

Department of Political Science
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Chair of Comparative Public Law

The Successful Case of the Japanese Constitution, Its History and Its Implications

Will the U.S. – “Imposed” Constitution Continue to Endure?

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The Successful Case of the Japanese Constitution, Its History and Its Implications.

Will the U.S.-"imposed" Constitution Continue to Endure?

Abstract

The period immediately following Japan's surrender at the end of World War II represented a phase of profound transformation for the nation as the country moved from an authoritarian monarchy to a stable democracy under U.S. occupation, which lasted from 1945 to 1952. The epiphany of this transition was the promulgation of the 1947 Japanese Constitution, which introduced such fundamental principles as pacifism, enshrined in the infamous Article 9, the protection of human rights, and the affirmation of popular sovereignty. Although the dominant narrative tends to emphasize the imposition of the constitution by the United States, a deeper analysis reveals a more intricate and complex process that involved extensive domestic debate and the influence of several foreign constitutional models, including the German and British constitutions.

The extraordinary longevity of the Japanese Constitution, which has remained in force without any changes since its adoption, has stimulated numerous discussions over the decades about its legitimacy, ability to adapt to contemporary challenges, and future prospects, with particular attention to Article 9. This article, which prohibits Japan from maintaining offensive armed forces, has been the subject of intense controversy, especially in the context of changing global security dynamics and increasing international pressure for Japan to take a more active role in regional and global defense.

This thesis aims to explore in depth the phenomenon of constitutional transplants and imposed constitutions in contexts of occupation, using the Japanese case as a paradigmatic example to understand the factors that have contributed to its exceptional stability. In addition, contemporary revisionist movements advocating the need to update the constitution to meet today's challenges and the prospects for possible constitutional reform will be analyzed. Through a comparative approach, the study aims to offer a deeper insight into the resilience of Japan's constitution, highlighting its central role in defining the country's democratic identity and the dynamics that have ensured its stability for more than seven decades.

Keywords: Constitutional Transplant, United States, Japan, Constitutional Endurance, Japanese Revisionist Movement, Comparative Constitutional Inquiry.

Introduction

The year following the dramatic conclusion of World War II in Japan marked one of the most significant turning points in modern history. Wars often produce winners and losers, but rarely on a scale comparable to that in East Asia in 1945, when Japan surrendered to the United States and its allies¹. What made the outcome of this Pacific conflict unique was Japan's transformation into a stable democracy.

Japan was under occupation from 1945 to 1952, regaining full sovereignty with the entry into force of the San Francisco Peace Treaty in 1952. However, Okinawa did not return to Japanese control until 1972, and to this day, the United States has never entirely “abandoned” the country. About 47,000 U.S. military personnel are present in Japan, providing military protection under the U.S.-Japan Security Treaty, signed in 1952 and revised in 1960². The most significant legacy of the seven years of U.S. occupation is undoubtedly the postwar Japanese Constitution and the pacifist Article 9, which prohibits Japan from maintaining armed forces outside the defense of its territory³. Japan's pacifist Constitution was promulgated on November 3, 1946, and enacted on May 3, 1947, replacing the “Imperial Constitution of Greater Japan” of 1889⁴.

The narrative of the U.S. occupation of Japan often focuses on the “imposition” of a constitution that includes the aforementioned waiver of war clause and stripped the Japanese Emperor of his status as the “head” of the state, reducing him to a symbolic figure⁵. However, describing this process as a simple imposition by the Supreme Commander of the Allied Powers’ staff (led by General MacArthur and U.S. occupation officials) oversimplifies the situation and may be misleading, as the dynamics involved were much more complex⁶.

This interpretation not only underestimates Japanese participation but also ignores the diversity of opinions present on both sides⁷. Although it is true that the Americans drawn up an initial draft of the constitution and sent it to the Japanese, the process of adopting the Japanese constitution was much more complex than the literature describes. Contrary to the notion that it was simply a translation of the American draft, various Japanese political parties, associations, and government

¹ Ray A Moore and Donald R Robinson, ‘Introduction: "A New Order of Things"' in Ray A Moore and Donald L Robinson (eds), *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (Oxford University Press 2002) 3.

² Axel Berkofsky, ‘Japan's Post-War Constitution: Origin, Protagonists and Controversies’ (2010) 2 *Il Politico* 5.

³ The Constitution of Japan (日本国憲法 *Nihon-koku kenpō*) [1947].

⁴ Berkofsky A [2010] (n.2).

⁵ Axel Berkofsky, ‘Japan's US-‘Imposed’ Post War Constitution: How, Why and What For?’ in Silvio Beretta, Axel Berkofsky and Fabio Rugge (eds), *Italy and Japan: How Similar Are They?* (Springer Milan 2014) 67.

⁶ Moore RA and Robinson DR [2002] (n.1).

⁷ John M Maki and Lawrence W Beer, *From Imperial Myth to Democracy: Japan's Two Constitutions, 1889-2002* (University Press of Colorado 2002).

figures had already proposed several constitutional drafts prior to the submission of the American document⁸.

A central aspect of the drafting of the new Japanese constitution is the so-called “constitutional transplant.” Indeed, the Japanese Constitution was deeply influenced not only by the U.S. model, but also by elements drawn from the German and British constitutional systems⁹. This process of transplanting constitutional principles and structures from foreign models reflected the need to provide Japan with a stable and democratic legal basis that could ensure domestic peace and international cooperation¹⁰.

A peculiarity of the Japanese constitution, which clashes even more deeply with the narrative of imposition, is its remarkable longevity, different from all the other constitutions established during the post-World War II period. In the global landscape, countries show notable differences in the longevity of their constitutions. Democracies usually tend to ensure constitutional durability by making specific changes to constitutional texts, rather than replacing them altogether¹¹. It is widely believed that the longevity of a constitution depends on the interaction between design factors and external elements. For a constitution to be durable, it must not only be self-sustaining domestically but also resilient in the face of international upheaval¹². In this sense, the durability of the Japanese Constitution is particularly enigmatic, as it has never been amended since its adoption. It should be noted that its predecessor, the Meiji Constitution, had also never been amended, a historical legacy that contributes to constitutional stability¹³.

The longevity of a constitution can be seen as a sign of stability and social cohesion. Still, the absence of amendments is not necessarily an indicator of inherent justice or adaptability to social and political change¹⁴. In some cases, the lack of constitutional amendments may reflect an institutional rigidity that prevents the legal framework from evolving with respect to societal needs. In this sense, the Japanese constitution offers an emblematic example of such a dynamic. Despite its durability, the Constitution has not avoided criticism and challenges¹⁵. In particular, Article 9 has been the subject of intense discussion and controversy, especially in recent decades.

⁸ Sylvia Brown Hamano, ‘Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights’ (1998) 1 University of Pennsylvania Journal of Constitutional Law 415.

⁹ Shoichi Koseki, *Birth of Japan's Postwar Constitution* (Taylor & Francis Group 2018).

¹⁰ Moore RA and Robinson DR [2002] (n.1).

¹¹ Tom Ginsburg, James Melton and Zachary Elkins, *The Endurance of National Constitutions* (Cambridge University Press 2009).

¹² Id [11].

¹³ Koseki S [2018] (n.9).

¹⁴ Ginsburg T, Melton J and Elkins Z [2009] (n.11).

¹⁵ John M Maki and Lawrence Ward Beer, ‘Constitutionalism in Asia. Asian Views of the American Influence.’ (1980) 53(3) Pacific Affairs 522.

Revisionist movements, often supported by some political sectors, have argued that such Article, while it has ensured a long period of peace, may today be a limitation on Japan's ability to respond effectively to new global security and geopolitical challenges¹⁶. These revisionist movements have emerged in response to significant changes in the international scenario, including evolving regional security threats and the increasing assertiveness of some global players¹⁷. They argue that the constitution should be updated to better reflect the country's current needs and enable Japan to play a more active role in international security¹⁸. However, such proposals face internal resistance, especially from those who see the constitution, particularly Article 9, as a pillar of Japanese pacifism and a symbol of discontinuity from the country's militarist past¹⁹. As such movements show, the constitutional debate in Japan is far from over, and the issue of reform remains a central issue for the country's political future.

The main objective of this thesis will be to analyze the phenomenon of constitutional transplants and constitutions imposed in contexts of occupation, using the Japanese case as a pivotal point, representing it as an emblematic example of such processes. Through in-depth analysis, this research aims to investigate the reasons for the extraordinary longevity of the Japanese Constitution, which has never been amended since its promulgation in 1947, despite the significant political, economic, and social transformations the country has gone through.

Another crucial aspect will be the contribution of this analysis to the debate on the future of the Japanese Constitution, especially in light of the recent passing of Shinzo Abe, a central figure in the revisionist movement and a historic leader of the Liberal Democratic Party (LDP)²⁰. Abe, with his political vision, has long been a proponent of constitutional revision, particularly of Article 9, and his death opened a phase of uncertainty regarding the future of constitutional reform in Japan²¹.

This thesis, therefore, aims not only to explain why the Constitution has maintained its original form for more than seven decades, but also to explore the prospects for change in light of the internal and external pressures that Japan continues to face. Ultimately, this research will not limit itself to a historical and legal analysis of the past but will seek to make a contribution to contemporary thinking about the fate of the Japanese Constitution, highlighting the challenges that revisionist movements might face in a political landscape lacking Abe's strong leadership.

¹⁶ Richard J Samuels, 'Securing Japan: Tokyo's Grand Strategy and the Future of East Asia' (2008) 45(07) *Choice Reviews Online* 45.

¹⁷ T Inoguchi, 'Japan's Emerging Role as a 'Global Ordinary Power'' (2005) 6(1) *International Relations of the Asia-Pacific* 1.

¹⁸ *Id* [17].

¹⁹ John W Dower, 'Embracing Defeat: Japan in the Wake of World War II' (2001) 88(3) *The Journal of American History* 1042.

²⁰ Samuels RJ [2008] (n.16).

²¹ Inoguchi T [2005] (n.17).

This research will be based on the methodology of Comparative Constitutional Inquiry, as the Japanese Constitution is the result of various external influences. Its longevity will be examined and analyzed through comparison with other international constitutional models in order to better understand the dynamics that have ensured its stability over time. Such a comparative approach will highlight the peculiarities of the Japanese model in the context of constitutional transplants and assess the similarities and differences with other constitutional experiences, particularly those of the United States.

Comparative Constitutional Inquiry represents the systematic study and comparison of constitutional systems, principles, institutions, and jurisprudence across different countries and historical periods²². This field aims to generate various forms of analytical insights, whether descriptive, normative, or explanatory, by exploring the similarities and differences among various constitutional frameworks²³. The essence of Comparative Constitutional Inquiry lies in the assumption that constitutionalism across different regions shares common elements, which makes comparison possible and valuable.

