaning that although a state is required to provide with some military support, it is not imposed on the state how much of said capabilities it is to provide and if that state is to actively deploy its troops in the mission. The articles in fact only state that the member state is required to contribute to the European scheme for a Common Security and Defence Policy and its operational capacity, but in no regard it does state that the EU has a decisional power over the deployment of a member state's troops.[129]

An example is represented by Arts. 43–46 TEU which concern the uses of military forces under the aegis of the European Union. Art. 43(2) states that although the concrete missions and measures to be taken must be decided by the Council, the actual performance in these operations and the ability to contribute

[128] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, No. II, 246-294.
[129] Peters A., 250.

to said operations falls onto the member states. Furthermore, the articles above mentioned, although imposing on the necessity of contributing to the European scheme for a Common Security and Defence Policy, do not remove – in the German case – the authority of the *Bundestag* over the decision to concretely deploy German troops. Therefore, any German deployment will still require the parliamentary approval even if the operation/mission in question is to be conducted under the aegis of the European Union.[130] This requirement of receiving parliamentary approval before any kind of deployment in fact cannot be overruled by any EU Law.

In this regard, there have been instances in which Germany could participate into EU missions, without having to resort to FCC's rulings and without finding itself in a contradictory position with the Basic Law. An example is the German participation into the Permanent Structured Cooperation Operations (PESCO), to which Germany participates on a voluntary basis. This possibility of participating to said operations was introduced in 2017, following Art. 42(6) of the TEU, which states:

> «Those Member States whose military capabilities fulfil higher criteria, and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. (…) »[131]

This article allowed Germany to freely deploy its troops within the EU framework without imposing it on the country. Given that this participation is, in fact, on a voluntary basis, the *Bundestag* can more easily vote in favour or against a German participation without having to involve the FCC for a ruling and without being in contrast to the provisions outlined in the Basic Law, for

[130] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, 257.
[131] Consolidated version of the Treaty on European Union (2012/C 326/01), in https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT

PESCO allows «willing and able member states to jointly plan, develop and invest in shared capability projects, and enhance the operational readiness and contribution of their armed forces».[132]

Given this analysis of all the articles, provisions and Court's rulings which have allowed Germany to participate more "freely" – if compared to article 87(a) of the Basic Law – to peacekeeping operations and armed conflict resolution missions, one must not be surprised on one hand of the ongoing debate on the constitutionality of certain participation and on the other of all the external actors and circumstances which have helped the Germany to participate in said operations. Provision held in the UN treaty, the NATO Treaty, the TEU and the FCC's rulings itself have all played a major role in defining the constitutional background and have all given legal justification to the German decision to participate or not to participate in certain conflicts/peacekeeping operations/etc.

After having looked at the legal and constitutional foundations on which Germany lays its justification for international participation in regards to armed conflict resolution and peacekeeping operations, it is important to mention that although after the two amendments to the Basic Law in terms of military engagement and the various Court's orders Germany never participated to armed conflicts or humanitarian operations, the situation changed after 1992, which can be considered as the turning point as it was when the German forces were deployed abroad for the first time. Since then, the *Bundestag* has approved more than a hundred and thirty mandates, amounting to more than sixty humanitarian and peacekeeping operations.[133]

[132] European Defence Agency, Permanent Structured Cooperation (PESCo), in https://www.eda.europa.eu/what-we-do/our-current-priorities/permanent-structured-cooperation-(PESCO)

[133] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, No. II, 257.

The following chapter will analyse the German involvements and the political climate behind them, taking into account the legal provisions and the Court's verdicts which have been previously analysed.

6. Germany's international missions and operations: when, why, how?

As it has been outlined in the previous chapter, Germany has participated to some peacekeeping operations under the aegis of the UN, OSCE, NATO and the EU. In the following pages, will be presented the operations – both concluded and ongoing – in which Germany has participated over the course of the years since its first amendments to the Basic Law.

Before starting with the analysis of the missions to which Germany participated, following is the comprehensive list of all the UN peacekeeping operations in which Germany participates. Currently it is involved in nine UN missions and, although involved in various UN operations, its efforts have been focused on the MINUSMA operation – the UN peacekeeping operation in Mali, which is Germany's largest operation to date.[134]Other UN missions to which Germany is currently contributing with either funds, troops and police forces are UNIFIL[135], MINURSO[136], UNMISS[137], UNAMID[138], UNMIK[139], UNMIL[140], UNSOM[141] and MINUJUSHT[142]. As for the contributions to the UN budget, Germany, which is currently contributing six per cent of the UN budget, is the fourth-largest contributor, after the US, China and Japan.

[134] Federal Foreign Office, *UN peace missions and Germany's engagement*, in https://www.auswaertiges-amt.de/en/aussenpolitik/internationale-organisationen/vereintenationen/germanys-engagement-un-peace-missions/229116; Samaan J.L. – Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15.
[135] Lebanon
[136] Western Sahara
[137] South Sudan
[138] Sudan
[139] Kosovo
[140] Liberia
[141] Somalia
[142] Haiti

Although, this high contribution to the UN budget might seem contradictory to the thesis that the German people were and, in some regards, still are quite pacifist, it can be explained by the German belief that these missions might be one of the best tools to efficiently prevent and resolve wars and conflicts. It can in fact be argued that Germany, although still reticent towards the use of force, considers said operations as tools to primarily promote peace and cooperation among states.[143]

6.1 History of the German intervention in peacekeeping operations

In the previous chapters it has been hinted that, since its loss of the Second World War, Germany has been characterised by a military culture which can be defined as a «culture of restraint». This reticence in participating in conflicts or peacekeeping operations, despite it being able to do so after a few constitutional amendments and FCC's rulings, is exemplary of this pacifist attitude which characterised Germany and still characterises it today.[144] Furthermore, it can be argued that, except for two instances, Germany has never participated in a mission or operation which was not considered as part of a common scheme of defence or a common effort to restore peace.[145]

The following table (Table 1) summarises not only the increase of German participation in multilateral operations since the late 1990s, but also the development of its contributions – in terms of quality and quantity –to the various missions in which it decided to participate. Table 1 will not be a comprehensive list of all the missions in which Germany participated, for its

[143] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 61-82.
[144] *Ibidem*.
[145] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 67.

purpose is to show the increase in international engagement of the still reticent German Republic after the 1990s.

Table 1[146]

Military Operation/Conflict	**Type of contribution**	**Year**
Persian Gulf	Germany provided logistical support only: it dispatched its ships in Mediterranean, but not in or near the Gulf region	1987
UNTAG (Namibia)	Germany provided support to the international police forces	1989
Gulf War	Germany was not actively engaged. It only offered financial and logistical support	1990-1991
UNAMIC (Cambodia)	Germany dispatched its medical troops	1991-1992
Operation Sharp Guard in the Adriatic	It offered its ships in the Mediterranean Sea but not for a combat operation	1992-1996
(UNOSOM II)– Somalia	It gave supplies and transport units	1993-1994

[146] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 67.

(UNPROFOR) – Bosnia-Herzegovina	It offered only its logistical support	1993-1995
Bosnia-Herzegovina	It provided with air force personnel, but it never participated in the NATO's airstrikes	1993-95
(UNOMIG) – Georgia	As part of the UN peacekeeping coalition it offered medics and military observers	since 1994
(IFOR) – Bosnia Herzegovina	It stationed in Croatia roughly 3000 non-combat troops	1995-96
(SFOR) – Bosnia Herzegovina	It stationed in Bosnia Herzegovina 3000 troops (both combat and non-combat troops)	since 1996
Iraq	As part of the US-led air raids against Iraq, Germany allowed the American troops to use its military bases, but it never participated in the attacks	1998
Kosovo	Germany participated in a verification mission under the aegis of OCSE, which was characterised by unarmed troops; it also	since 1998

	participated in the NATO air strikes although they had not received the mandate from the UN Security Council	
Iraq	Support to Turkey for fear of an invasion	2003
ISIS	Deployment of 1200 troops to fight against ISIS	2015

As one can see from Table 1, Germany's involvement in international peacekeeping coalitions has exponentially increased in the 1990s. It is of the utmost importance to mention, however, that despite this increase, Germany never directly participated in the armed conflicts or peacekeeping operations, but only offered its logistic and medical support, along with providing supplies and although it has in some occasions offered combat troops, they were never engaged in active combat. Therefore, the pacifist attitude mentioned before is perfectly represented in the operations Germany took part in and shows that in the German case an increase in participation does not necessarily mean a shift in its reticence to participate into conflicts and its culture of restraint.[147]

As for what concerns the political and public sentiment towards the above-mentioned operations, one has to look at various factors, as in some instances – such as the decision to participate into the fight against ISIS – the German decision has been profoundly influenced by external actors. Starting from the

[147] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, No. II, 257.

first German participation, one has to look back to the political climate of the 1980s. At the time the Berlin Wall was still a reality and, although policies such *Ostpolitik and Perestroika*, greatly helped the relationship between the two Germanies, the Cold War continued to pose a threat to international peace and security. As we already mentioned, however, even at a time of great uncertainty, West Germany never championed its active engagement in international operations.

The consensus of the federal government's Security Council (*Bundessicherheitsrat*) in 1982 was that, although it had been amended in its Art. 24(2), the Basic Law prohibited any kind of deployment of the *Bundeswehr* outside of the German territories, whether it be under the aegis of an international organisations or as a unilateral decision of the FRG. This non-interventionist view was challenged by various German legal authorities which considered Art. 24(2) provided the constitutional justification for a German participation into foreign peace operations.

Despite the legality behind a possible intervention, however, both the political elites and the public were reticent in accepting a German involvement outside of its direct territory. The rationale behind said sentiment can be traced back to the general idea that Germany were to be a peaceful country, which promoted peace and repudiated the offensive use of force as the primarily solution to an international conflict.[148]

This consensus started to be challenged also by some members of the political elite around 1987, which marks the first German international participation into a dispute. At the time, the US had some clashes with Iran while it was attempting to «secure the passage of Kuwaiti oil tankers in the Persian Gulf» and, in need of assistance, the US asked its European allies to provide military support in

[148] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 61-82.

order to aid them in the conflict.[149]Given the increasing pressures from its allies over the years of the Cold War, Germany had to start showing its willingness to participate into the international arena.

However, even though the German government was directly asked by the Reagan Administration to provide ships to be sent to the Persian Gulf in order to offer military protection, it managed to limit its participation and support due to its constitutional restrictions. Following Art. 24(2) in fact Germany stated that it could only participate in the NATO area of jurisdiction and could thus not participate into the conflict with the means and with the modalities which the US was demanding.

As this instance shows, although some members of the political elite, both inside and outside Germany, were pushing for a more active participation, Germany wanted to maintain its constitutional stance on participating in international conflicts and posed itself in opposition to the request not only of the American Administration but also of the German Ministry of Defence, which had previously proposed a further interpretation of the Basic Law so to allow the *Bundeswehr* to have more room for manoeuvre.[150]

This operation can be considered one of the most important missions to which Germany had participated, not for its scope or its degree of involvement, but because it marked the first time Germany agreed to participate into an international conflict as well as for it started a political and public debate internal to Germany itself about the role that the *Bundeswehr* should have in said circumstances and whether the Basic Law could be interpreted in a more open manner.

[149] Baumann R. - Hellmann G., 68.
[150] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, No. II, 246-294.

The Gulf War posed an even bigger challenge to the German military reticence. At the time, Germany was preoccupied with the so called "Two-plus-Four" negotiations, which scope were to lead the country to a German reunification and as it might seem obvious the political discourse was concentrated onto uniting the country and on the role which this "new" country were to take in the international arena. A united Germany meant that the country had to burden more responsibilities both in the European and in the international context and as such the «policy of the good example (*Politik des gutenBeispiels*)»and the «policy of responsibility (*Verantwortungspolitik*)» were considered imperative given the more important role that Germany had to take once reunited.[151]

In this climate, the political elite continued to stress the importance that Germany had a responsibility to build «a new culture of international co-existence», which meant pursuing its restrained and anti-militarist culture.[152]From a German point of view, an active German participation in the Gulf War would be, therefore, considered to go against these positive policies and resolutions. Amidst this reluctance, the Bush Senior Administration asked the then German Chancellor Helmut Kohl to actively participate in the conflict by deploying some of its troops. As it happened for the Persian Gulf conflict, some members of the political elite stressed the impossibility of doing so under the obstacle posed by the Basic Law. What differs from the above-mentioned conflict, however, is that this time the political debate on whether Germany should be able to participate into a conflict became more agreed upon by the members of the government.[153]

Several politicians, among which many of the Christian Democrats stressed that the constitutional limitations on military deployment posed by the Basic Law

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[151] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 69.
[152] *Ibidem*.
[153] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, No. II, 246-294; Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 61-82.

should no longer be considered as a justification – «a shield and pretext»–for a German non-intervention, but should, on the contrary, be used as a pretext to overcome them, possibly amending the Basic Law itself. As a consequence of this debate, the public became polarised into two opposing views: on the one hand, the idea that some of the Christian Democrats, among others, were pushing for a militarisation of Germany, on the other, the idea that an amendment to the Basic Law would allow Germany to normalise its international role and be able to shoulder the same responsibilities as its allies.[154]

It can, thus, be argued that the debate which was born out of the request of the Bush Senior Administration to receive some German troops created an unprecedented split in the public and political opinion on the international role of Germany: if before Germany had always been characterised by a categorical non-interventionist attitude, now some were questioning the same values of restrain which had characterised Germany in the second post-war period. As we have mentioned before, this debate was also instrumental not only in creating an alternative current to the pacifist one, but also in redefining the legal boundaries «for a legitimate German use of military force».[155]

It is imperative to notice, however, that although the deployment of which it has been previously talked about marks an important shift in the political and public sentiment towards a possible intervention of the German troops in international conflicts, they do not mark a complete change in the commitment that Germany decided to undertake when doing so. These two operations, in fact, have seen little to none active participation of the *Bundeswehr* itself. Nonetheless they are the clear example of an increase in the magnitude of the German contribution: there have been a shift from medical troops – which were sent to the 1991-2

[154] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, No. II, 247.
[155] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 71.