This type of research involves various methodologies, such as analysis of constitutional structures, adjudication techniques, and cross-jurisdictional jurisprudence²⁴. It categorically rejects the view that each legal system is internally unique and incomparable and instead seeks to understand how different societies address common constitutional challenges²⁵. Specifically, the methodology adopted in this thesis will be based on a historical-comparative and functional approach. The goal will be to understand contemporary challenges related to revisionist movements and prospects for reform and to examine how external patterns that have influenced Japan's constitutional system will continue to affect its current stability, ultimately hypothesizing whether this particular constitutional structure will continue to endure.

To achieve this goal, the thesis will be divided into four chapters, each devoted to an in-depth analysis of one of the key aspects of this research. The first chapter will lay a theoretical foundation for understanding the complexities of Japanese constitutional construction. It provides insights into the legitimacy, adaptation, and reception of constitutional principles in varying contexts and sets the stage for a deeper examination of Japan's constitutional system in subsequent chapters.

This theoretical framework will be developed by focusing on constitutional transplants, imposed constitutions, and the admissibility of amendments. First, the analysis will focus on defining

²² Ran Hirschl, 'Comparative Methodologies', *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019).

²³ Ibid [22] 15.

²⁴ Ibid [22] 31-32.

²⁵ Ibid [22].

and exploring constitutional transplants, that is, the adoption of foreign constitutional elements in new or transitional contexts, examining their spatial, situational, and temporal dimensions and their impact on comparative constitutionalism. Next, the focus will be shifted to constitutions drafted under occupation, analyzing international law norms on interim occupations and the specific characteristics of such constitutions. The chapter will close with a discussion of imposed constitutions and the fundamental concepts of amendability and constitutional power, central to the drafting of the 1947 constitution, introducing the question about the alleged imposition of the Japanese document.

The second chapter will shift the focus to the historical aspects of the case study, analyzing the political and constitutional processes that led to the creation of the Constitution from August 1945 to May 1947. The analysis will begin by illustrating the Japanese historical context following the end of World War II, and its subsequent occupation, which became a primarily U.S.-led mission under Douglas MacArthur. The analysis will certify the failed attempts of the Japanese government to draft in complete independence a new constitution under the leadership first of Prince Konoe and later of Joji Matsumoto, arriving at the more or less direct intervention of the United States, which led to the first official draft on March 6, 1946. The chapter will conclude with the final ratification by the Japanese chambers, highlighting the main changes and suggesting the theory that this external semi-imposition may have been necessary for Japanese democratization. In addition, a theoretical and technical analysis of the Constitution will be included, contextualizing it within the theoretical framework explained in the first chapter. This integrated approach will allow the Constitution to be evaluated not only through its historical and practical impact but also in light of the legal and political theories that have influenced its formation and evolution.

The third chapter will analyze the more purely technical-functional elements concerning the implementation and perception of Japan's new document, from 1947 until it remained unchanged. It will examine how the constitution, initially reluctantly accepted by a resistant and conservative government, profoundly influenced postwar Japanese democracy. In particular, the role of jurisprudence and its reluctance to firmly defend constitutional principles against political pressures will be highlighted, which seems to have led to a situation where constitutional ideals often clashed with the practical needs of government. In addition, the chapter explores the cultural factors that influence the reluctance to amend the Constitution, emphasizing the role of public perception and political conservatism in maintaining its stability. The conclusion shows the Constitution as a balance between stability and change, emphasizing the importance of jurisprudence protecting its principles.

The fourth chapter will close the discussion by focusing on the longevity of the Constitution, emphasizing its uniqueness as the oldest unamended constitution in the world. The argument of American imposition is challenged, showing that the establishment of the document was more

complex and multifaceted than is often portrayed in both the literature and propagandistic discussions of Japan's political elites. Moreover, the chapter will highlight how the difficulty in even proposing a modification to the document is due to its design, which by incorporating the principles of human rights, pacifism, and popular sovereignty in a way that is utterly new to Japanese culture, creates a very solid balance between stability and change that is difficult to break. In this context, the figure of Shinzo Abe and his revisionist policies, especially regarding Article 9, have influenced the constitutional debate, but popular resistance and political uncertainties suggest that the Constitution will continue to be a cornerstone of Japanese democracy for the foreseeable future.

The analysis will highlight how the context of interim military occupation and external influences in reconstruction contexts, along with their subsequent internal responses, have contributed to a document that, while rooted in a complex past, continues to play a central role in defining Japan's national identity and international relations. This thesis will offer an original contribution to understanding Japan's Constitution, considering not only its longevity and resilience but also contemporary challenges and opportunities for evolution, highlighting how a balance between stability and change can be maintained even in the face of pressures for revision. Through critical and comparative analysis, this study will ultimately aim to illuminate the forces at play that determine the permanence and adaptation of a constitution in a changing global context.

Chapter I

Between Constitutional Transplants and Constitutional Impositions

Introduction

Before entering into the substance of this thesis and its primary object, the Japanese Constitution of 1947, it is necessary to create a theoretical frame around which the analysis will be constructed. The case of the *Kenpō*¹ is of particular interest because it incorporates some of the most fundamental elements of the internal debates of comparative public law. Among the various elements, the phenomena of constitutional transplants and imposed constitutions, together with constitutions drafted under occupations, represent some of the most crucial elements of the constitutional discourse.

These theoretical concepts provide a broader context for understanding the process of setting up a constitution and the impacts of those emerging from non-native contexts, such as the case of Japan after World War II. Constitutional transplants represent the transfer or adoption of constitutional principles or institutional structures from one nation to another, often in political transition or post-conflict situations². These transplants raise numerous questions, especially regarding the legitimacy, adaptation, and reception of constitutional principles in new national contexts, different from their country of origin.

Likewise, imposed constitutions or those drawn up under occupation, a trend that began to spread in the years following the Second World War, pose further questions regarding the sovereignty of the people and the nation, self-determination, and participation in the constituent process. In these contexts, constitutional amendability is a fundamental concept, as it is strongly influenced by the presence of these external actors and these particular historical circumstances that led to the drafting, approval, and promulgation of the constitution³.

At the heart of the whole discourse lies the Japanese Constitution, and it is for this reason that it is crucial to examine and deepen these theoretical concepts to fully understand the context and challenges surrounding the establishment of such document. In this way, the analysis will be more coherent and linear and can be more thoroughly dedicated to the constitutional project's development, implementation, and future destiny. To achieve this, the

¹ From the Japanese “憲法” (pronounced: Kenpō), meaning constitution – regulation. It is the official Japanese name of the 1947 document.

² Vlad Perju, ‘Constitutional Transplant, Borrowing and Migrations’ (2012) 254 Oxford Handbook on Comparative Constitutional Law 1.

³ Xenophon Contiades and Alkmene Fotiadou, ‘Imposed Constitutions: Heteronomy and (un)Amendability’, *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018).

chapter will be divided into four paragraphs. In the first paragraph, the analysis will be entirely devoted to constitutional transplants, phenomena that deeply reflect the interconnection between global legal systems set up in recent years. The section will be divided into three additional sub-paragraphs for a more precise analysis.

The first will illustrate the more “technical” side of the concept, as it will briefly explain the terminology issues found in constitutional transplants, as there is much disagreement between scholars over which term or metaphor is best to describe such a concept. The second part will expand the analysis by illustrating the different dimensions that are part of the matter of transplants: spatial, situational, and, above all, temporal. Finally, the third sub-paragraph will illustrate the profound connection between legal transplants and the continuous development of comparative constitutionalism, highlighting the importance of cultural relativity and flexibility in adapting new constitutional rules or provisions. Of course, the concept of legal transplant paves the way for many new issues that have developed over the past sixty years, including constitution-making under occupation, the subject of the second paragraph. Again, the section will be divided into three sub-paragraphs, each analyzing a different side of this phenomenon.

In the first sub-paragraph, the analysis will illustrate some international law norms concerning *interim* occupations, their definitions, and indications that a “just” occupation can be conducted. The second part will briefly analyze the problem of state-building in these delicate contexts and the importance of dialogue and confrontation between external and internal actors in drafting a constitutional document. In the final sub-paragraph, the focus will move to the more “definitional” part of the analysis, illustrating the general characteristics of the constitutions drawn up under occupation with the help of a sample study conducted by Zachary Elkins, Tom Ginsburg, and James Melton.

To deepen the analysis and make this theoretical basis as linear and comprehensive as possible, in the third paragraph, the attention will shift to the phenomenon of imposed constitutions, which differ from the previous category of constitutions discussed because they lack the element of dialogue. This concept is essential for analyzing the Japanese constitution, as the debate about its supposed imposition is still much heated nationally and globally. In the first sub-paragraph, the analysis will consider different definitions of constitutional imposition, emphasizing, however, the arguments advanced by David Law, who argues that a real

imposition does not exist, or rather, if any imposition then exists, in whatever context it is drafted, it can be considered as “imposed.”⁴

Subsequently, in the second part, the two fundamental elements of the constitutions imposed will be analyzed: internal consensus and external influence, placing at the center of the discussion the analysis carried out by Law in his “Imposed Constitutions and Romantic Constitutions.” Finally, the analysis will close by illustrating the concept of heteronomy, the extreme expression of external influence on the nature of an imposed constitution. To close the chapter, the fourth paragraph will analyze a fundamental element common to all the concepts explained so far: constitutional amendability. Such analysis is necessary for the central research of this thesis as the Japanese Constitution emerges as an important exception in the contemporary constitutional context, as it has never been amended in all of its seventy-seven years of life.

The first part of the paragraph will illustrate the two conventional types of constitutional amendments, corrective and explanatory, with the help of some examples taken from the American Constitution, as Illustrated by Richard Albert. Moreover, Albert himself introduces a new, more extreme type of amendment, the Constitutional dismemberment, which will be part of the analysis of the paragraph. Subsequently, the focus will shift to the rule of mutuality, which is fundamental, especially in matters of dismemberment. Finally, the section will close with an analysis of the amendability in the context of constitutional imposition and the relative importance of the political and social perception of the document in the matter. Investigating these various concepts offers a fundamental context for fully understanding the challenges and dynamics of the Japanese constitutional context, which will be analyzed in the following chapters.

1.1. What are Constitutional Transplants?

In the realm of Comparative Public Law, constitutional transplants have emerged as a fundamental area of study, gaining prominence in recent years amidst the growing influence of international law and constitutional human rights norms. This phenomenon reflects the increasing global interconnectedness of legal systems as nations navigate complex legal landscapes shaped by transnational agreements and cross-border interactions⁵.

⁴ David Stephen Law, ‘Imposed Constitutions and Romantic Constitutions’, *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018).

⁵ *Perju V* [2012] (n. 2).

Before delving into the specific case study of this research, the Japanese Constitution of 1947, it is essential to explore the origin, meaning, and significance of constitutional transplants and the mechanism from which the document was established. Understanding the historical context and underlying principles behind the concept gives a solid foundation for analyzing its application in the Japanese jurisdiction and its implications for the country's legal development.

1.1.1. An Issue of Terminology

The study of constitutional transplants within comparative law has always been much debated. In particular, terminology and metaphors have always been central to the discussion and, according to Michele Graziadei, the choice of metaphors as a tool to understand cross-constitutional interactions is of great concern⁶. Among the various choices within the debates, we find terms such as “transplants,” “migration,” “reception,” “circulation,” “borrowings,” “transmission,” “fertilization,” and so on. However, it would seem that four of these metaphors are the most convincing: “transplants” and its “borrowing” equivalent, and “circulation” with its equivalent: “migration”⁷. The too-mechanical nature of the term “transplants” has not allowed it to establish itself well within comparative constitutional law; for this reason, it is customary to use the term “borrowings” to describe episodes of constitutional transplant⁸.

However, the latter term is also much criticized. According to Kim Lane Schepple, the term borrowing means a voluntary exchange between equals, where the borrowed good will then be returned after a specific time period so that the owner can take advantage of what remains⁹; therefore, according to its basic definition, this term does not apply to constitutional transplants. Constitutional norms are not the property of any system and can be modified during the transfer process without having to “return” them; moreover, the most critical issue is represented by the element of consent: many of the constitutions transcribed by transplant lack will on the receiving part¹⁰.

For this reason, the alternative proposed is “migration” because the fluidity of this metaphor manages to capture the complexity behind the mechanisms of constitutional

⁶ Michele Graziadei, ‘Comparative Law and the Study of Transplants and Receptions’ [2006] The Oxford Handbook of Comparative Law 443.

⁷ Perju V [2012] (n. 2) p.5.

⁸ Ibid [7].

⁹ Kim Lane Schepple, ‘Aspirational and Adversative Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models’ (2003) International Journal of Constitutional Law 296.

¹⁰ Ibid [9].

transplant¹¹. In fact, according to Neil Walker's definition, constitutional or legal migration can describe all kinds of movements between systems, voluntary or involuntary, accepted or rejected, adapted or adopted, whether they concern elements of institutional design or concern more abstract or intangible institutional elements¹².

However, precisely because of the very peculiar nature of transplant mechanisms, it is essential to recognize that no metaphor is entirely correct in describing them¹³. Indeed, even the term migration is criticized, particularly by political scientists, as it is considered too amorphous a metaphor for such a precise mechanism¹⁴. This opinion is again questionable, as the mechanism of transplant does not refer to mechanical elements but to constitutional rules and provisions, which, in their most original nature, are nothing but ideas. In any case, inspired by the words of Perju, "since the disagreement on words does not suspend the need to use them"¹⁵, in this paragraph, as in the rest of the thesis in general, the term "transplant" will be used.

1.1.2. The Legal Transplants Debate Between Space and Time

The coinage of the term "legal transplants" is credited to Alan Watson, a famous comparatist, who defines them as: "the moving of a rule or a system of law from one country to another, or from one people to another."¹⁶. Watson's definition is characterized by the "spatial" dimension of the mechanism, referring precisely to legal movements that take place between precise places and, in turn, produce further movements or the evolution of that specific system in which transplants are carried out¹⁷.

Despite Watson's fundamental contribution, criticisms of his definition, such as Legrand's, have developed over time. Legrand argues that a constitutional rule or concept cannot exist without the specific context in which it originated¹⁸. Therefore, constitutional transplants cannot exist in any recipient country where they are applied¹⁹. Watson focuses too

¹¹ Perju V [2012] (n. 2).

¹² Neil Walker, 'The Migration of Constitutional Ideas and the Migration of the Constitutional Ideas: the case of the EU', *Migration as a New Metaphor in Comparative Constitutional Law* (6th edn, 2006).

¹³ Perju V [2012] (n. 2).

¹⁴ Lee Epstein and Jack Knight, 'Constitutional Borrowing and Nonborrowing' (2003) 1 *International Journal of Constitutional Law* 196.

¹⁵ Perju V [2012] (n. 2) p.20.

¹⁶ Alan Watson, *Legal Transplant: An Approach to Comparative Law* (University of Georgia Press 1993) 21.

¹⁷ George Rodrigo Bandeira Galindo, 'Legal Transplant Between Time and Space' in Thomas Duve *Entanglements in Legal History: Conceptual Approaches* (Max Planck Institute for Legal History and Legal Theory 2014).

¹⁸ Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

¹⁹ *Ibid* [18].

much on the spatial dimension, according to Legrand, thus, he accuses Watson of overlooking the concept of “situationality”, which is a crucial aspect of transplant discourse²⁰.

This and other debates underline a fundamental problem in the theoretical development of transplants in constitutional law: finding a definition that can overcome the gap between form and function, between “law in books” and “law in action.”²¹ Indeed, as the various debates show, constitutional provisions include not only the spatial and situational dimensions but also, above all, the temporal dimension. For his part, Watson, as a legal historian, gives great importance to history²². Still, it will be the contribution of Reinhart Koselleck and his formulation of the concepts of experience and expectation to define more coherently the temporal dimension of the mechanism of transplant.

Koselleck emphasizes the interconnection between experience and expectation, which he considers crucial to explain the function of constitutional mechanisms²³. Experience is a mixture of all past events embedded in the present, while expectation leads to the future²⁴. According to Koselleck, modernity has created a wider-than-ever-before gap between these concepts. Still, if these definitions are extended to the concept of legal transplants, they could serve as a bridge linking both experience and expectation²⁵.

Legal transplants are often portrayed as fitting into an imagined future. However, they can have temporal implications within the comparative discourse, which is strongly influenced by modernity²⁶. The various legal transplant projects represent the expectation of a future influenced by experiences outside a particular country or system, and, at the same time, they are created while considering the historical context of the country in which they are transplanted²⁷.

In this way, constitutional borrowings represent the perfect combination of experiences and expectations. From Koselleck’s point of view, we have arrived at a complete definition of the meaning and function of constitutional transplants. As also claimed by Bandeira Galindo learning to recognize and understand the influence of not only spatial but also temporal

²⁰ Legrand P [1997] (n.18).

²¹ Morton J. Horowitz, ‘Constitutional Transplants’ (2009) 10[2] Theoretical Inquiries in Law: Histories of Legal Transplantation 535.

²² Bandeira Galindo GR [2014] (n. 17).

²³ Reinhart Koselleck, ‘Space of Experience and Horizon of Expectation: Two Historical Categories’, *Future Past: On the Semantics of Historical Times* (Columbia University Press 2004).

²⁴ Ibid [23].

²⁵ Ibid [23].

²⁶ Bandeira Galindo GR [2014] (n. 17).

²⁷ Koselleck R [2004] (n. 23).

structures of these processes is fundamental as it can open new paths for research and continue to contribute to the ultimate purpose of law: the realization of justice²⁸.

1.1.3. Legal Transplant and The Development of Comparative Constitutionalism

Comparative constitutionalism greatly benefits from the debate on legal transplants, particularly transplants and borrowings between constitutions, as the supreme expression of the link between culture and law. For this reason, it is of fundamental importance to define this mechanism of transplants, their anatomy, and their purpose in depth. To do this, the work carried out by Vlad Perju in his “Constitutional Transplants, Borrowing, and Migrations” is a fundamental aid.

Perju begins the analysis by characterizing constitutional transplants as “comprehensive legal borrowings”²⁹; in fact, as opposed to mere legal borrowings, which allow the adoption of specific rules or provisions, transplants incorporate within them the possibility of transferring entire constitutional frameworks, which, thanks to their fluidity, can be reshaped and adapted to that specific system in need of transplant, without losing their original purpose³⁰. In this way, transplants can give an essential boost to the development of the constitutional system in its entirety and not only to isolated areas of the country’s law³¹.

Moreover, countries subjected to constitutional transplants often experience a complete reform of the system, which can be complicated and risky, as it could give rise to instability and general discontent, already present in a system in transition. Through transplant, recipient countries are able to model themselves on an exemplary model, already widely accepted, forming the distribution of power among the branches of government, the protection of individual rights, and the general framework of governance in a comprehensive way³².

It is crucial, as mentioned, to recognize the importance of cultural relativity within these processes. Despite the global nature of constitutional transplants, Perju suggests that recipient countries retain the flexibility to adapt imported constitutional models to their legal and political contexts³³. This adaptation process allows beneficiary countries to innovate within their legal systems, mixing imported elements with indigenous legal traditions and social

²⁸ Bandeira Galindo GR [2014] (n. 17).

²⁹ Perju V [2012] (n. 2).

³⁰ Ibid [29].

³¹ Ran Hirschl, ‘Towards Justocracy: The Origins and Consequences of the New Constitutionalism’ (2004) Princeton School of Public and International Affairs: Program and Law and Public Policy 217.

³² Perju V [2012] (n. 2).

³³ Ibid [32].

values³⁴. By harnessing the creative potential of adaptation, recipient countries can adapt constitutional transplants to their specific needs while preserving the integrity of their legal systems.

In conclusion, the discourse on transplants in comparative law has highlighted their complexity and fluidity in adapting to different systems. In fact, despite various debates on terminology or conceptual frameworks, constitutional transplants remain foundational in understanding the evolution of legal systems globally. In perspective, the study of constitutional transplants anticipates new challenges central to this research, such as the concept of constitution-making under occupation and the evolution of a “jus post-bellum.”³⁵ These concepts will contribute to understanding comparative constitutionalism and its implications regarding the constitutional evolution of the leading research country: Japan.

1.2. Constitution Making Under Occupation

As it is known, the drafting of the Japanese Constitution of 1947 was predominantly overseen by the American occupying forces during the post-war period – occupation that extended until 1952³⁶. While not occurring in isolation, this pivotal episode stands out as a pragmatic example of constitution making under occupation. The circumstances surrounding the drafting of the Japanese document, within the context of post-World War II reconstruction efforts and American occupation policies, offer valuable insights into the complexities and implications of constitution making under external authority.

To provide a comprehensive understanding of the research subject, it is imperative to delve into the concept, tracing its historical development, examining its various manifestations, and dissecting its underlying dynamics. Such an exploration will illuminate the multifaceted nature of constitution making under occupation and its profound impact on legal and political systems in occupied territories.

³⁴ Perju V [2012] (n. 2).

³⁵ Jean L. Cohen JL, ‘The Role of International Law in Post-Conflict Constitution-Making: Towards a Jus Post-Bellum for Interim Occupations’ (2006) 51[3] New York Law School: Perspective on Post-Conflict Constitutionalism.

³⁶ This assertion is subject to intense scholarly debates and rigorous scrutiny that will be thoroughly examinations in subsequent chapters. Nevertheless, given the thematic focus of this paragraph, due consideration must be accorded to this statement.

1.2.1. *International Law and Interim Occupations*

In order to fully understand the importance of occupation law and its humanization process, it is essential to analyze the key definitions and concepts underlying its evolution in the international legal context. First of all, the Hague Convention of 1907 provides a clear definition of territorial occupation, declaring that “a territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”³⁷.

However, the definition of territorial occupation was strengthened and amplified in the postwar period, characterized by the spread and subsequent promotion of ideals such as self-determination, sovereignty, and universal rights. In response to this evolution, the international community has recognized the need for a stricter international codification of the occupation law, giving rise to a process defined by Jean Cohen as “the humanization of occupation law.”³⁸ This process has been a significant step forward developing principles and standards that do not ignore the rights and well-being of the populations involved in occupation situations, contributing to mitigating the most damaging effects of this practice and promoting more excellent protection of human rights even in a post-conflict context³⁹.