UNAMIC operation in Cambodia – to the dispatch of supply transport and supply units – as part of the 1993-4 UNOSOM II operation in Somalia.[156]

At a first glance, this analysis seems to point into the direction that with the German participation in the Gulf War, the sentiment of the political elite and of the public were radically changed from before, somewhat resolving the heated debate which surrounded this issue. This, however, was never the case as, although the political elite's perspective and public opinion started to show a more sympathetic attitude towards the *Bundeswehr*'s deployment, the dispute was far from settled. For its partial settlement, various rulings of the FCC will be required throughout the course of the German participation into multilateral operations – as it has been outlined in the previous chapters.

As for what concerns the debate surrounding the role of the *Bundeswehr*, from the moment the FCC delivered its rulings, new ideas about what a German intervention would mean and entail started to emerge not only in the political discourse, but also among the German public. In light of the 1995 atrocities which were committed in Srebrenica, the two opposing perspectives on what a military intervention should be started to merge into a more interventionist one. The political elite as well as the public opinion started to agree that the «legacy of German history should not only be to call for 'No more wars!' (*Niewieder Krieg!*) but also for 'No more Auschwitz!' (*Niewieder Auschwitz!*)» for many in Germany started to struggle to reject the similarities between the atrocities perpetrated in the Balkans and in Auschwitz.[157]

This development in the German perspective, however, although it shows a softening on the constitutional and sentimental rigidity towards the participation into armed conflicts and peacekeeping operations, must not be interpreted as a

[156] Baumann R. - Hellmann G., 72.
[157] Baumann R. - Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001. Vol. X, 75.

radical shift from the pacifist and reticent attitude which had characterised Germany since the Bonn Republic. On the contrary, it has to be interpreted as the development of a society which decided that it was better to participate into resolving a conflict – within the constitutional frame set by the Basic Law – rather than shying away from its responsibilities towards its allies.[158]

By no mean, however, this means that the German society can be considered a militarist one. For instance, when the *Bundestag* decided to send some of the *Bundeswehr*'s troops to fight in Afghanistan in 2001, the government had to justify the *Bundestag*'s decision from a strongly anti-war public. Since the end of WWII, the public had completely lost faith in the military, which had been forced be the scapegoat and as such to accept the blame of being the reason for the defeat in the war. Therefore, the fact that now Germany was participating into peacekeeping operations or missions such as Enduring Freedom, must not be interpreted as a restoring of the militarist glory which characterised the military under the Nazi Regime, but more as a sensibilisation towards international issues.[159]

6.2 Other peacekeeping operations

As it has been mentioned before, Germany participated to various peacekeeping operations and armed conflicts, many more of the ones which have been shown in the previous chapter. Since 1987, Germany participated to over one hundred and thirty mandates, resulting in more than sixty different operations. Additionally, in 2017 alone the *Bundestag* issued seven mandates, among which

[158] Samaan J.L. - Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15.
[159] Germany in Afghanistan - The German Domestic Dispute on Military Deployment Overseas; Samaan J.L. - Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15.

the participation in the UNIFIL operation in Lebanon, where one hundred and thirty-one troops are currently deployed.[160]

The other peacekeeping operations to which Germany participates so to follow the agenda of the EU Common Security and Defence Policy are under the aegis of the EU. Said operations are the anti-piracy operation ATALANTA (Somalia) and the anti-human trafficking operation SOPHIA (Mediterranean Sea). Additionally, of all the operations to which Germany participated, only two – the 1997 operation in Albania and the 2011 operation in Libya – were carried outside of a multilateral scheme.[161]

[160] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in Journal on the Use of Force and International Law, 2018, Vol. V, 246-294.
[161] *Ibidem*.

7. The Constitution of Japan and the Japanese procedure for constitutional amendment

7.1 History of the Constitution of Japan

As Germany, Japan was defeated during the Second World War and its new Constitution was adopted in 1947. During the time, the "occupation" forces of US General MacArthur had the task of drafting a new constitutional document which was to substitute the Meiji Constitution – which had been the Japanese Constitution since 1889. Despite it being a somewhat imposed Constitution – in this chapter it will be analysed to what extent the Japanese political elite contributed to the new Constitution – General MacArthur tried to avoid any sharp breaking between the Meiji Constitution and the new Constitution he had been tasked to draft. In this regard, he maintained the imperial structure of Japan, but he redefined its powers and the ones of the executive.[162]

Despite having tried to surpass the Meiji Constitution with a relatively forthcoming approach, General MacArthur decided to insert Art. 9 in the Constitution, legally limiting the might of Japan's military forces. It has been argued that this provision not only is an extremely punishing norm for a sovereign state, but it also is legally ambiguous. As for the legal ambiguity, the wording of Art. 9 – which is still part of the Constitution of Japan – appears to be a unique instance as it is not a declaration of intent, but it is more a restricting norm which has immediate and direct consequences on national politics. Moreover, Art. 9 appeared to be even more limiting for a country like Japan, which throughout its history held always a strong military tradition.[163]

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[162] Ramaioli F.L., *Addio alle armi: l'articolo 9 della Costituzione giapponese* in https://tesi.luiss.it/17578/1/073202_POLLASTRO%20CRUCIANI_LUDO.pdf

[163] *Ibidem*; Panton M.A., *Politics, Practice and Pacifism: Revisiting Article 9 of the Japanese Constitution*, in *Asian-Pacific Law & Policy Journal,* 2010*,* Vol. XI, 163-215.

Japan has always been a country which had been profoundly influenced by its military tradition. Throughout its history, in fact, many were the instances where Japan focused its national and foreign policies in light of a more militarised Japan. The Rising Sun was supposed to be able to not only face the threats from the outside but also show its prestige via the magnitude of its military capability. With the American "occupation" of General MacArthur – he was the Supreme Commander for the Allied Powers (SCAP) in Japan – the country went through various reforms, officially ending the "glorious" past of its military forces. MacArthur's aim was to swiftly transition towards a more democratic regime, also in light of its economic reconstruction and a fundamental step towards this goal was the adoption of the new constitution.[164]

In order to avoid a fall into the old authoritarian and militarist attitude of Japan, the drafter of the Constitution decided not only to maintain the Imperial structure, but also to introduce the infamous Art. 9, so to prevent any attempt at a rearmament. Before analysing the abovementioned article, however, it is of the utmost importance to provide some context to the historical elements which led to the adoption of the modern Constitution of Japan.

At the time of the drafting of the Constitution, there were three official committees which were tasked with the drafting of the Constitution: one lead by Matsumoto Jōji, who had been chosen by the Japanese government and whose task was to create a satisfactory way of revising the Constitution; his conclusions were later found inapplicable. Another committee was led by the Prince Konoe Fumimaro, whose task was the same as Matsumoto Jōji and whose efforts were nullified when he was arrested as a war criminal. The last committee was led by General MacArthur who had the task of drafting a new Constitution to be presented to the Japanese authorities for approval. It is important to point out

[164] Maki J.M., *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, in *Law & Contemp. Probs.*, 1990, Vol. LIII, 73; Kades C.L., *The American Role in Revising Japan's Imperial Constitution*, in *Political Science Quarterly*, 1989, Vol. CIV, 215-247.

that among the three committees only the proposal presented by General MacArthur was accepted.[165]

Given the fact that the Japanese elite was given the chance of participating into the drafting of the Constitution, it could be argued that the new constitution was not entirely imposed on the Japanese people. Contrary to this assumption, some have argued that the drafting of the Constitution of Japan can be defined as a form of «imposed constitutionalism», to put it in the words of Professor Feldman, as it came from a foreign and, at the time, occupying force.[166]

If one is, however, to look more closely to the processes which led to the drafting and then implementation of the Constitution, one can see that said process was only seemingly an imposition, as the Japanese elite often provided crucial contribution to the final drafting of the document. Additionally, MacArthur's aim was not to export *tout court* the American democratic layout – a feature that an imposed constructionism would require – but to create «a set of workable institutions, of whatever flavour, that fit local conditions». A contribution of the Japanese elite was thus fundamental if the General were to achieve his goal.[167]

At the beginning, the Japanese elite was reluctant to accept the new Constitution, mainly due to its Art. 9, for said article was perceived as too much of an imposing legal statement. Among the most vocal critics of this provision were member of the Cabinet Yoshida Shigeru and the then Prime Minister Shidehara, who both tried to stall before having to ratify the Constitution. Moreover, many members of the Japanese elite were against Art. 9 also because it was an imposed provision,

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[165] Ramaioli F.L., *Addio alle armi: l'articolo 9 della Costituzione giapponese,* in https://tesi.luiss.it/17578/1/073202_POLLASTRO%20CRUCIANI_LUDO.pdf; Losano M.G., *Il rifiuto della guerra nelle costituzioni postbelliche di Giappone, Italia e Germania*

[166] Elkins Z. – Ginsburg T. – Melton J., *Baghdad, Tokyo, Kabul: Constitution Making in Occupied States*, in *Wm. & Mary L. Rev.*, 2008, Vol. IL, 1140.

[167] Elkins Z. – Ginsburg T. – Melton J., 1140-1141.

for no Japanese would have ever even dreamt of limiting one of the sources of Japan's national and international prestige.[168]

Critiques were also moved against the Constitution in its totality as it had been perceived as extremely restricting especially since it prohibited the legitimacy behind Japan's self-defence. Even the attempt of Matsumoto to move Art.9 in the Preamble, thus reducing its legal importance, was ineffective, for General MacArthur presented Art. 9 as a way for Japan to maintain its imperial system as a sort of exchange: the right to an army for the chance of maintaining the imperial structure. Art. 9 was thus inserted in the new Constitution by the procedures set out in Art. 73 of the Meiji Constitution, which abolished itself.[169]

With the abolition of the Meiji Constitution in 1947, Japan officially ended its authoritarian regime, and entered a more democratic phase, maintaining nonetheless its Imperial structure.

7.2 Art. 96 and Constitutional revisions of the Constitution of Japan

After having removed the Meiji Constitution, General MacArthur wanted that also in the article concerning the revision of the Constitution Japan had a more democratic approach. To fulfil this aim, Art. 96 was created:

> «Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon *be submitted to the people for ratification,* which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify. *Amendments when so ratified shall immediately be promulgated by the*

[168] Ramaioli F.L., *Addio alle armi: l'articolo 9 della Costituzione giapponese,* in https://tesi.luiss.it/17578/1/073202_POLLASTRO%20CRUCIANI_LUDO.pdf.
[169] Maki J.M., *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, Law & Contemp. Probs., 1990, Vol. LIII, 73.

> *Emperor* in the name of the people, as an integral part of this Constitution».[170] (emphasis added)

As one can see from the wording of Art. 96, there are two important elements which should be analysed. On the one hand, the direct democracy approach to the method for the Constitutional revision: once the Diet has approved the decision of amending the Constitution, it is imperative that also the Japanese people agree with said decision. This provision not only marks a clear break from the past – in the Meiji Constitution the people were subjects and had no authority over the decision to amend the Constitution – but also renders ambiguous the simplicity by which the Constitution can be amended. In this regard, it could be either extremely hard to amend the Constitution or extremely easy, depending on the international circumstances (i.e. an external threat) and on the internal sentiment – more or less militarist.

On the other hand, the role of the Emperor, although merely ceremonial, is maintained. In this regard, Art. 96 should be read in conjunction with Art. 7 which states that:

> «The Emperor, with the advice and approval of the Cabinet, shall perform the following acts in matters of state on behalf of the people: *Promulgation of amendments of the constitution*, laws, cabinet orders and treaties (…)».[171] (emphasis added)

These two articles mark a clear break from the provisions laid out in the Meiji Constitution for they provide a democratic approach to the method of constitutional revision in Japan. Art. 73 of the Meiji Constitution – which concerned the amendments which could be made to the Constitution – showed a

[170] The Constitution of Japan 1947
[171] *Ibidem*.

much more authoritarian approach. Following is an extract of Art. 73 of the Meiji Constitution:

> «(1) When it has become necessary in future to amend the provisions of the present Constitution, a project to the effect shall be submitted to the Imperial Diet *by Imperial Order.*
>
> (2) In the above case, neither House can open the debate, unless not less than two-thirds of the whole number of Members are present, and no amendment can be passed, unless a majority of not less than two-thirds of the Members present is obtained».[172] (emphasis added)

As it can be seen by the wordings of the Meiji Constitution, the people had no decisional power over amending the Constitution, for only the Diet and the Emperor could decide. Additionally, another change from the Meiji Constitution has been the decreased power granted to the Emperor when it comes to amending the Constitution: if before he had the right of veto over the amendments which were proposed, after 1947 his role became only ceremonial.[173]

As far as amending the Constitution, it has never been amended but in recent years Prime Minister Shizo Abe has been pushing for amending Art. 9 in order to remove the impositions on the Japanese rearmament – this will be discussed in more depth in Chapter 9. If, however, the Constitutions has never been amended, there have been instances where it has been openly interpreted to allow a more relaxed application of Art. 9.[174]

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[172] The Meiji Constitution 1889.
[173] Motoyama K., *The Significance of the Provisions for the Renunciation of War and Abolition of Military Forces in the Japanese Constitution*, in *King's Law Journal*, 2015, Vol. XXVI, 285-298.
[174] Oliver D. – Fusaro C., *How Constitutions Change: A Comparative Study; Richard Albert. "The Structure of Constitutional Amendment Rules.",* in *Wake Forest Law Review*, 2011.

8. Art. 9 of the Constitution of Japan: historical background and legal implications

Art. 9 of the Constitution of Japan deals with the renunciation of war and the prohibition of using any kind of military forces by the Japanese people. Following are the relevant passages of said article:

> «(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*».[175] (emphases added)

Contrary to the relatively ambiguous wording of art 87(a) of the Basic Law, Art. 9 leaves no room for interpretations for it clearly states that with said article Japan renounces war and is forbidden to maintain any type of military forces as its right to be a belligerent country is not recognised. Many have argued that not having the *right of belligerency* means that Japan has no right to have self-defence forces along with "offensive" forces.

Their rationale was that Art. 9(1) makes no indications that the Japanese people should only renounce offensive forces opposed to both offensive and defensive forces for two distinct reasons. Firstly, war can be a mean, both offensive and defensive, to settle international disputes; secondly, it could be hard to distinguish a war of invasion from a war of self-defence – in history many have been the instances where a country used a pre-emptive war claiming it was for

[175] The Constitution of Japan 1947.

self-defence purposes. Although correct, many were not persuaded by this interpretation. Over the years, in fact, many government officials declared that Art. 9 does not prevent Japan from having self-defence forces.[176]

Some members of the Japanese political elite argued that «*forever renounc(ing) war as a sovereign right*» means that the Japanese people only renounce invading other countries, and do not renounce having a military apparatus per se, for it was unclear whether the statement renouncing «*war as a sovereign right of the nation*» was also referring to «*as a means of settling international disputes*». Is has been in fact argued that generally speaking «*as a means of settling international disputes*» has been often interpreted to have an equivalent meaning to using war as a mean to invade other countries, thus excluding the idea of self-defence. It is in this sense that some could argue in favour of Japan having self-defence forces.[177]

Thanks to various international Treaties with the US, Japan was allowed to have Self Defence Forces (hereon SDF) or *Jieitai*, which are mainly used in three areas: Air, Ground and Sea. Once again controversy rose as some argued that the SDF was in reality just a different type of military might, and as such it was believed to be unconstitutional. The Japanese governments and various American Administrations, however, mainly for geopolitical reasons, interpreted the SDF in a way that could be constitutional and thus in a way that would not clash with the rigid wording of Art. 9. For it to be constitutional, however, the SDF was limited in many aspects – such as warfare capability. This more relaxed interpretation, which allowed Japan to have SDF, came at a time when the US needed more cooperation from Japan in maintain its security, as

[176] Green M.J., *The Us-Japan Alliance A Brief Strategic History*, in *Education About Asia*, 2007, Vol. XII; Albert R., *Constitutional Amendment And Dismemberment*, in *The Yale Journal Of International Law*, Vol. XXXXIII.
[177] The Constitution of Japan 1947; Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – pp.1-30

before it had to be shouldered solely by the US troops in case of an attack against the island.[178]

Japan received international permission to have self-defence forces only after it ratified the UN Charter, as Art. 51 allowed it to be part of collective self-defence scheme and as such in need of having an SDF. This shift was made legally binding by the 1951 Security Agreement between Japan and the US, which reads:

> «Japan as a sovereign nation has the right to enter into collective security arrangements, and further, the Charter of the United Nations recognizes that all nations possess an inherent right of *individual and collective self-defence*».[179]

Despite it having gained, internationally, the right to have self-defence forces and be able to participate to collective operations, Japan deemed unconstitutional – under Art. 9 – to defend an American military base in Japan in case of an attack. This auto-restricting attitude must be analysed in the sense that, although allied with the US, the Japanese government did not want to sacrifice its "blood" for a country who had been, just a few years prior, the founding father of Art. 9. This view was to be reiterated in 1954, when the Diet held a debate on the above-mentioned Agreement.[180]

Given this reticence, various were the pressures from the US to change this attitude. It would be only in 1960 that a new article (Art.5) would be introduced in the Security Agreement, which declared that an attack on Japan, even if not directed to Japanese facilities – such a US base – were to be considered an attack

[178]Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – pp.1-30; Madsen S., *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, in *Transnat'l L. & Contemp. Probs.*, 1993, Vol. III, 549.
[179] Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – pp.1-30, p18
[180] Green M.J., *The Us-Japan Alliance A Brief Strategic History*, in *Education About Asia*, 2007, Vol. XII

towards Japan itself as it «would be dangerous to its own peace and safety» and as such Japan should «act to meet the common danger in accordance with its constitutional provisions and processes» after having informed the UN Security Council.[181]

This argument, however, poses an issue concerning self-defence: if Japan is to consider an attack for example to a US base as an attack to its own country, its measures for self-defence would be considered as individual self-defence and not collective self-defence. As far as Art. 51 of the UN Charter is concerned, however, this distinction should not pose an issue for a Japanese action for it owns both an «*individual and collective self-defence*». The problem rises with Art. 9 of the Constitution, which, despite the provisions in the UN Charter, does not allow Japan to act on its right of self-defence. The Japanese argument against being able to act upon its right to self-defence was just that: although Japan has the right to own a self-defence force, Art. 9 prohibits its use and thus no defence military force can be employed in such efforts.[182]

This stalemate slightly improved between the 1960s and the 1980s, when conflicts such as the Vietnam War and the Iranian revolution were threatening the already precarious equilibrium. The real turn point on the issues risen by Art. 9, however, would be marked by the Gulf War – as it was the case for Germany. Japan had in fact been accused by other countries – the US and Kuwait – that, although it provided a substantial amount of funds, its efforts were not enough. As a result, in 1992 the so called PKO Law – the Law Concerning Cooperation for United Nations Peace Keeping Operations and Other Operations – was

[181] Keddell J.P.Jr., *The politics of Japanese defense: managing internal and external pressure,* Routledge, New York, 2015; Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – pp.1-30, pp.18-19
[182] Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – p.19

passed, allowing – with numerous restrictions so to avoid conflicts with Art. 9– the deployment of the Japanese SDF outside of Japan's own territories.[183]

It is important to mention that the PKO Law did not allow Japan to be actively engaged in combat areas, but it allowed it only to conduct support activities in which no use of force or active combat was required. Such activities varied from constructing roads to helping in hospitals and since the 1992 the SDF have been deployed to numerous countries among which Rwanda and Cambodia. At the time, a debate rose concerning the might of the SDF: some argued that, given its increased involvement in international operations, it had to be improved, whilst other still feared a too big of an "army", even if a defensive one. The nuclear threat posed by North Korea in the early 2000s pushed the discussion on whether Japan should increase its SDF capability even further.[184]

With the rise to power of the current Prime Minister Shinzo Abe, furthermore, the political discourse started to change from a more cautious one to a more daring one, even arriving to proposing amendments to the infamous Art. 9.

8.1 Proposals to amend the Constitution

As it has been mentioned before, the Constitution of Japan has never been amended and this characteristic marks it as one of the few in the world which was able to maintain its original form without having been amended. The fact that it has never been amended, however, does not mean that it has never been tried. Following are some instances in which, since 2005, Japanese Prime Ministers have tried to push for a constitutional reform. Only two Prime Ministers, Junichiro Koizumi and Shinzo Abe, have tried to amend the Constitution in order to remove or at least reduce the implications of Art. 9. Their

[183] Madsen S., *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, in *Transnat'l L. & Contemp. Probs.*, 1993, Vol. III, 549.
[184] Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – pp.1-30

effort, however, have always been met by strong oppositions, sometimes from the other political forces, some other time from public opinion, sometimes from both.

The Liberal Democratic Party (hereon LDP), which is Abe's party, has been the one who has been championed the most the cause of amending the Constitution. This prerogative has to be reconducted to the fact that the LPD has been the ruling party for most of the years after the end of WWII. Over the years, the opposition which it had to face started to fade due to the increasing global and security issues posed by the empowerment of Japan's neighbours, namely North Korea and China, which both own nuclear weapons.[185]

The year 2005 marks the first instance in which proposals to amend the Constitution have been moved forward by the ruling party. It can be argued that the LDP's proposal might have been too ambitious at the time, for it proposed a complete revision of Art. 9, something which had never been proposed before. It requested the removal of the wording concerning the renunciation of war as it forbade Japan to have any war-making apparatus, something that was deemed necessary with the increasing international threat posed by North Korea. Such change would have not only allowed Japan to regain its "right to war" but also it would have given it the constitutional justification it needed for disposing of the SDF.[186]

If this amendment had been approved, it would have meant a tremendous shift in the Japanese approach to warfare: firstly, it would have allowed it to legally rearm itself without encountering any constitutional restrictions; secondly, it would have moved Japan away from its post-war rhetoric of using its disarmament as a sort of apology towards those countries which had been

[185] Japan: Amendment of Constitution, Article 9 – February 2006 The Law Library of Congress – pp.1-30
[186] Pence C., *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, in *N.C.J. Int'l L. & Com. Reg.*, 2006, Vol. XXXII, 335.

oppressed doing the Japanese colonialist period; thirdly it would have allowed it to act upon its rights of self-defence, and fourthly it would have allowed it to participate to active peacekeeping operations and collective defence actions, such as the Afghanistan and Iraq wars.

The wordings of Art. 9 were not the only ones to be changed, but also its title which, for obvious reasons, would have been changed from «renunciation of war» to «national security». These kinds of amendment to Art. 9, however, would have also meant a contradiction with one of the pillars of the Japanese Constitution, namely pacifism.[187]

The preamble to the Constitution in fact states that:

> «We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that *never again shall we be visited with the horrors of war through the action of government*, do proclaim that sovereign power resides with the people and do firmly establish this Constitution.
> (…)
> *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*».[188] (emphases added)

As one can see from these few sentences, pacifism can be considered at the core of the Constitution and such an amendment would have gone against one of the pillars of the Constitution itself, thus making it incompatible. It should thus come

[187] Pence C., *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, in *N.C.J. Int'l L. & Com. Reg.*, 2006, Vol. XXXII, 335.
[188] The Japanese Constitution 1947.

as no surprise that Koizumi's proposal was refused. As for what was the international sentiment at the time towards a possible Japanese rearmament, its Asian neighbours feared the return of a military Japan, for they were yet to forget – and forgive – the atrocities that the Rising Sun had perpetrated.[189]

As for what concerns Japan's internal politics, this attempt created much debate within the Japanese political parties. On the one hand, some desired that Japan became more proactive – in a militarist sense – in its international role; on the other, some feared of a possible resurrection of Japan's old militarism. For all of the post-war period, the Social Democratic Party (hereon SDPJ) has made its priority the maintenance of the Constitution as it was drafted in 1947, and thus perceived this proposal as a potential threat to this goal. On the contrary, the LDP, the conservative party which had held office for the majority of the post war years, has always seen the Constitution as one filled with US-imposed restrictions, and views some constitutional changes as a fundamental step in concluding the post-war period for a change in the constitution would allow Japan to re-obtain its sovereignty and national dignity in terms of military capability.[190]

Over the years, however, the LDP has nonetheless viewed these restrictions as possibly advantageous to Japanese foreign policy. They would allow Japan to have a legal excuse in not wanting to participate in certain military missions thus delimiting Japan's military commitments to the US according to Japan's own interests. This idea of the LDP of wanting to use its own constitutional restrictions on military use should, however, not be seen as partial desire for reform, but it must be viewed as a mean to an end: given the difficulty in amending the Constitution, Japan should use its constraints for pursuing its

[189] Pence C., *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, in *N.C.J. Int'l L. & Com. Reg.*, 2006, Vol. XXXII, 335.
[190] Hughes C.W., *Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security Policy,* in *Foreign Policy Research Institute*, 2006, 726.

interest on its own terms and for remilitarising Japans gradually and not under other countries' timeframe.[191]

Furthermore, this first attempt carried major political implications for it started a new practice of debating on the revision of Art. 9. All of the major parties in favour of a revision created Constitutional Research Committees, which aim is to draft the revisions which will be proposed to the Diet. Generally, these proposals covered the preamble and Art. 9. To respond to this trend, even the opposition party, the SDPJ, published its own version. The most moderate proposals recognised the expansion of Japan's military capability but would still call for non-combat participation to the UN peacekeeping operations. On the contrary, the most radical ones envisaged a new role for Japan so that it would be able to actively participate to combat operations.[192]

As it has been hinted, this first attempt at amending the Constitution was not successful. The second attempt at amending the Constitution was conducted by Shinzo Abe in 2014. His decision to reinterpret Art. 9 so to allow the country to exercise collective self-defence (CSD), not only started a fierce debate at home, but it also created concern about its Asian allies. On the contrary, the US aided Japan in pursuing this course of action. Although not a proper amended, Abe's new interpretation is worthy of mention. It has in fact been argued that Abe decided to pursue the road of interpretation opposed to the road of amending directly Art. 9, for he understood the political backlash that he would have to face. It thus seemed smarter to pursue a softer stance first. Despite his apparent more moderate approach opposed to an amendment, however, he met numerous critics.[193]

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[191] Hughes C.W., *Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security Policy,* in *Foreign Policy Research Institute*, 2006, 726.
[192] Hughes C.W., 725-744.
[193] Keddell J.P.Jr., *The politics of Japanese defense: managing internal and external pressures*, Routledge, New York, 2015; McElwain K.M. - Winkler C.G., *What's Unique about the Japanese Constitution? A Comparative and Historical Analysis,* in *The Journal of Japanese Studies*, 2015, Vol. XXXXI, 249-280.