The expression of this desire was represented by the Fourth Geneva Convention of 1949, which stressed the importance of *de facto* control over a territory⁴⁰. It stipulated that the occupying power must have the effective ability to supplant the authority of the occupied government, which could not function otherwise⁴¹. This definition arises from the vital concern of such convention to protect citizens residing in territory occupied during those post-war years⁴². In this way, the legislative system on occupations succeeded in including obligations that would ensure the complete protection of civilians and mandates that could mitigate the occupying forces’ power to over-alter the occupied country’s system.

It was during this post-war period that the assertion that international law and the law of occupation could be linked and adapted not only to facilitate the various constitutional changes but also to establish a particular vision of the internal constitutional order, with the

³⁷ Second International Peace Conference, *Convention [IV] Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land* (1907) Art. 42.

³⁸ Cohen JL [2006] (n. 35).

³⁹ Graber D, ‘The Development of the Law of Belligerent Occupation 18863-1914: A Historical Survey’ [2017] *American Journal of International Law* 344.

⁴⁰ Cohen JL [2006] (n. 35).

⁴¹ International Committee of the Red Cross, 75 UNTS 287 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (United Nations 1949).

⁴² *Ibid* [41].

intention of establishing a radically more substantial concept of international order⁴³. This vision went beyond broad and relatively flexible concepts such as democracy, political participation and development to support a conception that included, among other concepts, economic developments and attention to international human rights standards⁴⁴. These advocates of the construction of post-conflict democracy justify this view by arguing that a constitution instituted through this process would have a more solid foundation, based on individual popular sovereignty⁴⁵. On the contrary, a transformation entirely based on state or elite control would not help solve the problems that made the occupying administration necessary in the first place⁴⁶.

In this context, the first “Occupation Constitutions” emerged, documents that took shape, in particular, in the countries defeated during the Second World War. As will be investigated, these constitutional documents have left a lasting imprint on the governance and institutions of the countries concerned, influencing their institutional and social path for decades to come. However, despite emerging in a specific historical context, the dynamics of setting up occupation constitutions continue to be relevant in more modern times. An eloquent and relatively modern example is the 2004 Iraqi Provisional Constitution, drafted by the United States during the occupation of the territory⁴⁷.

*1.2.2. State-Building and Its Implications*⁴⁸

In general, the process of building a new constitutional systems and orders is profoundly influenced by a highly delicate balance between the adequate capacity to govern and the claim to the right to do so⁴⁹. In occupation situations in particular, there is a risk that the mere use of force, lacking genuine legitimacy, will only lead to temporary solutions creating a conditional way of life without the ability to be effectively imposed, thus relegating

⁴³ Cohen JL [2006] (n. 35).

⁴⁴ Nehal Bhuta, ‘New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation’ (2010) 60[3] University of Toronto Law Journal 799.

⁴⁵ Carsten Stahn, ‘Jus in Bello, Jus ad Bellum: Jus post Bellum? Rethinking the conception of the Law of Armed Forces’ (2006) 17[5] European Journal of International Law 921.

⁴⁶ Ibid [45].

⁴⁷ It was established during the U.S.-led occupation after the 2003 invasion, and it served as a temporary legal framework to guide the country’s government as it transitioned from the dictatorship of Saddam Hussein to a democratically elected government. Although it faced numerous criticisms for being influenced by foreign occupiers, it played a critical role in the path towards the establishment of a permanent constitution in 2005.

⁴⁸ In this context, state-building refers to the process of setting up new institutions in post-conflict situations, which is the primary concern of the occupation powers when establishing new occupation constitutions.

⁴⁹ Bhuta N [2010] (n. 44).

these solutions to mere hypotheses⁵⁰. Therefore, in this context, the distinction between coercive power and legitimacy becomes extremely blurred during the transition from one constitutional system to another⁵¹.

In situations of occupation, the constituent powers cannot rely on the usual foundations of tradition, religion, or custom on which the activity of constitutional construction traditionally rests⁵². In these circumstances, constitutions are more likely the result of numerous and complex negotiations between the occupying power and the occupied population rather than the expression of somewhat cohesive political views.

Consequently, the establishment of this new order emerges from effective coordination between different political entities, both external and internal⁵³. This is particularly important in demonstrating that legitimacy, in its more strictly democratic definition, is not the only or the main factor of effectiveness in the state-building process⁵⁴. For this reason, it is of fundamental importance to understand the dynamics of power, the relationships between the various actors involved, and the modalities of negotiation that influence state-building in occupation contexts⁵⁵. In essence, although these constitutional documents may represent a significant step towards the stabilization and legality of post-conflict contexts, they face unique challenges linked to their origin and construction. However, careful analysis of such documents can offer valuable insights into the complexities related to political traditions and the search for stability in unstable contexts such as *interim* occupations.

1.2.3. *The Fundamental Importance of Constituent Power*

According to Schmitt's conceptualization, the bearer of constituent power is identified as the agent or entity vested with the authority to enact a definitive, holistic determination concerning its own political structure and essence⁵⁶. This implies that the agent possesses the dual capability to not only forge but also sustain a cohesive state of social and political order which is characterized by a delineated hierarchy of dominance and deference⁵⁷. However, in

⁵⁰ Bhuta N [2010] (n. 44).

⁵¹ Ibid [50].

⁵² Ibid [50].

⁵³ Tom Ginsburg, 'Baghdad, Tokyo, Kabul...: Constitution Making in Occupied States' (2007) 7 Illinois Public Law and Legal Theory Research Papers Series 1.

⁵⁴ Ibid [53].

⁵⁵ Ibid [53].

⁵⁶ Carl Schmitt, *Constitutional Theory* (Duke University Press 2008).

⁵⁷ Bhuta N [2010] (n. 44).

the context of occupation constitutions and state-building it is essential to analyze more in depth the concept of constituent power, going beyond its definition.

Richard Albert refers to constituent power as a sociological phenomenon, outside the legal and moral realm⁵⁸. Albert divides the theory of constituent power into two macro groups: *pouvoir constituant* and *pouvoir constitué*, which refer to two different groups of people, each related to the other according to a hierarchical relationship of the distribution and exercise de power so that one group is subordinate to the other⁵⁹. As is recognized, the superior group is represented by the *pouvoir constituant*, which translates to constituent power and refers to the body of people over whom supreme power resides⁶⁰. This power is then “imposed” on the *pouvoir constitué*, or constituted power, represented by the institutions created through the constitution to carry out the duties and authorities delegated by the people in the document⁶¹.

However, according to the scholar, it is difficult to be able to define the people as a constituent power, as the very idea of “the people” turns out to be too vague, indeterminate and idealized to provide a meaningful explanation regarding the drafting or ratification of constitutions, not least because very often the process of constitution making is not carried out through the direct participation of citizens, even when it comes to constitutions not drafted during occupations or imposed by external powers⁶².

It would thus be more correct to state that the theory of constituent power represents not so much a descriptive consideration of how constitutions are created and changed, but more a normative aspiration according to which some scholars believe they should be established and changed⁶³. Yet, according to Albert, even this aspiration itself remains unclear. It could refer to the desire to draft or approve constitutions directly by the people, or to an inspiration that narrows the scope of political actors and gives wider participation to jurists and scholars⁶⁴. In particular, another aspiration might emerge, namely the promotion of constitutional stability and durability⁶⁵.

In fact, constituent power theory has as its main goal to maintain the status-quo, making it difficult to change the fundamental core of the constitution. Consequently, the constitutional

⁵⁸ Richard Albert, ‘Constitutional Amendment and Dismemberment’ (2017) 43 The Yale Journal of International Law 1.

⁵⁹ Ibid [58].

⁶⁰ Ibid [58].

⁶¹ Ibid [58].

⁶² Ibid [58].

⁶³ Ibid [58].

⁶⁴ Ibid [58].

⁶⁵ Ibid [58].

order is more stable and further contributes to the longevity of the document itself⁶⁶. According to this perspective, legislation regarding wartime occupation is inappropriate in circumstances where the occupier proposes to exercise the de facto power of a sovereign dictator, altering the state, laws and socio-economic institutions and, in effect, appropriating the constituent power of the local population, even if this is done “temporarily” in the name of establishing democracy⁶⁷.

Thus, in the case of constitutions imposed or outlined under occupation in post-conflict situations, the concept of constituent power is even more problematic because not only do the people not participate directly in the drafting of the constitution and the creation of the institutions that flow from it, but the constitution-making process itself is carried out by actors outside the culture and social fabric of the country, who risk abusing that power.

1.2.4. Occupation Constitutions’ Characteristics

As stated by Ginsburg, not all instances of military occupation result in the establishment of a new constitution or system; in fact, it would seem that the establishment of new Occupation constitutions is more prevalent among certain occupying countries that see Constitution-making as a strategic approach, first among all, Russia, the U.S., and France⁶⁸. In fact, despite formally recognizing and promoting the fundamental value of self-determination, these three countries’ main objectives were not necessarily focused on granting complete autonomy to the occupied territories⁶⁹.

Nevertheless, despite this general commonality, in a 2008 study by Zachary Elkins, Tom Ginsburg, and James Melton, it has been noted that the different constitutions written under occupation differ profoundly from each other. The subject of the research was the 42 constitutions identified as “Occupation” ones from 1789. This relatively low number is an expression of the fact that, indeed, the vast majority of occupations do not result in constitutional changes⁷⁰. This observation represents the first finding of the study.

When it comes to occupation constitutions, it is easy to assume that the constitutions of the occupying countries serve as a fundamental basis for drawing up the new constitution, either by the will of the power itself or by the will of the domestic actors, which are in any case

⁶⁶ Albert R [2017] (n.58)

⁶⁷ Cohen JL [2006] (n. 35).

⁶⁸ Ginsburg T [2007] (n. 53).

⁶⁹ Ibid [68].

⁷⁰ Zachary Elkins, Tom Ginsburg and James Melton, ‘Military Occupations and their Constitutional Residue’ (2008) 19[2] APSA-CP 7.

chosen and influenced by the occupiers themselves⁷¹. In analyzing this aspect, Elkins and the others have estimated the similarity between the constitutions under analysis and the constitutions of the occupying countries in the years of writing⁷².

Interestingly, the similarity score between constitutional pairs showed a relatively moderate convergence trend⁷³. In fact, out of the forty-two occupancy pairs, the average score is 0.75, with a stretching range fluctuating from 0.58 to 0.88⁷⁴. In particular, as regards the eight constitutions with the United States as an occupying power, the similarity scores are lower than the general average⁷⁵. In this context, the exception is the Japanese constitution, which has a score of 0.73⁷⁶. In fact, the Constitution of 1947 is considered one of the greatest successes of U.S. constitutional transplants⁷⁷. However, apart from this notable exception, it would seem that the constitutions of the occupied countries inherit little from their occupiers since, according to scholars, it is quite surprising.