Despite this unsuccessful attempt, it nonetheless marks the first time the Japanese government had publicly declared that the use of SDF for CSD purposes was constitutional. It marks it as the first time for, although other governments before him had recognised the inherent rights to self and collective defence of Japan, they had always reiterated the idea that Japan could not act on them. With Abe, this *modus operandi* is put to a halt and a new paradigm is created. With this shift, the government could decide to what extent develop and where to deploy its military forces. This process marked the re-emergence of Japan as a sovereign state, status which had lost with the 1947 Constitution and its Art. 9.[194]It is important to mention that, although Abe could not obtain the changes he desired, he was able to obtain a lift on the ban of dealing arms outside of Japanese territories, thus slightly moving away from the pacifist stance from before.[195]

Aware of its past failures, in 2017 Abe tried once again to sway the government and the public opinion into, this time, amending Art. 9. His idea was that the amendment, once it had obtained the approval in the Diet and then in the referendum, were to enter into force in 2020. Many voiced their concerns over this decision, among others Komeito, the LDP coalition ally, as well as its opposition parties. their argument was that if Art.9 were to be amended, Japan would use this chance to increase its forces and its international participation, thus in clear contrast with the pacifist stance taken in the constitution. As for what concerns the public opinion, the polls of the time were opposed to this decision, not for some pacifist stance but because they feared international backlash.[196]

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[194] Liff A.P., *Policy by Other Means: Collective Self-Defense and the Politics of Japan's Postwar Constitutional Reinterpretations*, The National Bureau of Asian Research, Seattle, Washington, 143.
[195] Westbrook T., *Putting Japan's Constitutional Changes into Perspective: Preventing Conflict through Military Interoperability?*, in *Japan Studies Association Journal*, 2017, Vol. XV, 83.
[196] XinHuaNet, *Japan's Abe maintains constitutional amendment goal mid opposition*, in http://www.xinhuanet.com/english/2019-05/03/c_138031761.htm; Council of Foreign Relations,

8.2 Abe's latest attempt at amending the Constitution

In 2019, Abe once again proposed an amendment to Art. 9. This time the amendment to Art. 9 was meant not only to reword the majority of Art. 9 – effectively removing the *renunciation of war* clause from the Constitution– but also to clearly state the role that SDF should have in the context of Japan's military apparatus. This time many were in favour of discussing this amendment both in the Diet and among the members of the public, although some reticence was still shown in both the opposition parties and public opinion, as many could not and still cannot agree on what should be amended. Nonetheless, it can be argued that Japan faced a shift in its perception in the world and in the perception of what its role should be in it.[197]It is arguable that causes for this change could be the ever-increasing presence of the Chinese Navy in the South China Sea, and the increasing nuclear power capability of North Korea.[198]

Public Attitudes on Revision, in https://www.cfr.org/interactive/japan-constitution/public-attitudes-on-revision

[197] JapanTimes, *Abe calls for constitutional amendments proposals to be debated in Diet*, in https://www.japantimes.co.jp/news/2019/07/08/national/politics-diplomacy/abe-calls-constitutional-amendments-proposals-debated-diet/#.XXNxjpMvP6a; Council of Foreign Relations, *Public Attitudes on Revision*, in https://www.cfr.org/interactive/japan-constitution/public-attitudes-on-revision.

[198] Westbrook T., *Putting Japan's Constitutional Changes into Perspective: Preventing Conflict through Military Interoperability?*, in *Japan Studies Association Journal*, 2017, Vol. XV, 83.

9. Japan's peacekeeping operations: when, why, how?

As it has been outlined in the previous chapter, Japan had a history of refusing to deploy its SDF for it has declared it to be incompatible with Art. 9 of its constitution. There have, however, been some instances, mainly due to the passing of the PKO Law, were Japan had employed its SDF aboard. It is of the utmost importance to highlight that although this deployment, Japan has never been part of a peacekeeping operations with what can be defined as "boots on the ground", meaning that it has ever actively participated in active combat whilst conduction said peacekeeping operations.[199]

As for the contributions to the UN budget, Japan, which is currently contributing nine per cent of the UN budget, is the third-largest contributor, after the US and China, and right before Germany. For some it might be surprising that Japan although it participates in less UN missions contributes more to its budget. In reality, Japan is compensating with a higher budget for its lack of active participation in UN missions.[200]

Before starting with the analysis of the missions to which Japan participated, following is the comprehensive list of all the peacekeeping operations in which Japan participates. Currently it is involved in one UN peacekeeping operation: UNMISS[201] with four Staff Officers deployed.[202]Although Japan is currently active in only one UN mission, it has participated to others and in various forms. Following is a table (Table 2) which summarises Japan's participation in UN peacekeeping operations and the extent of its contributions to the various missions in which it decided to participate.

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[199] Ministry of Foreign Affairs of Japan, Japan's Contribution to UN Peacekeeping Operations (PKO), in https://www.mofa.go.jp/policy/un/pko/

[200] ProvidingForPeacekeeping, Peacekeeping Contributor Profile: Japan, in http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-japan/

[201] United Nation Mission in South Sudan

[202] United Nations, Troop and Police Contributors, in https://peacekeeping.un.org/en/troop-and-police-contributors

Table 2[203]

Military Operation/Conflict	**Type of contribution**	**Year**
UNAVEM II – Angola	Electoral observers	1992
UNTAC – Cambodia	Civilian police, troops (engineer unit), electoral observers	1992-1993
ONUMOZ – Mozambique	Staff officers, troops (movement control unit)	1993-1995
ONUSAL – El Salvador	Electoral observers	1994
UNDOF – Golan Heights	Staff officers and transport troops – in this case the Japanese contribution was limited to providing transport services	1996-2013
UNAMET – East Timor	Civilian police	1999
UNTAET – East Timor	Troops(engineering unit) and staff officers	2002
UNMISET – East Timor	Troops (engineering unit) and staff officers	2002-2004
UNMIT – Timor-Leste	Civilian police	2007-2008
UNMIN – Nepal	Military observers	2007-2011
UNMIS – Sudan	Staff officers	2008-2011
MINUSTAH- Haiti	Troops (engineering unit) and staff officers	2010-2013
UNMIT – Timor-Leste	Military liaison officers	2010-2012

[203] Ministry of Foreign Affairs of Japan, Japan's Contributions Based on the International Peace Cooperation Act, in https://www.mofa.go.jp/fp/ipc/page22e_000684.html

UNMISS – South Sudan	Staff officers and troops (engineering unit)	2011-present

As one can see from Table 2, Japan's involvement in UN peacekeeping operations started in 1992 with the UNAVEM II mission in Angola, for in that year the Japanese government passed the PKO Law, officially allowing Japan to deploy its SDF troops outside of its own territories.[204] Although allowing for participation in UN peacekeeping missions, the PKO Law could not grant full operability to the Japanese forces, for they were and still are restricted in the kind of contribution they could make due to Art. 9 of the Constitution. As one can see from the section *type of contributions* in Table 2, Japan never deployed armed troops or military personnel, but only provided logistic or technical support. This trend is confirmed not only in the UNAVEM II mission, but also in all the following peacekeeping operations Japan took part in.

As for the German case, the increase in participation in UN peacekeeping operations in the 1990s must be reconnected to a desire of the Japanese government to be more involved in the international arena, also to show the aid and contributions which the SDF could bring to the UN and to other countries in need.[205] As for what concerns the political and public sentiment towards the above-mentioned operations in the 2000s, one has to look at various factors: on the one hand, some members of the political elite such as Abe and the neoconservative party Japan Restoration Party[206] were in favour of a more active participation of the Japanese troops – as it has outlined before the Abe administration is still trying to amend Art. 9; on the other the opposition parties and some members of the public viewed that the above shown contributions were

[204] Madsen S., *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, in *Transnat'l L. & Contemp. Probs.*, 1993, Vol. III, 549.
[205] Ministry of Foreign Affairs of Japan, Japan's Contributions Based on the International Peace Cooperation Act, in https://www.mofa.go.jp/fp/ipc/page22e_000684.html
[206] There is no official name in English, the Japan Restoration Party is the literal translation of its Japanese name "Nihon ishin no kai" (にっぽんいしんのかい)

more than enough as they both maintained Japan in a pacifist stance – as highlighted in the preamble of the Constitution – and correctly inserted it in the international context.[207]

It is possible to notice that between the year 2004 and the year 2007, Japan did not participate in UN peacekeeping operations. This can be reconnected to a diminished enthusiasm on behalf of Japan towards said operations, mainly due to changes to the international environment. More specifically, after 9/11 and the consequent declaration of the War on Terror by the US and some of its allies, the Japanese forces had to be reallocated to aid this cause to the detriment of the UN peacekeeping operations. In this regard, it is important to mention that although the Japanese forces were diverted from the UN operations, they were never actively engaged in conflicts as doing so would have been contrary to the constitutional layout set in Art. 9.[208]

Towards the end of 2001, in fact, Japan adopted the Anti-Terrorism Special Measure Law, which allowed it to deploy the SDF in the Indian Ocean to aid – in terms of oil fuelling –the US ships in their invasion of Afghanistan. This aid, which was only second to the US one in terms of contributions, was ended in 2010 for the democratic Party of Japan allowed the Anti-Terrorism Special Measure Law to expire.[209]

Japan, however, has not only been involved in UN peacekeeping operations, but it also been involved in International Humanitarian Relief operations and International Election Observing operations. Table 3 will provide a comprehensive list of Japan's participation in these operations and the extent of its contributions.

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[207] Ministry of Foreign Affairs of Japan, Japan's Contributions Based on the International Peace Cooperation Act, in https://www.mofa.go.jp/fp/ipc/page22e_000684.html

[208] ProvidingForPeacekeeping, Peacekeeping Contributor Profile: Japan, in http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-japan/

[209] *Ibidem*.

Table 3[210]

Military Operation/Conflict	**Type of contribution**	**Year**
Humanitarian operations for refugees – Rwanda	Troops (Refugee relief unit and airlifting unit)	1994
General and regional elections – Bosnia and Herzegovina	Election observers	1998
Humanitarian operations for displaced persons – East Timor	Troops (airlifting unit)	1999-2000
Municipal assembly elections – Bosnia and Herzegovina	Polling supervisors	2000
Humanitarian operations for refugees – Afghanistan	Troops (airlifting unit)	2001
Constituent assembly elections – East Timor	Election observers	2001
Assembly elections – Kosovo	Election observers	2001
Presidential election – East Timor	Election observers	2002
Humanitarian operations for refugees – Iraq	Troops (airlifting unit)	2003

[210] Ministry of Foreign Affairs of Japan, Japan's Contributions Based on the International Peace Cooperation Act, in https://www.mofa.go.jp/fp/ipc/page22e_000684.html

Presidential and national assembly elections – Congo	Election observers	2006
Presidential and national assembly elections – East Timor	Election observers	2007
Constituent assembly election – Nepal	Election observers	2008
Local referendum – Sudan	Election observers	2010-2011

As one can see from Table 3, Japan has been involved in many Humanitarian and Election Observing operations both in the 1990s and in the 2000s. Similarly to what had happened for the UN peacekeeping operations, Japan decided to diverge its attention from these kinds of operation to aid the US in its endeavour against Afghanistan and then Iraq in the post-9/11 period. Nonetheless, despite this momentary decrease, Japan sees humanitarian and peacekeeping operations as a mean to end: on the one hand it is a tool to help those in need, on the other it helps in boosting its prestige in the international context, for it allows it to identify itself as a civilian power – opposed to a military one as it has been described in its history – and it aids its diplomacy.[211]

These operations are thus used as a way of extending Japan's diplomatic activities and amplifying its voice within the international powers, while enjoying the legitimacy given by the UN and its Security Council. In this regard, these operations, especially the UN peacekeeping ones, have played an important role in Japan's foreign policy. On the one hand, they allowed Japan to distance itself from its militarist past and pursue the narrative of being a pacifist

[211] Ministry of Foreign Affairs of Japan, Japan's Contributions Based on the International Peace Cooperation Act, in https://www.mofa.go.jp/fp/ipc/page22e_000684.html

country – this narrative has been proven fundamental for Japan's relationship with its neighbouring countries; on the other, it gave Japan an opportunity to distance itself from the US and its militarist ambitions.[212]

Another reason why Japan participated to so many missions, even if it had the restrictions imposed by Art. 9 was because of its ambition of obtaining a «permanent seat on a reformed UN Security Council» for it believed that being the third largest contributor to its budget and participating to numerous peacekeeping operations would have positively influenced its chances. As it seem obvious, there are some flaws with this rationale for it is highly unlikely that the UN would have reformed its Security Council and even more unlikely that it would have chosen Japan as the new member: Japan had in fact been "on the wrong side of the war".[213]

For instance, the SDF's participation to UNDOF – the United Nations Disengagement Force agreed by the Israeli and Egyptian forces in 1974 – perfectly fits in this narrative. With its participation Japan wanted to portray a positive image in order to present it like a suitable candidate for a seat at the Security Council's table. Another instance in which Japan used its participation into peacekeeping operations to obtain a permanent seat was in 2005, when other countries – such as India, Germany, and Brazil – which were championing the cause of a reformed Security Council, launched their campaign in occasion of the UN 60th Anniversary.[214]

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[212] Seaton P.A., *Japan's Contested War Memories The 'Memory Rifts' in Historical Consciousness of World War II*, London, Routledge, 2007.

[213] ProvidingForPeacekeeping, Peacekeeping Contributor Profile: Japan, in http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-japan/; Hakimi M., *Techniques For Regulating Military Force,* University Of Michigan Public Law And Legal Theory Research Paper Series Paper, 2018, No. 622, in Bradley C. (ed.), *The Oxford Handbook Of Comparative Foreign Relations Law*.

[214] United Nations, United Nations Disengagement Observer Force – Background, in https://undof.unmissions.org/background

Another reason why Japan was so invested in participating in UN peacekeeping operations was their strategic geographic location. If one is to look carefully at the geography of the missions in which Japan participate, it is possible to see a pattern. Given that more than eighty per cent of Japanese's oil requirements comes from South East Asia and the Middle East, Japan needs that the sea routes a free from danger. Participating in UN peacekeeping operations in certain regions in fact allowed Japan to participate in peaceful resolutions of disputes which could have easily threatened Japan's core needs and interests: the procurement of oil. Furthermore, precipitating in them would put Japan in a good light for these countries to see, further boosting its reputation at the international level.[215]

One last reason for why Japan would want to participate to such amount of missions would be to train its SDF. Giving it the chance of training outside of the Japanese territories whilst coming into contact with different military troops from around the world, would definitely help Japan in improving its own "army". Especially in light of a possible amendment of Art. 9, where the SDF would then need to be able to show its operational experience. UN peacekeeping missions would allow it to achieve so whilst maintaining the appearance of a pacifist and «good international citizen».[216]

As for what concerns the political parties, there have been some oppositions to Japan's participation in UN peacekeeping mission. The Communist Party, for instance, declared that it did not support a Japanese participation on the basis that the SDF itself cannot be considered constitutional and so would be its employment, even if under the aegis of the UN. On the contrary, since its first participation the Japanese public has been generally positive towards a Japanese involvement, with an increasing trend towards the end of the 1990s reaching

[215] ProvidingForPeacekeping, Peacekeeping Contributor Profile: Japan, in http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-japan/
[216] *Ibidem*.

seventy-nine per cent votes in favour in a poll conducted in the early year 2000.[217]

There are, however, a few problems with how the public opinion sees a Japanese participation into this kind of mission. These problems arise when there are casualties among the Japanese personnel during a peacekeeping operation. This sentiment is to be connected to the losses which Japan suffered during one of its UN peacekeeping missions: the UNTAC operation in Cambodia, where many Japanese lives were lost.

9.1 History of the Japanese intervention in peacekeeping operations: Five Principles on Peacekeeping Operations

In the previous chapters, it has been analysed what factors came into play when the SDF participated in UN missions as well as it has been outlined what kind of missions – humanitarian and peacekeeping – Japan participated in. Following is an historical analysis of the evolution of Japan's participation in peacekeeping missions. When Japan started to participate in 1992 in peacekeeping operations, it was at a time when Japan was required to cover a larger international role whilst still facing numerous constitutional restraints. The positive experiences in Cambodia [218] and East Timor [219] created more opportunities for a further Japanese participation, for the SDF's contribution to UN peacekeeping operations had been largely accepted both inside Japan and in other countries.[220]

[217] *Ibidem*.
[218] UNTAC
[219] UNTAET
[220] Suzuki K., *Twenty-Five Years of Japanese Peacekeeping Operations and the Self-Defense Forces' Mission in South Sudan,* in *Asia-Pacific Review*, 2017, Vol. XXIV, 44-63.

This acceptance and Japan's successes, however, did not remove the international legal constraint which Japan was still obliged to respect under the Act on Cooperation for United Nations Peacekeeping Operations and Other Operations, also known as the PKO Cooperation Act (Act No. 79 of June 19, 1992). Following this Act, which is to be inserted in the context of the legal framework of the UN, Japan is obliged to participate *only* in those operations which respect the Five Principles on Peacekeeping Operations – which in the PKO Cooperation Act are expressly rereferred to as «the five basic principles governing Japan's participation». If the peacekeeping operations in which Japan is participating were not to qualify for one of them – as outlined in point (4) – Japan would be forced to retire its SDF forces from said operation.[221]

The Five Principles are the following:

« *(1) A ceasefire must be in place* between the parties in the conflict;

(2) The parties to the conflict, including countries in the region in which the UN peacekeeping forces will operate, *must have given their consent to Japan's participation in the operation and the peacekeeping forces*;

(3) *The activities must be conducted in a strictly impartial manner*, with UN peacekeeping forces not showing a bias toward any specific party to the conflict;

(4) *Japan's participation may be suspended or terminated if any of the above conditions ceases to be satisfied*;

(5) The *use of weapons shall be limited to the minimum necessary* to protect the life or person of the personnel» (emphases added)[222]

[221] Act on Cooperation for United Nations Peacekeeping Operations and Other Operations (Act No. 79 of June 19, 1992), in http://www.pko.go.jp/pko_j/data/law/pdf/law_e.pdf; Suzuki K., *Twenty-Five Years of Japanese Peacekeeping Operations and the Self-Defense Forces' Mission in South Sudan*, in Asia-Pacific Review, 2017, Vol. XXIV, 47.

[222] Suzuki K., *Twenty-Five Years of Japanese Peacekeeping Operations and the Self-Defense Forces' Mission in South Sudan,* in *Asia-Pacific Review*, 2017, Vol. XXIV, 47; Funk R.B., *Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions*, in *Cornell Int'l L. J.*, 1992, Vol. XXXV, 363.

All Japanese participation to UN missions has been done following these rules, except for the one in South Sudan – the only mission in which Japan still participates. The case in South Sudan did not necessarily break any of the above-mentioned conditions but raised ambiguity over the idea that it might have. The SDF participation in the UNMISS operations faced difficulties for no stable ceasefire was achieved and as a consequence a civil war developed. These circumstances raised doubts over the validity of Japan's participation and over the Abe Administration's pacifist stance, for it was Prime Minister Abe who first decided to join the UN contingent in South Sudan. It has been decided that no debate was to be raised for this circumstance, and although Japan still participates in the UNMISS, ambiguity remains.[223]

To understand what led to the creation of the Five Principles, one must look back at the events which unfolded right after the end of the Cold War, namely the Gulf War. It has been already mentioned that at the time Japan had received many pressures from the US to aid it in its endeavour, and that Japan received no gratitude for its funds. At the time, despite Resolution 678 «authorize[d] Member States...to use all necessary means», Japan could only provide a monetary support as it was constrained by its constitution.[224]

This inability to contribute to the war and to international missions in a more "meaningful" way, initiated a debate over the role which Japan could have took in the international arena, given its numerous restrictions. It was in this circumstances that Japan passed the International Peace Cooperation Law, which purpose was to «establish the domestic framework for extending appropriate and prompt cooperation with UN Peacekeeping Operations,

[223] George A., *Japan's Participation in U.N. Peacekeeping Operations: Radical Departure or Predictable Response?*, in *Asian Survey*, 1993, Vol. XXXIII, No. VI, 560-575; Suzuki K., *Twenty-Five Years of Japanese Peacekeeping Operations and the Self-Defense Forces' Mission in South Sudan*, in *Asia-Pacific Review*, 2017, Vol. XXIV, No. II, 44-63

[224] George A., *Japan's Participation in U.N. Peacekeeping Operations: Radical Departure or Predictable Response?*, in *Asian Survey*, 1993, Vol. XXXIII, No. VI, 560-575; Suzuki K., *Twenty-Five Years of Japanese Peacekeeping Operations and the Self-Defense Forces' Mission in South Sudan*, in *Asia-Pacific Review*, 2017, Vol. XXIV, No. II, 45.

International Humanitarian Relief Operations and International Election Observation Operations, and thereby enable active contribution by Japan to international peace efforts centring upon the United Nations» as outlined in Art. 1.[225]

Along with this law, the then Prime Minister Toshiki Kaifu decided to submit to the Diet the United Nations Peace Cooperation Bill for it to be reviewed. This law would have extended the powers of the Prime Minister as it would have given him authority over the newly founded UN Peace Cooperation Committee, granting him the power to dispatch «UN Peace Cooperation Forces, which would be organized outside SDF force structure, to aid in transporting materials, providing medical care, and other peacekeeping tasks». It was not approved, however, as the Diet responded that any supporting actions which would use military forces, even if under the UN aegis, would be unconstitutional due to Art.9.[226]

In 1991, the situation changed and the PKO Law was passed. As it was mentioned before, this law allowed Japan to participate into UN peacekeeping operations – hence the name PKO Law – but not in coalition forces. The passing of this bill, however, was not without issues as the Japan Socialist Party (JSP) vehemently opposed any overseas SDF deployment. As a result, on the one hand there was the "against" coalition represented by the JSP, on the other there was the "in favour" coalition formed by the LDP, Komeito and the Democratic Socialist Party (DSP). The "in favour" coalition, however, had divergences within it for they could not agree under which terms the SDF could be able to be deployed. To solve this impasse, they decided to integrate five specific

[225] Ministry of Foreign Affairs of Japan, Outline of Japan's International Peace Cooperation, in https://www.mofa.go.jp/fp/ipc/page22e_000683.html
[226] Suzuki K., *Twenty-Five Years of Japanese Peacekeeping Operations and the Self-Defense Forces' Mission in South Sudan*, in *Asia-Pacific Review*, 2017, Vol. XXIV, No. II, 45-46.

restrictions to Japan's possibility of participating to UN peacekeeping operations, namely the Five Principles.[227]

As one can see from these events, the road to obtaining the permission to participate in peacekeeping operations was far from easy, and it involved many debates both within the Japanese elite and public, and within the international community itself, which diverged according to at which country one was looking. The US has always been a strong supporter of a more intervening and participating Japan, whilst the Rising Sun's neighbours, mindful of the historical militarist tradition and exploits, were wary of a newly militarised Japan.[228]

If the road for obtaining a few concessions to the deployment of the SDF, one can only assume that a road for obtaining an amendment, of which ever kind, to either the Preamble or Art. 9 can be even more arduous. Nonetheless, the Abe Administration is pursuing, more aggressively than ever before, the path towards this achievement and if the regional balance, already precarious due to the increasing Chinese military presence in the South China Sea, were to be disrupted, it could lead to a more favourable political and public opinion towards an amendment.[229]

After having presented circumstances, the historical developments, the actors and factors which influenced both the German and the Japanese post-war experience, it is imperative to analyse whether they are leading towards a constitutional reform or if they will continue to interpret the respective

[227] Motoyama K., *The Significance of the Provisions for the Renunciation of War and Abolition of Military Forces in the Japanese Constitution*, in *King's Law Journal*, 2015, Vol. XXVI, No. II, 285-298.
[228] *Ibidem*.
[229] Heginbotham E. – Samuels R., A New Military Strategy for Japan: Active Denial Will Increase Security in Northeast Asia, in Foreign Affairs, 2018, in https://www.foreignaffairs.com/articles/asia/2018-07-16/new-military-strategy-japan

constitution in ways which will enable them to pursue their interest when it comes to the deployment of the respective "military forces".[230]

[230] "Military forces" has been inserted into inverted commas for it would be improper to use the it to describe the SDF as constitutionally they cannot be considered as such.

10. Germany and Japan in international conflicts, between constitutional reform and constitutional interpretation

So far, the constitutional elements which characterise the participation of Germany and Japan into international conflicts as well as the so called "war articles or clauses" have been examined. Following is a comparative analysis, conducted on both countries, to provide some concluding reflections whether they can participate in international conflicts and to what extent, that is to say whether they will need/want a constitutional reform or will base their participation in future international missions on the interpretation of the Constitution. The analysis will be divided into three sections: the first section will analyse the issue from a constitutional point of view, the second section will present the sentiment of the political elite and public opinion, and the third section will look at the international context.

10.1 Germany

As it has been outlined, after having lost the Second World War, Germany was divided into four zones of influence and the Basic Law, which was adopted in 1949, is the result of the influence of the Allies' occupation, in particular the Americans, of the West German territories.

10.1.1 Reflections on the Constitutional Landscape

Under a constitutional point of view, Germany does not have a clear prohibition to have a military apparatus for Art 87(a) and Art. 24(2) do not state so. What these articles hint at, however, is the "impossibility" of Germany to participate into active military conflicts, for they state the role that the *Bundeswehr* should assume. Thus, in the German case, the constitutional issue surrounding the German armed forces is not to be linked to the prohibition of owning military

forces per se, but it is to be connected to how Germany utilises said military forces, and their role in military conflicts and peacekeeping operations.[231]

Additionally, given their ambiguous wording, these articles can be left open to interpretation, thus leaving to the FCC's discretion in the interpretation of the articles in a specific international and historical context. It has, in fact, been argued that the original intent of Art. 87(a) was exclusively to ensure a ban on the domestic deployment of the *Bundeswehr*, rather than a more general kind of deployment, resulting in a de facto no obstacle to a non-defensive military intervention outside of the German border. Later, this interpretation was surpassed by a more mainstream one which, on the contrary, intends the wordings of Art. 87(a) as relating to both kinds of deployment, that is to say both domestic and foreign.[232]

As one can discern from the simple wordings of said article, in fact, it does not expressively specify that the ban on the military deployment is to be referred only to the domestic one, and as such it can also be extended, more generally, to the idea that the Basic Law prohibits all kinds of offensive military deployments. This ambiguity of Art. 87(a) has led the political elite to resort more often to the FCC's rulings on given articles or issues to resolve the debate surrounding the kind of deployment that the military forces could be involved in.[233]

It can thus be argued that under a constitutional point of view, Germany was able to deploy the *Bundeswehr* in the ways it did due not only to the FCC's various rulings, but also to its membership to some international organisations such as the UN, the EU and NATO. Given its membership to the EU, NATO and the UN, Germany has found constitutional support also from the international community, for Art. 42(1), along with Arts. 43, 44, 45 and 46 of the TEU and

[231] Germany in Afghanistan - The German Domestic Dispute on Military Deployment Overseas
[232] Miller R.A., *Germany's Basic Law and the Use of Force*, in *Ind. J. Global Legal Stud.*, 2010, Vol. XVII, 202.
[233] Germany in Afghanistan- The German Domestic Dispute on Military Deployment Overseas

Art. 4 of the NATO Treaty, along with Art. 51 of the UN Charter allows it and to an extent even demands that Germany actively contributes to the conflicts and peacekeeping operations at play – always within specific criteria.[234]

It is for such reasons that, under a constitutional point of view, Germany might not need nor want a further constitutional revision, for firstly, the Basic Law had already been amended so to meet the historical and international requests of the time; secondly the wordings of the articles above-mentioned leave, to some extent, room for ambiguity and interpretation, which can help Germany in always finding a legal justification for its decision and actions, and lastly it can rely on many international provisions which can aid it in participating and justifying a more or less rapid development of its armed forces – see Art. 4 of NATO Treaty, Art. 42(1), along with Arts. 43, 44, 45 and 46 of the TEU and Art. 51 of the UN Charter.[235]

With the above-mentioned articles, in fact, Germany was able to constitutionally justify its participation into various UN peacekeeping operations and other armed conflicts without contrasting the legality of its Basic Law. Contrary to Japan in fact the reasons for why Germany would want to revise its constitution would not be for justifying its possession for armed forces, but for an unconstitutional use which might come out of their deployment, which, as it has been argued in Chapter4, has been very rare.