Another fundamental element regarding the identification of the characteristics of occupation constitutions is represented by their duration⁷⁸. The “natural” life expectancy of occupation constitutions, excluding the years when the country was under occupation, consists of only five years; for this reason, the example of Japan continues to emerge as particularly peculiar in that the constitution is distinguished by its exceptionally long duration without undergoing any amendment during its seventy-seven years of life⁷⁹. This phenomenon arouses considerable academic interest, considering the average duration also analyzed by Elkins, Ginsburg, and Melton. In conclusion, it may be stated that the Japanese constitution is a *sui generis* document when confronted with constitutions of the same nature and analyzed both under temporal and structural lenses.

1.3. Imposed Constitutions

After exploring the implications of state and constitution-building after occupation, it is fundamental to consider the phenomenon of “imposed constitutions.” These represent another modality through which a new constitutional order can be built in transitional or post-

⁷¹ Elkins Z, Ginsburg T and Melton J [2008] (n. 69).

⁷² Ibid [71].

⁷³ Ibid [71].

⁷⁴ Ibid [71].

⁷⁵ Ibid [71].

⁷⁶ Ibid [71].

⁷⁷ Ibid [71].

⁷⁸ Ibid [71].

⁷⁹ Ibid [71].

conflict periods but are distinguished from occupation constitutions since they are directly imposed without a significant involvement of the domestic actors in the drafting process. In this context it is fundamental to delineate an important distinction, the one regarding legitimacy. The legitimacy of imposed constitutions and those crafted under occupation is subject to deep scrutiny and complexity. Regarding imposed constitutions, there are typically formulated without direct input from the population, and their legitimacy may rest on factors such as international recognition or adherence to democratic principles. Of course, doubt persists regarding their true reflection of local interests, and the apparent lack of popular legitimization.

Constitutions developed under occupation, although potentially involving some degree of popular participation, are influenced by the occupying power. Thus, their legitimacy hinges on perceptions of the occupier's intentions and the extent of local involvement. Ultimately, the legitimacy of both types of constitutions is contingent upon their effectiveness in governing and protecting citizen's rights, but the drafting process together with popular and international perceptions greatly influence their legitimacy. This distinction is fundamental in the context of the Japanese Constitution of 1947. In fact, it is still unclear whether this constitution should be regarded as an occupation constitution or an imposed one. This document, while being fundamental in re-stabilizing the country and its democracy, is the center of lively debates regarding sovereignty and self-determination since it was drafted, published, and distributed without the significant participation of the Japanese population.

For this reason, the analysis of imposed constitutions opens up yet another point of reflection regarding the complexity of power dynamics and international relations in post-conflict occupation context, underlying the importance of thoroughly considering the historical, political, and social context in evaluating the impact and implications of such documents.

1.3.1. *Definitional Issues: Is "Imposition" A Reality?*

At first glance, the concept of imposed constitutions seems unequivocal: an imposed constitution is a constitutional document imposed on a nation. However, as stated by David S. Law, the question is more complex, as upon reflection, every single part of this definition

brings thousands of questions and needs of clarification. According to the scholar, in fact, from different points of view, one could even declare that every single constitution is imposed⁸⁰.

For example, if a constitution endorsed by a white majority allowing and legalizing slavery is considered, this would be a constitution imposed on that particular minority represented by the black community, thus, in essence, it could be conceived that some faction of the community somehow always imposes the constitution on another faction⁸¹. Indeed, if individuals constantly perceive a constitution as lacking their consent, can any constitution ever escape the label of “imposed”?

To compensate for this theoretical problem, Noah Feldman tries to clarify the concept by saying that the imposition refers purely to a constitution imposed by external powers on a particular community or nation⁸². Yet, here too, there are several difficulties of definition. According to the scholar, the fundamental problem of the concept of imposed constitution is that this creates a false dichotomy between imposed and not imposed constitutions; in fact, according to him: “On the one hand, even an ostensibly imposed constitution can reflect a considerable measure of local input and influence. [...] On the other hand, imposition and alienation are arguably endemic to all constitutions, regardless of how or where they are authored.”⁸³ For this reason, it considers the concept unstable and inconsistent, as it is challenging to identify a fairly stable middle ground, but, despite this, it is an excellent point of reflection in the field of debates within comparative law⁸⁴.

Mainly, the phenomenon of an imposed constitution serves as a potent form of criticism aimed at discrediting an existing constitution, for this, as will be illustrated, is the main argument carried forward by the Japanese revisionist movements. In fact, rather than serving as a tool for a better understanding or clarification of a different type of constitutionalism, the term “imposed” operates as a negative label within a narrative that seeks to undermine the legitimacy of a given constitution⁸⁵. Labeling the 1947 constitution as an imposition directly suggests its legitimacy and raises doubts about its origins and credibility.

In essence, the concept of imposed constitution draws a negative connotation simply from an implicit and widespread accuracy idealization of what the constitutions represent and how they are set up; for this reason, some constitutions are denigrated, and others are idealized

⁸⁰ Law DS [2018] (n. 4).

⁸¹ Ibid [80].

⁸² Noah Feldmann, ‘Imposed Constitutionalism’ [2005] 37 Connecticut Law Review 857

⁸³ Ibid [82].

⁸⁴ Law DS [2018] (n. 4).

⁸⁵ Ibid [84].

and “romanticized”⁸⁶. Indeed, applying this imposition label may not necessarily reflect the literal imposition of a constitution, especially if we accept the argument that each constitution is somehow imposed⁸⁷. The perception of a constitution as not-set or imposed is more determined by the type of narrative that is created around it, rather than by its real nature.

1.3.2. Between Internal Consent and Outside Influence

Once again, David Law provides a further point of reflection on two fundamental elements of the constitutions defined as imposed: the problem of consensus and external influence. First, no constitution can boast unanimous support or consensus from all those who are subject to its governance, the very process of constructing a constitution reflects the different political processes in which winners and losers are present and of course those who are on the side of losers can harbor feelings⁸⁸. Even when participation in the drafting process is open and inclusive, there is no guarantee that all factions of the population will accept and adhere to the resulting constitution⁸⁹. For this reason, Law suggests refining the concept of consensus, asking, first of all, the consensus of what entity is necessary, whether of “the people” or of “the state.”⁹⁰

Thus, is it more correct to define that the necessary consensus is that which derives from the state or from the people? This question brings with it several other difficulties. To define as the only necessary consensus that of the state contradicts the very nature of constitutional theory and conventional politics, as it is quite problematic to argue that the consensus is configured only when it is directly donated by the state, an abstract entity, ignoring the impact that the setting can have on real people⁹¹.

Similarly, to say that a constitution requires the consent of the people raises the question of precisely who constitutes the people. One of the most debated dimensions, in fact, concerns the distinction between citizens and not citizens: in fact, if in defining the people as “citizens,” how can we justify why some have the right to be defined as citizens and others do not?⁹² This issue is at the heart of contemporary debates and represents one of the most challenging dilemmas of law and justice.

⁸⁶ Law DS [2018] (n. 4).

⁸⁷ Ibid [86].

⁸⁸ Ibid [86].

⁸⁹ Ibid [86].

⁹⁰ Ibid [86].

⁹¹ Ibid [86].

⁹² Ibid [86].

In any case, if in considering the nature of the constitutions, there is a need to define a type of consensus that better decides on the legitimacy of the document, it is challenging to avoid concluding that this consensus must necessarily be that of the people, whether it is direct or indirect⁹³. As for the theme of influence, regardless of the nominal authors of a constitution, its content typically bears the signs of significant external influence, all the more so in this age of exceptional globalization. Moreover, the phenomenon of constitutional lending, migration, or transplant has always been widespread, as noted.

In this case, according to Law, a possible solution could lie in the definition of a constitution as imposed only when external parties intervene without invitation, unlike when the internal constituent power requests this involvement⁹⁴. Drawing this distinction also helps the still uncertain classification of a *sui-generis* constitution, such as the 1947 Japanese Constitution. Foreign imposition is often considered an original sin in constitutional narratives, as the moment of formulation is of special importance, but, in the case of Japan, while it is true that McArthur's intervention was uninvited, it came after two failed attempts by the Japanese people themselves⁹⁵.

Therefore, the distinction between imposition and non-imposition requires a skeptical attitude, since its usefulness seems more rhetorical than descriptive or explanatory. It is precisely because of this lack of skepticism that the Japanese constitution continues to be considered illegitimate, despite its label of "imposition" is purely a characterization that serves the interests of politicians seeking to undermine the stability of the document. In essence, by nature, constitutions are deeply intertwined with politics, and influences are practically inevitable⁹⁶. For this reason, reducing the complexity of political and constitutional dynamics to a single term – whether it is "imposed" or "indigenous" – is unlikely to capture their essence fully. For this reason, it is necessary to clarify the concept of heteronomy well when discussing imposed constitutionalism.

⁹³ Law DS [2018] (n. 4).

⁹⁴ Ibid [93].

⁹⁵ Ibid [93].

⁹⁶ Ibid [93].

1.3.3. *The Concept of Heteronomy in Constitutional Imposition*

Constitutions exist within a spectrum of imposition, starting with constitutional autonomy - which can be considered as a form of self-imposition or internal imposition - and extending to the concept of constitutional heteronomy⁹⁷. On the one hand, autonomy implies a comprehensive understanding of the concept of society or people that establishes and decides on their own rules and provisions. Conversely, we can find heteronomy, where provisions and rules arise from external sources⁹⁸.

This concept, therefore, refers to being subject to the authority of another entity, an external power. This authority can manifest itself in different ways and forms, such as through force or coercion or indirect influence through formal or informal mechanisms, including meddling in a particularly persuasive way within the decision-making process at the constitutional level⁹⁹. In fact, in the context of heteronomy, many constitutions that initially might not seem imposed show some traces, if not objective manifestations, of external impositions¹⁰⁰. According to definition, heteronomous constitutions are influenced directly or indirectly in their set up, adaptation and adoption. This definition, therefore, includes the traditional notion of an imposed constitution, which has been so much investigated in the rest of this paragraph. However, the concept of heteronomy extends far beyond situations of military defeat or occupation to include constitutions not originating from such circumstances¹⁰¹.

Understanding a constitution imposed through the lens of heteronomy includes cases in which, as mentioned, enforcement takes place with consent. This includes situations where external actors play a direct or indirect role in the amendment, adjudication of disputes, or shaping the legal framework of a constitution¹⁰². Examples that are different from Japan include the Canadian Constitution before its patriation, the Grenada Constitution, and many Commonwealths Caribbean constitutions¹⁰³. However, once again, adopting such a broad definition of constitutional imposition raises the question of whether establishing contemporary

⁹⁷ Contiades X and Fotiadou A, '[2018] (n. 3).

⁹⁸ Ibid [97].

⁹⁹ Ibid [97].

¹⁰⁰ Ibid [97].

¹⁰¹ Ibid [97].

¹⁰² Richard Albert, 'Constitutions Imposed with Consent?', *The Law and Legitimacy of Imposed Constitutions* [Routledge 2018].