10.1.2 Political and public perspectives

It is arguable that under a political and public perspective Germany does not want to and will not want to revise its constitution and it is content with the current provisions. Although there have been some amendments, namely Art.

[234] Hoffmann A. – Longhurst K., *German Strategic Culture and the Changing Role of the Bundeswehr*, in *WeltTrends*, 1999, Vol. XXII, 145-162.
[235] *Ibidem*.

24(2)– which are arguably the reason why both the political elite and the public might not want further amend it for fear of returning to less democratic practices – the Basic Law still maintains the pacifist stance which its drafters intended.[236]

Since the end of the Second World War Germany had been portrayed – rightfully so – as the perpetrator of numerous atrocities and that as such cannot be fully trusted with complete ownership of its armed forces. After the Second World War, in fact, the *Bundeswehr* had been created with the idea that it was a force to be used for deterring war opposed to fighting it. Despite this attitude, which is mainly shared by the public opinion – which to some extent feels still shameful for its ancestors' past – the German armed forces have been required in multiple occasions, due to international pressure, to hold a more proactive stance, despite the pacifist opposition which sometimes arose from the public.[237]

Despite having to hold a more proactive stance, however, the German forces have never been employed for purposes of fighting wars, but always for the purposes of deterring them and aiding the people in need in zones of conflicts. It can thus be argued that the *Bundeswehr* has never been employed in operations which contradicted its pacifist stance.

Additionally, the German people do not wish to further revise their constitution as they believe that to atone for the past mistakes and atrocities, Germany must now spread a more responsible way of resolving international disputes which does not necessarily involve the use of force and ones armed forces for war purposes. This idea was developed after the reunification and it means that the public and the political elite believe that Germany has a duty to burden more responsibilities both in the European and in the international context. These responsibilities are represented by the «policy of the good example (*Politik des*

[236] Bowlby C., *Germany: Reluctant military giant?*, BBC, 12 June 2017, in https://www.bbc.com/news/world-europe-40172317

[237] Hoffmann A. – Longhurst K., *German Strategic Culture and the Changing Role of the Bundeswehr*, in *WeltTrends*, 1999, Vol. XXII, 145-162.

gutenBeispiels)» and the «policy of responsibility (*Verantwortungspolitik*)», which were and are still considered imperative.[238]

These policies represented the political and popular will that Germany was invested in the international disputes, with a responsible outlook. This outlook means that not only Germany has too participate to international conflict in a way that sets the good example in terms of conduct – showing that disputes can also be solved without having to necessarily resort to the use of force – but also in a way that holds the responsibility of said participation. The German political elite and public believe that Germany has in fact a responsibility to uphold for it should on one hand spread the «policy of the good example» and on the other ensure that it contributes to the dissolution of armed conflicts around the world.[239]

In this climate, the political elite and the public continue to stress the importance that Germany has a responsibility to build «a new culture of international co-existence», which in a way means pursuing a restrained and anti-militarist culture. It is thus for the above-mentioned reasons that it can be argued that both the political elite and the public do not wish nor feel the need to further amend the Basic Law in order to have more authority and decisional power over the employment and deployment of the *Bundeswehr*.[240]

Along with the constitutional and political elements of this debate, a major role is played by the international context in which Germany is inserted.

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[238] Baumann R. – Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001, Vol. X, No. I, 69.
[239] *Ibidem*.
[240] Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 246-294; Baumann R. – Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001, Vol. X, No. I, 61-82.

10.1.3 International Context

Historically, after their loss of the Second World War Germany and Japan have had different external influences and domestic developments. On the one hand, Germany was the heart of Europe and its success meant a success of the US influence in Europe and, to an extent, the survival of the continent itself: arguably a peaceful Germany leads to a peaceful Europe. On the other hand, Japan, although crucial for the US in controlling the East Asian region, was never part of a reality like the European one – in its institutional sense – and thus could not benefit from the direct American interested approach.[241]

Additionally, Japan's main role was to protect the US' interests in the region, to provide it with logistic support – namely the use of military bases on Japanese territories – and, in a way, aiding the US in preventing other countries in the region to fall under the Soviet sphere of influence. It can be argued that, in this regard, Germany had a similar role, the core difference lays in the fact that whilst Japan was never under the threat of a possible Sovietisation, the US feared that, if not controlled properly, West Germany could ideologically align itself with the USSR. This would have eventually led to a sovietisation of other European countries: the US' nightmare at the time. It is thus why it can be argued that the role which Germany needed to have for the US' plans in Europe was profoundly different from the Japanese one.[242]

At this point, it is of the utmost importance to notice that, although with the ability of deploying the *Bundeswehr* under Arts. 87(a) and 24(2) of the Basic Law, Art. 4 of the NATO Treaty, and Art. 51 of the UN Charter, Germany never deployed – nor it was advised to by its allies – its troops. This was done to avoid

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[241] Samaan J.L. – Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15.
[241] Germany in Afghanistan - The German Domestic Dispute on Military Deployment Overseas; Samaan J.L. – Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15.
[242] Germany in Afghanistan- The German Domestic Dispute on Military Deployment Overseas

any exacerbation of the relations, sometimes more relaxed and some other more on edge, between the US and the USSR.[243]

Moreover, the drafting of the Basic Law and its ability to participate into the international affairs – almost like a peer – since its early years, show how the international context in which Germany was inserted was more favourable to a controlled rearmed Germany opposed to a not armed one at all. In this sense, the international context in which Germany was inserted had a double effect: firstly, it was characterised by a push for amendments to the Basic Law as certain actors, namely the US, needed Germany to participate in certain operations and certain ways; secondly, it was characterised by giving more concessions to Germany for it was in a more controlled environment and under a more direct influence of the Allied Powers compared to Japan.[244]

It can thus be argued that following the international context Germany was inserted in, there have been pressures from external actors, namely the US with the NATO Treaty to amend the Basic Law in order to accommodate their requests. It can also be argued, furthermore, that with the recent requests from President Trump to increase its economic contribution to NATO, Germany will not want to further amend the Basic Law, but will have to accept the idea that its *Bundeswehr* might be required to be employed in more operations.

Despite the international pressures in amending the Constitution the first time, however, it is highly unlikely that the international context will stress for more amendments.

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[243] Samaan J.L. – Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15; Peters A., *Between military deployment and democracy: use of force under the German constitution*, in *Journal on the Use of Force and International Law*, 2018, Vol. V, No. II, 246-294.

[244] Samaan J.L. – Jacobs A., *Countering Jihadist Terrorism: A Comparative Analysis of French and German Experiences*, in *Terrorism and Political Violence*, 2018, 1-15; Baumann R. – Hellmann G., *Germany and the use of military force: 'total war', the 'culture of restraint' and the quest for normality*, in *German Politics*, 2001, Vol. X, No. I, 67

10.2 Japan

Contrary to the German experience, after having lost the Second World War and having experience a nuclear attack Japan was never formally occupied by a foreign country but was placed under the direction of General MacArthur and its SCAP. His contributions heavily influenced the modern Japanese Constitution and he is to be held responsible for the renowned Art. 9.

10.2.1 Reflections on the Constitutional Landscape

Contrary to the German experience, Japan never amended its Constitution and not for lack of attempts to do so. Unlike Arts. 87(a) and 24(2) of the Basic Law, Art. 9, which has been at the heart of many constitutional attempts, does not allow Japan to have military forces if not for defensive purposes. In this regard, there have been interpretations made by the political elite, but none could be legally applicable due to the specific wordings of said article. The fact that its wordings are in a way so definite, accompanied by the fact that Art. 9 was an imposed provision and not a decision of the Japanese people, should clarify the idea that the Japanese political elite and some members of the public want to amend the constitution.

This wanting of amending the Constitution is to be connected to the theory that the Japanese Constitution and more specifically Art. 9 are the reminder of the loss of the Second World War by the Japanese military forces and the end of a long historical tradition of militarism and prestige. Under a constitutional point of view, however, although the Japanese political elite and the public might want to amend the Constitution, they will have to also change the fundamental nature of the Constitution itself, as having a military apparatus in the more traditional sense will be in contrast with one of the pillars of the Japanese Constitution, namely pacifism.[245]

[245] Pence C., *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, in *N.C.J. Int'l L. & Com. Reg.*, 2006, Vol. XXXII, 338.

This pacifist stance has greatly helped Japan in dealing with the atrocities it committed during its occupation periods by reassuring that the new Japanese empire was not to pursue its predecessor in militarist conquests, but it was to pursue a more pacifist and non-interventionist stance. For this purpose, not amending either the Preamble of the Constitution or Art. 9 would greatly help Japan when dealing with its neighbours and with its image in the international arena.[246]

As for what concerns the constitutionality of owning an army or self-defence forces, although it was not a direct consequence of an amendment to the Constitution, Japan received international permission to have self-defence forces only after it ratified the UN Charter in 1956, as Art. 51 allowed it to be part of collective self-defence scheme and as such in need of having Self Defence Forces. Under a constitutional point of view, however, this international interpretation does not allow Japan to legally own military forces such as an army, a navy, an air force, and so on. If Japan were to have them, it would legally need to amend the constitution as interpretations have proven to be not enough to circumvent the prohibitions laid out in Art. 9.[247]

To obviate this problem, not only the wordings of Art. 9 would need to be changed, but also its title which, for obvious reasons, should be changed from «renunciation of war» to «national security». These kinds of amendment to Art. 9, however, would once againmean a contradiction with one of the pillars of the Japanese Constitution, namely pacifism. It can thus be argued that under a constitutional point of view, although it might be recommended to amend the constitution in order to have more operationality behind the deployment of the

[246] Motoyama K., *The Significance of the Provisions for the Renunciation of War and Abolition of Military Forces in the Japanese Constitution*, in *King's Law Journal*, 2015, Vol. XXVI, No. II, 285-298.
[247] The UN Charter; the Basic Law

SDF, it might not be pragmatic nor wise to do so, for it could complicate the external relations which Japan has with its neighbours, namely South Korea. [248]

The possibility of amending the Constitution, however, cannot be analysed only by looking at its legal implications, but it must be reconnected to the political and public sentiment, especially since both holds the key to any amendatory practice of the Constitution itself.

10.2.2 Political and public perspectives

As for what concerns the political and public perspective on the idea of amending the Constitution it can be argued that especially the political elite, and less so the public, is fervent to amend the constitution in order to gain the possibility not only of having an actual army – in the sense of an army which can be employed for offensive missions as well as defensive ones – but also of reobtaining the status of "complete" country, a characteristic which many Japanese politicians and members of the public have felt it was missing since the loss of the Second World War.[249]

This idea of wanting to become "whole" again has in a way always been part of the post-war development of Japan and it has become more prominent with the first Premiership of Shinzo Abe. He has, in fact, made numerous attempts at amending the constitution but was always met with political opposition by the more pacifist parties. Despite this desire of wanting to re-emerge as a sovereign state, it is important to mention that the Japanese political elite had always given legal justifications to Japan's inability to participate in collective defence missions for it could not act upon the inherent rights – which has been recognised

[248] Pence C., *Reform in the Rising Sun: Koizumi's Bid to Revise Japan's Pacifist Constitution*, in *N.C.J. Int'l L. & Com. Reg.*, 2006, Vol. XXXII, 338.
[249] Hughes C.W., *Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security*, in *Foreign Policy Research Institute*, 2006, 725-744.

that Japan has by the international community – to self and collective defence of Japan.[250]

This seemingly pacifist attitude can be explained with the idea that, before the Abe Administrations, Japan did not want to act upon the international pressures if it could not properly return to be a sovereign state. Additionally, Japan wanted to participate to those missions which it knew were within its scope of interest. With Abe, this reiterating the idea that Japan cannot act on these internationally recognised inherent rights to self and collective defence was interrupted and a new paradigm was created. This new approach was taken not because the political elite changed its approach to its interest – Japan continued to participate to the missions which were within its scope of interest – but because the political elite, especially Abe, believed that Japan should be able to independently decide whether to have a military apparatus and its use, on the example of any other sovereign state.[251]

At this point it can be argued that the public and especially the political elite was content enough with the paradigm shift. However, the reality is that the Japanese political elite did not want to arrest Japan's return to the status of sovereign state by leaving the Constitution unamended butwanted to legally and constitutionally complete this journey. Obtaining the ability to participate into peacekeeping operations and under what terms, in fact, had been a long process and the Japanese political elite, as well as some members of the public, feel that Japan should be able to decide for itself in what ways and if to contribute to armed conflicts and to international missions.[252]

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[250] Lande E., *Realism - Between Offensive and Defensive - The Japanese Abe Government's Security Policy toward China*, in Asian Security, 2018, Vol. XIV, No. II, 172–192.

[251] Hughes C.W., Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security, in Foreign Policy Research Institute, 2006, 725-744.

[252] Liff A.P., *Policy by Other Means: Collective Self-Defense and the Politics of Japan's Postwar Constitutional Reinterpretations*, the National Bureau of Asian Research, Seattle, Washington, Asia Policy.

So far it has been argued that the political elite and arguably the majority of the members of the public are in favour of an amendment to Art. 9 of the Constitution. Contrary to the German experience, however, where almost the totality of the political elite and the public were against a possible amendment of the Basic Law – the debate in this regard has not even been raised – the Japanese public and political elite presents voices of opposition to the idea of amending the constitution. These voices, which are represented by the Social DemocraticParty and its electorate, fear that amending the Constitution, namely in its Art. 9 and its Preamble, could potentially be at the detriment of the pacifist attitude which had characterised the Japanese foreign policy since the implementation of the new constitution.[253]

Damaging this intrinsic pacifismcan be analysed in two perspectives: for some, usually the members of the public, it is considered as a possible first step towards a more militaristic Japan which could return to the glories of the past. For some others, usually some members of the political opposition, this attitude might reflect poorly on the relations which japan has nurtured over the post-war years with its neighbour, which would considerably change their approach to Japan if it were to return to its militarist attitude, even if mitigated.[254]

It can thus be argued that under a political and public perspective, there are two currents concerning the amendments which could be made to the Constitution. On the one hand, the majority of the political elite and of the public opinion are in favour of amending Art. 9 and consequently the Preamble; on the other hand, members of the political opposition and some members of the public fear of a militarisation of Japan if it were to have an amended Art. 9 and the removal of

[253] Hughes C.W., *Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security*, in Foreign Policy Research Institute, 2006, 725-744; Council on Foreign Relations, *Japan and Its Military*, 2006, in https://www.cfr.org/backgrounder/japan-and-its-military

[254] Motoyama K., *The Significance of the Provisions for the Renunciation of War and Abolition of Military Forces in the Japanese Constitution*, in *King's Law Journal*, 2015, Vol. XXVI, No. II, 285-298.

the pacifist stance which characterise its Preamble and the Constitution as a whole. It is for such reasons that, under a political and public point of view, Japanis divided into those who wish to amend the constitution and those who do not wish so.[255]

Along with the constitutional and political elements of this debate, a major role is played by the international context in which Japan is inserted.

10.2.3 International Context

After having lost the Second World War, bothJapan and Germany have had different external influences and domestic developments, which significantly shaped the development of their attitude towards the participation to peacekeeping operations and their attitudes towards whether amending the constitution or not. Japan, although crucial for the US in controlling the East Asian region, was never part of a reality like the European one – in its institutional sense – and thus could not benefit from the direct American interested approach. Japan's role in the US' foreign policy was fundamentally different from the German one.

Japan's main role was to protect the US' interests in the region, to provide it with logistic support – namely the use of military bases on Japanese territories – and, in a way, aiding the US in preventing other countries in the region to fall under the Soviet sphere of influence. In order for the US to have a compliant Japan, which could participate to the peacekeeping operations in which the US had interests and which could pursue the American agenda regarding foreign policy, it needed to allow Japan to participate into said missions under specific

[255] Hughes C.W., Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security, in Foreign Policy Research Institute, 2006, 725-744.

conditions, as amending the Constitution was neither in its interest nor its prerogative.[256]

It is thus why, with various international Treaties with the US, Japan was allowed to have SDF or *Jieitai*, in the post-war period. Although a debate around the constitutionality of the creation of said forces arose, various American Administrationsand the Japanese government at the time interpreted the SDF in a way that could be constitutional and thus in a way that would not clash with the rigid wording of Art. 9. This attitude was the result of various geopolitical interests, mainly Americans, and also of the American need of a more contributing ally when it came to the security of its bases on Japanese soil.
It can thus be argued that following the international context, Japan's decision to amend the constitution was never proposed nor openly supported by the US or other key players in the region; nonetheless, they had geopolitical interest in insisting for a more interventionist Japan with the possibility of utilising self-defence forces. The international context, however, was also characterised by those countries who Japan had conquered during its colonial period and which had to suffer due to its militarist and forceful ruling system. These countries have been more or less openly opposed to a Japanese rearmament as they fear that the trust that was built with Japan on the basis of its pacifism would erode if Japan were to ream and constitutionally abandon its pacifist stance.[257]

Under the international point of view, Japan was able to own the SDF in the ways it did due to the American intervention and international interpretation, but it is arguable that its desire to amend the constitution it is not supported, neither by its allies, namely the US, neither by its neighbours, namely China and South

[256] Westbrook T., *Putting Japan's Constitutional Changes into Perspective: Preventing Conflict through Military Interoperability?* in *Japan Studies Association Journal*, 2017, Vol. XV, No. I, 83; Council on Foreign Relations, *Japan and Its Military*, 2006, in https://www.cfr.org/backgrounder/japan-and-its-military
[257] Beer L. W., *Peace in Theory and Practice under Article 9 of Japan's Constitution*, *Marq. L. Rev.*, 1998, Vol. LXXXI, 815.

Korea. On the one hand, China does not want another militarised country to be able to interfere with its plans in the South China Sea; on the other, south Korea continues to blame Japan for its war wrongdoings and would not condone nor support its decision to amend. It is for such reasons that, under a constitutional point of view, it can be argued that Japan might want to amend the constitution but may find both domestic and international resistances.[258]

[258] Westbrook T., *Putting Japan's Constitutional Changes into Perspective: Preventing Conflict through Military Interoperability?* in *Japan Studies Association Journal*, 2017, Vol. XV, No. I, 83.

11. Conclusion

The aim of this dissertation was to investigate whether Germany and Japan may need to change their respective constitutions in relation to their participation in armed conflicts and the research has been carried out under three perspectives, constitutional, political and geopolitical, even though this is eminently a legal analysis. The answer to this question is that whilst it is unlikely that Germany will need and want a constitutional reform, Japan not only will need but it is also committed to amend its Constitution to this end. The rationale behind this answer is to be connected to the respective constitutional provisions on the use of force and armed forces, namely Art. 87(a) of the German Basic Law and Art.9 of the Constitution of Japan.

It has been argued that Germany will not need nor will not want to amend its constitution and thus revise its constitution as Art.87(a) does not prevent it from owning a military apparatus, but it only defines the instances in which Germany can participate into international missions. Said instances are only for defence purposes. Moreover, within the Basic Law itself and within the Treaty which Germany ratified, namely the TEU and NATO, there are important provisions which determines once again the instances in and the extent to which Germany can contribute to international missions.

Art. 24(2) and Art. 26 state that Germany can participate into international missions for defence purposes only in a system of mutual collective security and that it cannot declare war to any state. In this regard, when Germany declared the war on terror, it has been argued that it has been done under the idea of participating into a system of mutual collective security for terrorism is a threat to the German state. These provisions thus implicate that under a constitutional pint of view Germany has no need for a constitutional reform for it holds all the necessary tools to be able to deploy its *Bundeswehr*, within certain restrictions, as it sees fit.

As for what concerns the political and public point of view, it has been argued that Germany does not want to amend the Basic Law as they perceive that Germany has not only the necessary provisions to determine when it is constitutionally appropriate to participate into a conflict, but it can also count on the relevant FCC's ruling. Additionally, it has been argued that the German political elite and public are against an additional constitutional reform for they fear that further amending the Basic Law could be dangerous to the integrity of the constitution itself. There is still fear that the past experience with the Weimar Republic could repeat itself if the constitution is revised too often. As for what concerns the international context, other countries, despite the numerous American requests for incrementing the contribution to the NATO budget, feel that it is not necessary to further amend the Basic Law for they believe that contribution which Germany it now providing to international missions is sufficient.

Contrary to the experience of Germany, Art. 9 of the Japanese Constitution does not allow Japan to own a military apparatus, for as a country it has renounced war and thus does not need military forces. After the ratification of the UN Charter and the Five Principles on Peacekeeping Operations, Japan was able to own defence military forces, which however are still limited for what concerns their capability and military might. Due to this limitation and due to the overly restricting wording of Art. 9, Japan feels that under a constitutional point of view it needs a constitutional reform. It has in fact been argued that Japan perceives this impositiona constraint over its sovereignty.

As for what concerns the political and public point of view, it has been argued that Japan is characterised by two political and public views: the pro-revisionist and the anti-revisionists. The former is represented by Abe and its party and by the majority of the public opinion, which feel even more threatenedbythe increasing Chinese presence in the South China Sea and by the nuclear power of North Korea mainly due to the fact that, according to it, it does not own an

adequate military apparatus. The latter is represented by the opposition party and their supporters, who believe that if Japan were to amend Art. 9 and the Preamble of the Constitution it would lose its pacifism and pacifist stance when it concerns international relations. It is thus why it has been argued that, although it has been acknowledged that there is a debate concerning a possible constitutional reform, the majority of the political elite and of the members of the public strongly feel in favour of amending it, for they feel that continuing interpreting Art. 9 is too limiting.

Lastly, as for what concerns the international context other countries, such as China and South Korea, but also North Korea to an extent, feel that a possible rearmament of the Raising Sun would mean a return to the militarist attitude which characterised Japan in the centuries predating WWII. On the contrary, the US might look favourably over a possible Japanese rearmament and thus a constitutional reform for it could turn Japan into a fundamental ally in controlling the Chinese navy and military influence both over the region and over the South China Sea.

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13. Summary of the Dissertation

This dissertation aims at investigating and reflecting on whether Germany and Japan will need a constitutional reform in order to participate in future international military missions or will base their participation on the mere interpretation of the Constitution. The answer to this question is that whilst it is unlikely that Germany will need and want a constitutional reform, Japan not only will need it, but it is also committed to amend its Constitution to this end. The rationale behind this answer is to be connected to the respective constitutional provisions on the use of force and armed forces, namely Art. 87(a) of the German Basic Law and Art.9 of the Constitution of Japan. When talking about Article 9 of the Constitution of Japan and Article 87(a) of the Basic Law, it is necessary to specify what the concept of "the use of military force" entails. It is thus why, before one is to analyse the implications which the above-mentioned provisions have on the constitutionality of the deployment of the respective armed forces, it is imperative to define the terms "war", "armed conflicts" and "peacekeeping operations", for they carry profound differences in terms of the commitment of the armed forces and the legality of their deployment.

1. Definition of war, armed conflict and peacekeeping operations

1.1 Definition of war

In order to understand the concept of war, it is important to start from the famous analysis of Prussian philosopher Carl von Clausewitz, who theorised that war is a power relation between two actors, where one actor is trying to compel another actor, usually its adversary, to its will by the use of force. If one is to literally follow this definition, it might seem that for it to be a war it is necessary that a country uses its military forces. History has disproved this theory, for there have been wars – as it was the case of Turkey and Germany during the Second World War – in which two countries were at war with one another but never actively engaged in an armed fighting.

Additionally, it has been argued that von Clausewitz's theory might no longer apply to the post-WWI warfare for it does not take into account the rationale and the culture behind a country's decision to go to war, but only focuses on the idea of war being just a military tool to a political end. Nonetheless, von Clausewitz's theory is important for the discussion in this dissertation for it shed lights on the international rationale that was in place when the the Basic Law and the Constitution of Japan were designed.

1.2 Definition of armed conflicts

Generally, an armed conflict is when the opponents to the government have reached an enough level of military might to challenge the government militarily. If the opponents have reached this might and engage in an active conflict with the government, then international humanitarian law is applied. According to the International Humanitarian Law, there are two types of armed conflicts: international and non-international. The non-international armed conflicts are themselves further divided into different categories, and depending on their characteristics, they fall under Article 3 of the Geneva Conventions of 1949 or to Article 1 of Additional Protocol II.

At this point it has to be mentioned that the term "armed conflict" first appeared in the Geneva Convention as a substitutive word for "war". This substitution was intentional and aimed at avoiding that a country which was involved in a type of conflict would evade having to apply international law for it did not declare war. With this substitution, in fact, having declared war or not was rendered uninfluential to the application of the international law concerning armed conflicts. According to the international humanitarian law, for it to be labelled as an armed conflict, it is not necessary that a country declares a state of war, it is only necessary that a degree of military hostilities is taking place.

1.3 Definition of peacekeeping

Generally, the term peacekeeping has been used in association to those UN operations which aim is to restore peace and are in place in those countries which are torn by conflict. It is arguable that with few exceptions, such as the one in Rwanda in the late 1990s, peacekeeping operations have proven to be quite successful and one of the most effective tools at the UN's disposal to restore peace. With these operations, the UN peacekeeping troops provide security and the necessary support – whether political or logistic – to help countries face the difficult transition towards peace. An important feature which distinguishes peacekeeping operations from war and armed conflict, is that for it to be a peacekeeping operation all the actors involved into a conflict must agree to the presence of the UN peacekeeping troops.

Currently, there are fifth-teen UN peacekeeping operations and they follow a specific institutional *iter.* After the Security Council's deliberation, the UN peacekeeping forces are deployed, even though in some occasions the General Assembly can take the initiative in this regard. An important feature of any peacekeeping operation is that they follow three fundamental principles: (a) «consent of the parties», (b) «impartiality» and (c) «non-use of force except in self-defence and defence of the mandate».[259] These principles were theorised in the first UN peacekeeping operation and are continuously reaffirmed in UN documents concerning peacekeeping. If analysed in correspondence with the articles on armed forces in both constitutions, principle (c) allows to see how the two countries approached the duty of defending the UN mandate of maintaining peace and security.

[259]https://peacekeeping.un.org/en/what-is-peacekeeping

2. Constitution-making: Western, Asian, and Islamic constitutionalism

Before analysing the different types of constitutionalism, it is important to define what constitutionalism is. It is a legal and political doctrine which ensures a limitation of the public powers and which affirms that the public authority is normatively divided into respective areas of competence among different branches of government; Germany is a perfect example of this decentralisation of the power. Although fragments of constitutionalism can be found in societies which pre-date the modern one, such as feudal and medieval societies, it can be argued that constitutionalism developed in correspondence to the development of the modern European state. The advent of the French Revolution slightly evolved the primordial version of constitutionalism by inserting into the narrative the principle of equality.