¹⁰³ Ibid [102].

constitutions inevitably implies external influence, as modern constituent powers often seek advice from foreign advisers and are inevitably influenced by global constitutional models¹⁰⁴.

After asserting the peculiarity of constitutional imposition, it is critical to move to another essential element of this realm: constitutional amendability. Amendability is a fundamental element in the constitution-making process, and for this reason it is crucial to retain a deeper understanding of the concept, especially in the context of peculiar constitutions such as those imposed or drafted under belligerent occupation. In fact, redirecting the spotlight towards constitutional change and considering it as a legitimacy-generating force, on par with the initial exercise of constituent power, offers a fresh conceptual perspective to comprehend constitutional imposition or constitution-making under occupation as a blend of tangible reality and emotive resonance.

1.4. Constitutional Amendability

In the realm of imposed constitution or constitution drafted under occupation, the concept of amendability holds profound significance since it reflects the adaptability and responsiveness to these peculiar types of legal frameworks to changing societal needs and values. In fact, this aspect of constitutional law is particularly pertinent in contexts marked by occupation or external imposition, where the initial constitutional framework may require adjustments to align with the evolving aspirations of the governed populace.

In this context, the Constitution of Japan once again emerges as an exception since it has never been amended, although recently, there has been a rise in the revisionist discourse in the country. Before discussing the particular Japanese situation, it is vital to delve into the complexities surrounding constitutional amendability, examining its role as a mechanism for ensuring constitutional orders' continued relevance and legitimacy.

1.4.1. Types and Definitions of Constitutional Amendments

According to the Oxford Dictionary of Politics and International Relations, an amendment is defined as the official change to an existing piece of legislation – in this case, a constitution – and is added so as to direct, better define, or expand the existent provisions¹⁰⁵.

¹⁰⁴ Law DS [2018] (n. 4).

¹⁰⁵ Garrett Brown, Iain McLean and Alistair McMillan, *The Concise Oxford Dictionary of Politics and International Relations* (Oxford University Press 2018).

Constitutional amendments are generally divided into two categories: corrective and elaborative. Properly defined, an amendment is a correction made better to achieve the original objectives of the existing constitution¹⁰⁶. In presenting the definition, Richard Albert takes as an example the twelfth amendment of the United States Constitution, as it was designed so that the possibility of equality between presidential candidates could be reduced¹⁰⁷. With this amendment, voters had to distinguish between the votes for the president and the vice president.¹⁰⁸, taking care of a technical flaw in the original constitution¹⁰⁹.

A constitutional amendment can also be elaborative and is a more radical type of change than a simple correction. Instead of correcting an error or defect in the Constitution, an elaborative amendment broadens and improves the very meaning of the Constitution so that its understanding can be as contemporary as possible¹¹⁰. Once again, Albert takes the constitution of the United States as an example, talking about the Nineteenth Amendment. Through this amendment, in fact, it has been possible to enlarge the meaning of the so-called “Reconstruction Amendments” - the Fourteenth and Fifteenth, so that the promise of equality could be extended to a new category of voters who, at the time of the drafting of the two amendments were not considered¹¹¹.

While defining these two types of amendment, Albert introduces a new element in the matter of constitutional amendment: constitutional dismemberment. Unlike corrective or elaborative amendments, they do not aim to improve or broaden the purpose of the constitution, on the contrary, a dismemberment aims to disassemble fundamental parts of the constitution, as it can alter fundamental rights, basic structures of the system, or a core part of the very identity of the constitution¹¹². It is important to note, however, that constitutional dismemberment does not necessarily have to be a harmful or destructive concept. Dismemberments are descriptive and not normative concepts, and although they modify fundamental parts, they could weaken but also strengthen democratic procedures and

¹⁰⁶ Albert R [2017] (n. 58).

¹⁰⁷ Ibid [106].

¹⁰⁸ In fact, the electoral process of 1800 highlighted a significant flaw in the electoral system as designed in the Constitution, as two candidates ended up securing an equal number of electoral votes. This circumstance led to a prolonged process with the House of Representatives with nearly thirty-six rounds of voting by state delegations before Thomas Jefferson ultimately won.

¹⁰⁹ Albert [2017] (n. 58).

¹¹⁰ Ibid [109].

¹¹¹ Ibid [109].

This amendment prohibits gender discrimination in the voting process, marking an extension of the reconstruction amendments. While it did not address a specific flaw in the design of the constitution itself, it aligns with principles of equality rights and maintains consistency with the overall final purpose of the constitution.

¹¹² Albert R [2017] (n. 58).

objectives of a liberal system¹¹³. Returning to the U.S. Constitution, the so-called Civil War amendments¹¹⁴ are considered by Albert as constitutional dismemberment. These amendments had the fundamental function of eliminating the infrastructure of slavery, which at the time was considered a pillar of the American constitutional system.

Thus, since constitutional amendability creates a link between past, present, and future, in their most intrinsic sense, dismemberment can also be considered as a particularly noteworthy element, as they too can improve a system that was initially built on deeply flawed conceptions¹¹⁵. Nevertheless, amendment and dismemberment remain very delicate elements in the constitutional context of every country and for this reason it is crucial to consider the rule of mutuality.

1.4.2. The Rule of Mutuality

The rule of mutuality is fundamental in drawing a precise distinction between amendments and dismemberments. It is the foundation of the principles of contemporary design that outline a progressive framework for changing the rules with the fundamental aspects of constitutions that distinguish, indeed, between amendment and dismemberment¹¹⁶. This fusion creates a hierarchical structure of the various types of regulatory changes where the complexity of the procedures varies with respect to the type and nature of the proposed alteration. The more significant the change, the more rigorous the procedure becomes, and the difficulty level increases with the extension of direct or indirect popular support required for approval. At the most challenging level, the mutuality rule requires equality between the procedure necessary to dismember the Constitution and the procedure initially used for its original ratification¹¹⁷. The final purpose of the rule of mutuality, in fact, is to change the conventional approach to amendability, which does not allow too revolutionary changes to the original document, so that the actors involved in the process of constitutional change can be allowed to put any type of change - always subject to the constituent authorities - maintaining legal continuity and discouraging the trend that continues to invalidate constitutional changes.

According to Albert, the rule of mutuality comprises four factors, some of which are qualifications, and others are explanations, and together, they create the principle of symmetry

¹¹³ Albert R [2017] (n. 58).

¹¹⁴ The Thirteenth, Fourteenth, and Fifteenth Amendments established the victory of the Union against the Confederation and wrote in the Constitution a fundamental declaration of equality of all persons.

¹¹⁵ Albert R [2017] (n. 58).

¹¹⁶ Ibid [115].

¹¹⁷ Ibid [115].

that serves as the basis for the rule of mutuality¹¹⁸. The first factor to consider is differentiation: when the consolidated threshold for constitutional alteration is lower than the original threshold for constitutional ratification, only amendments, not dismemberments, can be made using that lower threshold¹¹⁹. This interpretation of differentiated levels should be understood as specially designed for different purposes. For this reason, the consolidated rule for formal alteration should allow only constitutional amendments.

The second element is unification: when the consolidated threshold for constitutional alteration is the same as the original ratification threshold, both powers of amendment and dismemberment can be interpreted as being incorporated under that unified consolidated threshold¹²⁰. Unification is particularly evident in Article V of the United States Constitution, since it solidifies the process employed to ratify the U.S. Constitution during its conception¹²¹. In this context, the formal amendment process can serve both to modify and to dismantle the constitution, consolidating the powers of amending and dismantling into a singular procedure.

The third factor is symmetry: the original threshold for constitutional ratification should be considered as creating a predefined ceiling for the threshold required for constitutional dismemberment¹²². Therefore, the symmetry between the thresholds for making and undoing the Constitution is intended to neutralize the arguments about the illegitimacy of the constitutional change¹²³. The fourth element is recognition: the ceiling of the threshold required for a valid dismemberment can be lowered where the political elite and the people recognize the legitimacy of a dismemberment achieved using a lower threshold than that used to ratify the constitution¹²⁴. The point of this factor is simply that the nature of the constituent power can change over time.

Together, these four elements suggest that the new constitutions should consolidate a growing structure of the rules of constitutional change within a two-way framework that creates differentiated procedures for amendments and dismemberments. What derives from this growing structure of the rules of exchange is a hierarchy of constitutional importance that allows the protection of fundamental rights, the structure, and the identity of the constitution from alterations unless one of these is dismembered according to the threshold chosen that

¹¹⁸ Albert R [2017] (n. 58).

¹¹⁹ Ibid [118].

¹²⁰ Albert R [2017] (n. 58).

¹²¹ Ibid [120].

¹²² Ibid [120].

¹²³ Ibid [120].

¹²⁴ Ibid [120].

leaves little doubt on the validity of the constitutional consensus that was formed behind the change¹²⁵.

1.4.3. Amendability in Imposed Constitution

Constitutions, as ever-evolving, are defined by the way they change or, on the contrary, by the lack of change; for this reason, amendability represents a fundamental element of constitutions. However, the imposed constitutions deviate from the conventional understanding of the constituent moment. Indeed, while some form of consensus may be present, as mentioned, it cannot be considered a constitution drafted “by the people”¹²⁶. Consequently, attempting to establish a complex amendment formula within the framework of imposed constitutions cannot simply imitate a democratic process; on the contrary, it strengthens external control¹²⁷. Thus, during the enactment of a constitution, these “distorted” participatory processes could involuntarily undermine the legitimacy of the constitution and create an unwanted rigidity¹²⁸. This form of rigidity inhibits formal processes of amendment from serving as a facilitating element of a gradual transition to autonomy through constitutional changes. Moreover, rigidity can eliminate the legitimization option through deliberate inertia and retention, essentially making the decision not to issue the constitution equivalent to the inability to effect changes¹²⁹.

However, the ultimate challenge lies in the popular perception of a document as imposed, which obviously affects its legal, moral, and, above all, sociological position. The case of Japan is exemplary in illustrating this dilemma, pointing out that the problem does not lie in the circumstances or reasons for their emanation but in how the constitution has evolved over time¹³⁰. Its longevity is particularly striking, especially considering the traditional narrative swearing on its imposition. Therefore, understanding the dynamics of the imposed constitutions and their impact on society requires a thorough analysis of the legal provisions and constituent processes and the historical and social context in which they were promulgated and developed.

¹²⁵ Albert R [2017] (n. 58).

¹²⁶ Ibid [125].

¹²⁷ Contiades X and Fotiadou A, '[2018] (n. 3).

¹²⁸ Ibid [127].

¹²⁹ Ibid [127].

¹³⁰ Law DS, 'The Myth of Imposed Constitution', *The Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

Conclusion

The goal of this chapter was to investigate the fundamental concepts underlying the central research of this thesis: the origins of Japan's 1947 constitution and its continued endurance throughout history. Although the Japanese *Kenpō* was drafted in a context of occupation, it plays a distinctive role within the global constitutional landscape, incorporating several distinctive elements that require in-depth and contextualized analysis. To achieve this goal, the chapter was divided into four paragraphs, each of which was divided into three additional sub-paragraphs. Through this precise structure of the paragraphs, this chapter aimed to deepen the implications of these theoretical concepts.