At this point it is important to mention that not all forms of constitutionalism, namely the Islamic constitutionalism and Asian constitutionalism, understand the principle of equality in the same terms as the Western one. If the latter is epitomised by the principle of dignity, the principle of equality and the recognition of fundamental human rights to the citizens and non-citizens, the other two differ in this regard. Asian constitutionalism, in fact, focuses on values such as meritocracy, respect and family relationships – to be intended in the Confucian sense.

In this sense it is possible to argue that theories such as the one of the "rule of law" by Burke or any sort of liberal-western approach to the separation of powers are missing from Confucian teachings. After the events of the Second World War, however, and the spreading of the American format of constitutionalism, Asian countries such as Japan started to merge these two apparently conflicting traditions thus creating what has been called Confucian constitutionalism. In this regard it has to be mentioned, however, that Japan does not only belong to Asian Constitutionalism, but it also has elements of the

Western one, for it was born out of the merging of the two traditions and for it holds elements of both.

As for what concerns Islamic Constitutionalism, it diverges immensely from the above-analysed types of constitutional traditions for it encompasses the idea of the divinity in the rule of law. In this form, the constitutional system is based on the idea that the citizens must commit to both the Islamic religious precepts and to the constitutional principles, which are based on the religion of Islam, forming a sort of theocratic constitutionalism since the religious elements are as important and the constitutional values. Countries which are characterised by this tradition believe that the Shari'a is the ultimate legal norm and that any law which is in contrast with the Shari'a or its precepts is invalid. They, however, differ on the role the role that the Shari'a should have in the society, with some countries, such as Iran, being stricter than others. Given this analysis, one might understand that a constitutionalism based on religious precepts might be a contradiction. It can, however, be argued that this is not the case as constitutionalism itself presents some similarities with religion, for both religion and constitutionalism follow the same logic: they both offer rules one has to follow.

As for what concerns the use of force and peace, these three kinds of constitutionalism find both commonalities and differences among them. For what concerns the differences, these traditions tend to differ the most from one another on the idea of the use of force. As for what concerns the similarities, it can be argued that, when it comes to peace, these three kinds of constitutionalism present commonalities. Although some argues in favours of the use of force, they all generally tend to see peace as a mean to achieve in order to defend the integrity of the power structure they champion.

3. The Basic Law and the German method for constitutional revision

After having lost WWI, the new Constitution of the German Empire was the Weimar Constitution and it was perceived by the German citizens as an imposition from above, a sort of punishment for having lost WWI. In 1933, Hitler rose to power and led Germany into the Second World War. After having lost WWII, Germany found itself once again at the mercy of the victors, but, aware of their past mistakes, the Allied Powers – the United States, the United Kingdom, the USSR, and France – decided to avoid imposing war reparations on Germany, so to avoid a repetition of the sentiment which eventually led to Hitler's rise to power. In this international context the Third Reich was divided into the German Democratic Republic (GDR), which was under the influence of the Soviet Union, and the Federal Republic of Germany (FRG), which was under the remaining Allied Powers.

As it became clear that it was impossible to reunite the two Germanies due to the escalation of the hostilities into the Cold War, the Basic Law was drafted as the temporary constitution of the FRG, with the intent of drafting the Constitution once the reunification was completed. Aware of the easiness with which Hitler could change the Weimar Constitution, the drafters of the Basic Law decided to insert an article specific to the methods of constitutional revision, namely Art.79. This article states that the Basic Law can be amended only by a law passed by two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*, thus making it quite hard to amend it.

4. Art.87(a)and Art. 24(2) of the Basic Law: historical background and legal implications

Art. 87(a) of the Basic Law deals with the use of the German military forces (or *Bundeswehr*) and it emphasises that the German armed forces must be used for

self-defence purposes and only to the extent permitted by the Basic Law itself. Right after Germany joined NATO in 1956, the *Bundeswehr* was supposed to be *exclusively* used for the "purpose of defending NATO territory" as laid out in NATO itself. In this occasion, the Basic Law's Art. 24(2) was amended for the first time thus allowing the West German state to actively contribute to NATO's operations against communist forces, in the case of aggression, without having to incur into issues of unconstitutionality of the participation or deployment of German troops. Despite this amendment the *Bundeswehr* did not participate into any peacekeeping operations until the early 1990s.

In order to allow Germany to participate into the various peacekeeping operations the Basic Law had to once again be amended in the 1960s and the Bundestag had to resort to the rulings and interpretations of the FCCs in order to be able to constitutionally deploy the *Bundeswehr*. These rulings are extremely important under a constitutional point of view, for they allowed Germany to constitutionally participate into foreign operations without having to amend the core nature of Art. 87(a) of the Basic Law. On a more technical note, the FCC could pursue with its decision as Art. 24(2) itself allows room for such interpretation.

Despite these various decisions of amending the basic Law in order to have a German participation into international missions, the German public and even members of the *Bundeswehr* itself have always been and still are characterised by a profound pacifist sentiment. The increased German participation into the missions does not collide with this sentiment for it has been done with the rationale that it is Germany's duty, aware of its past sins, to contribute with peacekeeping missions in order to spread and maintain international peace. In this regard, Germany's involvement in international peacekeeping coalitions has exponentially increased in the 1990s, and despite this increase, it never directly participated in armed conflicts or peacekeeping operations. Therefore, the pacifist attitude mentioned before is perfectly represented in the operations

Germany took part in and shows that in the German case an increase in participation does not necessarily mean a shift in its reticence to participate into conflicts and its culture of restraint.

There are other relevant constitutional provisions, namely the Art. 26 of the Basic Law and Arts. 42-46 of The Treaty on the European Union. Art. 26 is concerned with the practices to follow in order to secure international peace and thus is linked to the German unconstitutionality of preparing a war of aggression. Art. 42, along with Art. 43, 44, 45 and 46, can be inserted in the European scheme for a Common Security and Defence Policy and helps in determining the constitutionality behind a possible German participation into a conflict.

As it has been mentioned, various articles in the Basic Law state that Germany cannot declare war to any state. In this regard, when Germany declared the war on terror, it has been argued that it has been done under the idea of participating into a system of mutual collective security – something that Germany can participate in – for terrorism is to be considered as a threat to the German state. These provisions thus implicate that under a constitutional pint of view Germany has no need for a constitutional reform for it holds all the necessary tools to be able to deploy its *Bundeswehr*, within certain restrictions, as it sees fit.

5. The Constitution of Japan and the Japanese procedure for constitutional amendment

As Germany, Japan was defeated during the Second World War and its new Constitution was adopted in 1947. The forces of US General MacArthur had the task of drafting a new constitutional document which was to substitute the Meiji Constitution (1889). Despite having tried to surpass the Meiji Constitution with a relatively forthcoming approach, General MacArthur decided to insert Art. 9 in the Constitution, legally limiting the might of Japan's military forces. This provision appears to be not only an extremely punishing norm for a sovereign state, but also legally ambiguous. As for the legal ambiguity, the wording of Art.

9 appears to be a unique instance for it is a restricting norm which has immediate and direct consequences on national politics.

Additionally, since Japan has always been a country which had been profoundly influenced by its military tradition, many were the instances where Japan focused its national and foreign policies in light of a more militarised Japan. The Rising Sun was supposed to be able to not only face the threats from the outside but also show its prestige via the magnitude of its military apparatus. With the "occupation" of General MacArthur – he was the Supreme Commander for the Allied Powers (SCAP) in Japan – the country went through various reforms, officially ending the "glorious" past of its military forces.

6. 7.2 Art. 96 and Constitutional revisions of the Constitution of Japan

After having removed the Meiji Constitution, General MacArthur wanted that also in the article concerning the revision of the Constitution Japan had a more democratic approach. Art. 96 presents a direct democracy approach to the method for the Constitutional revision: once the Diet has approved the decision of amending the Constitution, it is imperative that also the Japanese people agree with said decision, via a referendum. This provision not only marks a break from the past, but also renders ambiguous the simplicity by which the Constitution can be amended: it could be either extremely hard to amend the Constitution or extremely easy, depending on the international circumstances (i.e. an external threat) and on the internal sentiment – more or less militarist.

7. Art. 9 of the Constitution of Japan: historical background and legal implications

Contrary to the experience of Germany, Art. 9 of the Japanese Constitution does not allow Japan to own a military apparatus, and it leaves no room for interpretations for it clearly states that with said article Japan renounces war and

is forbidden to maintain any type of military forces as its right to be a belligerent country is not recognised. Thanks to various international Treaties with the US, Japan was allowed to have Self Defence Forces (hereon SDF) or *Jieitai*, which are mainly used in three areas: Air, Ground and Sea. Some have argued that the SDF was in reality just a different type of military might, and as such it was believed to be unconstitutional.

The Japanese governments and various American Administrations, however, mainly for geopolitical reasons, interpreted the SDF in a way that could be constitutional and thus in a way that would not clash with the rigid wording of Art. 9. It is important to specify that Japan received international permission to have self-defence forces, which however are still limited for what concerns their capability and military might*, only* after the ratification of the UN Charter and the Five Principles on Peacekeeping Operations, as Art. 51 allowed it to be part of collective self-defence scheme and as such in need of having an SDF. Due to this limitation and due to the overly restricting wording of Art. 9, Japan feels that under a constitutional point of view it needs a constitutional reform. It has in fact been argued that Japan perceives this imposition a constraint over its sovereignty.

8. Proposals to amend the Constitution

The Constitution of Japan has never been amended and this characteristic marks it as one of the few in the world which was able to maintain its original form without any changes. The fact that it has never been amended, however, does not mean that it has never been tried. The latest attempt is the one by Shinzo Abe in 2019, where he proposed amending the totality of Art. 9. It was meant not only to reword the majority of Art. 9 – effectively removing the *renunciation of war* clause from the Constitution– but also to clearly state the role that SDF should have in the context of Japan's military apparatus. This time many, both in the Diet and among the members of the public, were in favour of discussing this amendment, although some reticence was still shown in both the opposition

parties and public opinion, as many could not and still cannot agree on what should be amended.

Nonetheless, it can be argued that Japan faced a shift in its perception in the world and in the perception of what its role should be in it. It is arguable that causes for this change could be the ever-increasing presence of the Chinese Navy in the South China Sea, and the increasing nuclear power capability of North Korea.

9. Japanese participation into peacekeeping operations

These operations have been used as a way of extending Japan's diplomatic activities and amplifying its voice within the international powers, while enjoying the legitimacy given by the UN and its Security Council. In this regard, these operations have played an important role in Japan's foreign policy. On the one hand, they allowed Japan to distance itself from its militarist past and pursue the narrative of being a pacifist country – this narrative has been proven fundamental for Japan's relationship with its neighbouring countries; on the other, it gave Japan an opportunity to distance itself from the US and its militarist ambitions.

Another reason why Japan participated to so many missions was because of its ambition of obtaining a «permanent seat on a reformed UN Security Council» for it believed that being the third largest contributor to its budget and participating to numerous peacekeeping operations would have positively influenced its chances. As it seem obvious, there are some flaws with this rationale for it is highly unlikely that the UN would have reformed its Security Council and even more unlikely that it would have chosen Japan as the new member: Japan had in fact been "on the wrong side of the war".

10. Conclusions

The aim of this dissertation was to prove whether Germany and Japan would want to change their respective constitutions and it has been analysed under three perspectives: constitutional, political and geopolitical.

10.1 Germany

Under a constitutional point of view, Germany might not need nor want further constitutional revisions, for it has already amended it and the wordings of the relevant articles leave, to some extent, room for ambiguity and interpretation. Additionally, it can rely on many international provisions which can aid it in participating and justifying a more or less rapid development of its armed forces – see Art. 4 of NATO Treaty, Art. 42(1), along with Arts. 43, 44, 45 and 46 of the TEU and Art. 51 of the UN Charter.

As for what concerns the political and public point of view, it has been argued that Germany does not want to amend the Basic Law as they perceive that Germany has not only the necessary provisions to determine when it is constitutionally appropriate to participate into a conflict, but it can also count on the relevant FCC's ruling. Additionally, it has been argued that the German political elite and public are against an additional constitutional reform for they fear that further amending the Basic Law could be dangerous to the integrity of the constitution itself. There is still fear that the past experience with the Weimar Republic could repeat itself if the constitution is revised too often. As for what concerns the international context, other countries, despite the numerous American requests for incrementing the contribution to the NATO budget, feel that it is not necessary to further amend the Basic Law for they believe that contribution which Germany it now providing to international missions is sufficient.

10.1 Japan

Contrary to the German experience, Japan never amended its Constitution and not for lack of attempts to do so. Unlike Arts. 87(a) and 24(2) of the Basic Law, Art. 9 does not allow Japan to have military forces if not for defensive purposes. This wanting of amending the Constitution is to be connected to the theory that the Japanese Constitution and more specifically Art. 9 are the reminder of the loss of the Second World War by the Japanese military forces and the end of a long historical tradition of militarism and prestige.

As for what concerns the political and public point of view, it has been argued that Japan is characterised by two political and public views: the pro-revisionist and the anti-revisionists. The former is represented by Abe and its party and by the majority of the public opinion, which feel even more threatened by the increasing Chinese presence in the South China Sea and by the nuclear power of North Korea. The latter is represented by the opposition party and their supporters, who believe that if Japan were to amend Art. 9 and the Preamble of the Constitution it would lose its pacifism and pacifist stance when it concerns international relations. It is thus why, although there is a debate concerning a possible constitutional reform, the majority of the political elite and of the members of the public strongly feel in favour of amending the constitution, for they feel that continuing interpreting Art. 9 is too limiting. Lastly, as for what concerns the international context other countries, such as China and South Korea, but also North Korea to an extent, feel that a possible rearmament of the Raising Sun would mean a return to the militarist attitude which characterised Japan in the centuries predating WWII. On the contrary, the US might look favourably over a possible Japanese rearmament and thus a constitutional reform for it could turn Japan into a fundamental ally in controlling the Chinese navy and military influence both over the region and over the South China Sea.