The analysis in the first paragraph focused on deepening the concept of constitutional transplantation, exploring the complexities that characterize this phenomenon. In particular, the paragraph examined the three basic dimensions of constitutional transplantation: spatial, situational, and temporal. In addition, the concept of transplants and comparative constitutionalism was explored in depth, highlighting how the study and comparison of imported constitutions have contributed to the enrichment of the subject of comparative law.

Next, the analysis shifted to the phenomenon of constitution-making under occupation, a phenomenon that has become particularly common in the last fifty years. The section, in particular, dealt with explaining the origin of the phenomenon and its relationship to international law and then focused on analyzing the particular characteristics of these constitutions, focusing on a study carried out in 2007 in which forty-two constitutions written during the occupation were analyzed to identify their common elements. In particular, the section showed how, in matters of imposed constitutions, the *Kenpō* emerges as a *sui generis* within its category, retaining very different characteristics from the classical ones in matters of imposition.

In the third paragraph, the focus shifts to another peculiar type of constitution: constitutions imposed by an external power. Within the paragraph, the focus was on a redefinition of imposition, as illustrated by David Law, and then shifted to an analysis of the concepts of internal consent and external influence, and then closed the paragraph with an illustration of the concept of heteronomy, which is fundamental to constitutional imposition. Finally, in the fourth and final paragraph, the analysis shifted to one of the topics central to the issue of the Japanese constitution: constitutional amendability. Within the paragraph, the analysis focused on illustrating the various types of amendments and introducing a new, more radical type of change: dismemberments, as illustrated by Richard Albert. Next, the analysis of

amendability focused on the rule of mutuality, fundamental in matters of dismemberments, closing the discussion by illustrating the particularities of amendability in the field of constitutional impositions.

By highlighting the importance of constitutional amendability, its implications, and its impact on social dynamics, it is possible to pave the way for a detailed and articulate exploration of the historical evolution of the Japanese constitution and its continued relevance and impact as the oldest unamended constitution in history.

In essence, exploration of constitutional transplants, constitutions imposed or drafted under occupation, and constitutional amendability lays a fundamental theoretical foundation for understanding the complexities inherent in processes of constitutional construction. Indeed, these concepts provide valuable insights into the legitimacy, adaptation, and reception of constitutional principles in different national contexts, as well as the interplay between external influences and internal dynamics. Thus, at the center of this discussion is the Japanese constitution, which assumes a fundamental role as a reference point for the analysis of the theoretical concepts illustrated in this chapter, placing them in a unique and peculiar historical, political, and cultural context. In this way, it will be possible to see the practical implementation of these constitutional principles in this context, assessing the challenges and opportunities encountered over time and their particular endurance.

Through a detailed exploration of these aspects, this thesis aims to investigate the factors and dynamics that contributed to the establishment of the Japanese constitution and their lasting impact on Japanese society, politics, and culture over time. The nature and evolution of the institutions and rights guaranteed by the constitution will be analyzed, as well as how the document has shaped Japanese society and political dynamics. Moving forward, subsequent chapters will build on this theoretical framework to delve into the complexity of Japan's constitutional system, offering insights into its unique features, challenges, and possible avenues for reform. Specifically, in the next chapter, the thesis will turn its attention to analyzing the historical context and the actual drafting of the 1947 Japanese constitution with the extensive contribution of the U.S. military.

Chapter II

Japan's Post-War Constitution Making Process

Introduction

The end of World War II and the acceptance of the Potsdam Declaration by the Japanese emperor and government marked a monumental turning point for the country's history, resonating deeply within the international community. With the final declaration of surrender by the Japanese authorities, the beginning of the occupation on the peninsula was sanctioned; initially conceived as a joint operation by the Allied forces, it swiftly transformed into a predominantly U.S.-led operation that endured until 1952.

Undoubtedly, the most transformative legacy of the seven years of U.S. occupation was Japan's new postwar Constitution, a revolutionary document, both in terms of contents and procedure, that reshaped the nation's identity¹. It was extremely pacifist in nature with its controversial Article 9, which definitively sanctioned the country's renunciation of war and total disarmament. Initially, Constitutional reform was not considered one of the primary goals of the occupation². Still, it quickly became apparent that a new Constitution would be essential to ensure the democratization and stability of postwar Japan.

This chapter delves into the historical and Constitutional processes that paved the way for the birth of Japan's new Constitution. It traces the Japanese government's initial attempts to draft a constitution under the guidance of Prince Konoe Fuminaro and later Joji Matsumoto, as well as the subsequent direct intervention of General Douglas MacArthur and his staff. By highlighting the pivotal role of these key players, this chapter aims to provide a comprehensive understanding of the individuals and events that shaped the future of post-conflict Japan.

To achieve this goal, the chapter will be divided into four distinct paragraphs, each of which will be divided into further sub-sections to offer as complete and in-depth an analysis as possible. The first paragraph will deal with the most "historical" part of the postwar Constitutional process, namely the surrender process and the subsequent occupation of Japan. It will outline the essential points of the Potsdam Declaration, a key document for both the occupation process and the future Constitutional project, moving immediately afterward to the context immediately following the end of the conflict and the acceptance of that declaration.

¹ Axel Berkofsky, 'Japan's Post-War Constitution. Origins, Protagonists and Controversies' (2010) 75(2) *Il Politico* 5.

² Tom Ginsburg, 'Baghdad, Tokyo, Kabul...: Constitution Making in Occupied States' (2007) 7(1) *Illinois Public Law and Legal Theory Research Papers Series* 17.

Next, the focus will shift to the Constitutional attempts carried out independently by the Japanese government, the first under the leadership of Prince Konoe Fuminaro and the second under the leadership of Joji Matsumoto. Both, however, failed to meet both the conditions of the Potsdam Declaration and the directions given by General MacArthur regarding the essential points to be included in the new Constitution: stripping the emperor of all his powers, guaranteeing absolute and inalienable protection of the rights of the individual, and declaring the renunciation of war.

Initially, the section will focus on the processes that led Konoe to take responsibility for drafting a new Constitution, followed by a brief look at the figure of the prince himself, his ambiguities and controversies, and ending with the tragic ending of both his contribution in the revision project and his life. After that, the analysis will focus on Matsumoto's Constitutional Committee attempt, which failed in part because of a leak in early February 1946, and because of the extreme stubbornness of both Matsumoto himself and General MacArthur, who, because of certain scandals that occurred during Konoe's work, had categorically prevented any communication between the Japanese revisionists and his staff.

For this reason, MacArthur and his staff decided to intervene in the constitutional issue, finding the Japanese government incapable of meeting the constitutional goals the Allies had set out to achieve for Japan's effective and complete democratization³. This process of U.S. revision will be precisely the focus of the third paragraph of the chapter, beginning with General Whitney's establishment of the Constitutional Convention and ending with the publication of the Constitutional draft on March 6, 1946.

However, before getting into the heart of the process, the analysis will initially focus on the primary documents on which the Steering Committee of the Constitutional Convention inspired its revision work. Next, the analysis will shift to the actual process of drafting the new Constitution, ranging from the brief - but extremely intense - work carried out by the Americans to the first Japanese revision led, once again, by Matsumoto. The section will then conclude with an illustration of the final steps that led to the final publication of the draft: the thirty-hour marathon meeting carried out by Kades and Whitney to finalize the Japanese revisions and the final act of acceptance by the government and the emperor.

The chapter will then conclude with a section entirely devoted to the final review of the new Constitution by the two chambers of government and the most important amendments

³ Although it may appear oxymoronic to impose democratization, this was indeed the objective of the Americans and MacArthur, who believed they were pursuing a mission for a higher good, either unaware of or disregarding the means employed.

made to the document, a process that took place throughout the summer of 1946. The analysis will open with a further discussion of the figure of the emperor, who was entirely revolutionized by the provisions of the new Constitution. The last paragraph of this section will include a theoretical and technical analysis of the Constitution, contextualizing it within the theoretical framework explained in the first chapter, so to allow the Constitution to be evaluated not only through its history but also in light of the legal and political theories that have influenced its formation and final establishment.

The focus would then be shifted to the amendments made to two important articles of the new Constitution, namely Article 9, concerning the renunciation of war, and Article 25, concerning social rights and the citizen's right to lead a dignified life through the efforts of the state. Although the various committees and subcommittees recognized the limited latitude of the document's amendments, the work carried out in 1946 was fundamental in the redefinition of the Constitutional provisions, which not for nothing are still in place today, a full seventy-seven years later.

In essence, this chapter not only lays out the historical path that led to the establishment of the 1947 Constitution but also offers a critical overview of the challenges and debates accompanying this path. In the broader context of Japan's postwar history, this analysis could prove essential for understanding the country's transition to democracy and assessing the role of the Allied occupation in shaping its political and social future.

2.1. The Occupation of Japan

After the devastating conclusion of World War II, Japan found itself in an unprecedented transition phase, going from a defeated force to a state occupied by the Allied powers. This period of occupation, which lasted for seven years, from 1945 until 1952, was marked by a series of profound political, social, and economic transformations, and it was during this period that the most emblematic and successful product of the occupation was established: the Japanese Constitution of 1947⁴.

The signing of the San Francisco Peace Treaty in 1951 marked the pivotal moment that granted Japan formal independence and international recognition⁵. However, the path to this independence was preceded by a decisive moment: the acceptance of surrender by the Japanese

⁴ Axel Berkofsky, 'Japan's US-'Imposed' Post War Constitution: How, Why and What For?', *Italy and Japan-How Similar Are They-a Comparative Analysis of Politics, Economics and International Relations* (Springer Milan 2014).

⁵ Berkofsky [2010] (n.1).

government after the devastating atomic attacks on Hiroshima and Nagasaki⁶. Despite the transmission of the declaration of surrender and the subsequent formal acceptance of the terms of the Potsdam Declaration, fighting between Japanese forces and the Allied powers continued⁷. It was not until August 15, 1945, that Emperor Hirohito addressed the nation to officially announce the surrender, although he explicitly avoided using the term “surrender.”⁸ This marked the official beginning of the Allied occupation of Japan, consolidating foreign forces’ control over the country until the completion of the aforementioned peace treaty.

2.1.1. A Step Back: The Potsdam Declaration

The Potsdam Declaration represented a pivotal moment in defining Japan’s postwar destiny, with implications that would shape the course of its future, both in the short and long term. In the climate of international tension and uncertainty, before the actual end of the war and the beginning of the occupation, in July 1945, the three leaders of the Allied powers, Harry Truman, Winston Churchill, and Chiang Kai-Shek, met in Potsdam to work on a statement that could clearly outline the conditions for Japan’s immediate surrender and subsequent occupation⁹.

The text of the declaration was unequivocal in its severity, threatening the complete destruction of Japan’s armed forces and the subsequent deterioration of the country if Japan did not agree to a series of draconian conditions¹⁰. Prominent among these conditions were allied occupation, elimination of military influence and authority – effectively eliminating the country’s war-making power –, reparations payments, and punishment for those judged to be war criminals¹¹. To fulfill all this, Japan had to declare and guarantee the unconditional surrender of its armed forces, renounce sovereignty over its territory, revive democratic tendencies, and, above all, undergo a reform process that could ensure fundamental freedoms and human rights, as well as establish a responsible and peaceful government¹².

⁶ Berkofsky [2010] (n.1).

⁷ Ibid [6].

⁸ Ibid [6].

⁹ Donald L Robinson and Ray A Moore, *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (Oxford University Press, USA 2002).

¹⁰ Ibid [9].

¹¹ Ibid [9].

¹² Robinson DL and Moore RA [2002] (n.9).

The complexity of the conditions and their interpretation by the Japanese government caused a series of delays and uncertainties in a climate already marked by deep tensions¹³. However, the escalation of events reached a critical point with President Truman's provocative decision to authorize the atomic bombings of Hiroshima and Nagasaki, which led to the almost destruction of these cities as well as the loss of thousands of lives¹⁴. The devastating impact of these attacks prompted the Japanese government to reconsider the terms of the Potsdam Declaration. After long and heated debates, the Council concluded by deciding to proceed with the acceptance of the terms of the Declaration, on one condition: that the emperor should retain his sovereign authority¹⁵.

This condition initiated intricate negotiations between the Japanese authorities and the Allied forces to define Japan's future. In the final reckoning, it was the Allies who brought closure to the issue through their proclamation that, subsequent to the act of surrender, the authority vested in the Emperor and the Japanese Government to administer the state would henceforth be subject to the directives of the Supreme Commander of the Allied Powers (SCAP)¹⁶. Moreover, it was firmly asserted that the ultimate configuration of governance in Japan, as stipulated in the Potsdam Declaration, would be forged through the unfettered expression of the will of the Japanese populace¹⁷. Despite the many reservations of the Japanese authorities about these declarations, on August 14, 1945, in a meeting with Prime Minister Suzuki, the emperor accepted the conditions, sealing Japan's effective surrender and paving the way for a new era in the country's history¹⁸.

2.1.2. General Douglas MacArthur: Mission, Visions, and Reforms

The occupation of Japan officially began on August 28, 1945, and was finalized with the surrender ceremony held on September 2 aboard the American warship "Missouri."¹⁹ Although the occupation was nominally an Allied effort, it was primarily an American operation dominated by General Douglas MacArthur, the Supreme Commander of the Allied

¹³ Lucian W Pye and Eiji Takemae, 'Inside GHQ: The Allied Occupation of Japan and Its Legacy' (2003) 82(1) Foreign Affairs 176.

¹⁴ John W Dower, *Embracing Defeat: Japan in the Wake of World War II* (W.W. Norton & Co. 1999).

¹⁵ Shoichi Koseki, *The Birth of Japan's Postwar Constitution* (Ray A Moore tr, Taylor & Francis Group 2018).

¹⁶ Dale M Hellegers, *We, the Japanese People: World War II and the Origins of the Japanese Constitution* (Stanford University Press 2002).

¹⁷ Koseki S [1999] (n.15).

¹⁸ Robert J. C. Butow, *Japan's Decision to Surrender* (Stanford University Press, 1954) 143.

¹⁹ Berkofsky [2014] (n.4).

Powers. As SCAP, MacArthur was responsible for implementing American policies as stated in the Potsdam Declaration under Washington's direction²⁰.

MacArthur, tasked with implementing the Potsdam Declaration's policies, often interpreted or disregarded orders to suit his vision²¹. He used his headquarters in Tokyo and the Eighth Army of the United States, based in Yokohama, to enforce occupation policies and directives²². The main objectives of the occupation, in their simplest form, were represented by two points: to ensure that Japan would never again become a threat to world security and peace and to encourage the establishment of a democratic and peaceful government away from the "ultra-nationalist and totalitarian teachings" to which the Japanese people were accustomed²³.

MacArthur's leadership was characterized by his belief in the superiority of American values and institutions, which he considered universally applicable²⁴. He viewed his mission in Japan as a divine mandate to "save" the Japanese people from their imperial system and instill true democracy²⁵. This belief was evident in his ambitious reform project, which included granting women the right to vote, encouraging labor unions, liberalizing education, reforming the judicial system, and democratizing economic institutions²⁶. MacArthur's commitment to these reforms was so profound that he even sidestepped Washington's explicit authorization for constitutional review, pushing ahead with his vision for Japan.²⁷

This tendency of MacArthur to move "against the tide" was particularly marked by his position regarding a central issue in the international context after the war, namely the debate over the conviction of Emperor Hirohito as a war criminal. In fact, central to MacArthur's mission was his handling of Emperor Hirohito²⁸. While many Allied leaders sought to try the Emperor as a war criminal, MacArthur believed that doing so would undermine Japan's social and political stability²⁹. He argued that the Japanese people's deep-rooted belief in the emperor as a leader necessitated his retention to facilitate effective reforms³⁰. This stance highlighted

²⁰ The most important directives from Washington indicating SCAP's authority were "Initial Post-Surrender Policy for Japan" (SWNCC 150) and the "Basic Directive for Post-Surrender Military Government in Japan" (JCS 1380).

²¹ Dower JW [1999] (n.14).

²² Robinson DL and Moore RA [2002] (n.9).

²³ Ibid [22] 9 – Quoted from a brief statement by Secretary of State Byrnes, September 1, 1945.

²⁴ Schaller Michael, *American Occupation of Japan: The Origins of the Cold War in Asia* (Oxford University Press 1987).

²⁵ Berkofsky [2010] (n.1).

²⁶ Douglas MacArthur, *Five Fundamental Reforms* (Directive of 11 October 1945).

²⁷ Koseki S [1999] (n.15).

²⁸ Pye LW and Takemae E [2003] (n.13).

²⁹ John R Pritchard, *The Allied Occupation of Japan, 1945-1952: The History and the Records* (Edwin Mellen Press 1990).

³⁰ Robinson DL and Moore RA [2002] (n.9)

MacArthur's strategic approach to the occupation, balancing American democratic ideals with pragmatic considerations of Japanese societal structures.

General MacArthur's staff, including his loyal and skilled right-hand man Major General Courtney Whitney, was an extension of himself. Charles Louis Kades, an experienced and dedicated colonel, led the constitutional revision project despite his lack of Japanese knowledge. His Japanese counterpart, Kanamori Tokujiro, a constitutional scholar, balanced liberal views with a strong belief in the emperor's dignity and kokutai. Their interactions highlighted the ideological conflict between radical renewal and preserving Japanese identity during Japan's postwar constitutional reform.

2.2. Japanese Constitutional Attempts

The Constitution of Japan, drafted by the occupying forces led by General MacArthur, is the most significant outcome of the American occupation of Japan after World War II³¹. However, there have been several debates surrounding its legitimacy since its conception. The main narrative suggests that it was imposed on the Japanese people by external forces and was never truly accepted by them³². Although this claim cannot be dismissed entirely, we must acknowledge that General MacArthur's intervention, although uninvited, was in some ways necessary³³. Before the final U.S.-directed draft was formulated, General MacArthur had given the Japanese government the option to direct Constitutional review operations independently, provided they adhered to certain conditions already agreed upon during the negotiations at the end of the war³⁴.

The main cause of the failure of the Japanese attempts lies in an *a priori* miscommunication. In fact, while Japanese government officials were convinced that a simple modification of the provisions already in the Meiji Constitution would suffice, the occupying forces and MacArthur, in particular, had a complete overhaul of the Constitutional system in mind³⁵. For this reason, the two drafts submitted to the United States, the first by Prince Konoe Fumimaro and the second by Joji Matsumoto, failed to meet Americans' expectations on the new system, which were considerably more revolutionary³⁶.

³¹ Berkofsky [2010] (n.1).

³² Ibid [31].

³³ David Stephen Law, 'Imposed Constitutions and Romantic Constitutions', *The Law and Legitimacy of Imposed Constitutions* [Routledge 2018].

³⁴ Ibid [33].

³⁵ Berkofsky [2014] (n.4).

³⁶ Berkofsky [2014] (n.4).

2.2.1. Prince Konoe Fumimaro

Prince³⁷ Konoe Fumimaro was among the first to address the constitutional revision issue, meeting with General MacArthur on September 13th to discuss the urgency of political reform and revising the 1889 Constitution³⁸. Despite Konoe's plea for guidance on revising the Constitution, MacArthur focused on pressing issues like expanding suffrage to women and workers, responding harshly when Konoe expressed concerns about amending the electoral law³⁹. Officially appointed as a special assistant in the Privy Seal's office, Konoe began revision work on October 9, 1945, with informal assistance from diplomat George Acheson Jr., to avoid overt contribution⁴⁰.

Indeed, Acheson was very cautious in giving his advice, but he did not hesitate to outline the various defects of the Meiji Constitution⁴¹. The main problems were the lack of accountability mechanisms for the cabinet, its limited bill of rights, the lack of adequate judiciary power in protecting citizens' rights, and the lack of civilian control of war ministers⁴². Konoe was very welcoming and enthusiastic regarding Acheson's suggestions, calling for further consultations during the operation⁴³.

A few days later, the state department decided to send Acheson's office guidelines on the proper handling of Constitutional review⁴⁴. The emperor remained at the center of the proposed system, with a cabinet established to offer guidance and support for the emperor's role in enacting representative legislation⁴⁵. However, the emperor was to be divested of certain powers - specifically, the ability to amend the Constitution and exert control over the legislature and armed forces⁴⁶.

Doubts about Konoe's role arose soon after his first meeting with MacArthur on October 4. Konoe's reputation was marred by his previous terms as prime minister, during which Japan declared war on China and entered the Axis alliance⁴⁷. In fact, Konoe served as

³⁷ Konoe Fumimaro was designated 'Prince' due to his membership in the Konoe family, one of Japan's most illustrious noble families. This title reflected his high-ranking position in Japanese society and politics, and his family had a long history of service to the imperial court.

³⁸ Pye LW and Takemae E [2003] (n.13).

³⁹ Robinson DL and Moore RA [2002] (n.9).

⁴⁰ Dower JW [1999] (n.14).

⁴¹ Robinson DL and Moore RA [2002] (n.9).

⁴² Pye LW and Takemae E [2003] (n.13).

⁴³ Koseki S [1999] (n.15).

⁴⁴ On October 17, Secretary Byrnes cabled two sets of guidelines on constitutional revision to Acheson's office based on SWNCC 228, which will be discussed more in-depth in paragraph 2.3.1. of this chapter.

⁴⁵ Pye LW and Eiji T [2003] (n.13).

⁴⁶ Dower JW [1999] (n.14).

⁴⁷ Pritchard JR [1990] (n.29).

prime minister twice between 1936 and 1941, and it was during his term, in 1937, that Japan declared war on China, beginning the so-called “war of annihilation.”⁴⁸ Later, also during Konoe’s tenure, the country entered the trilateral pact with Fascist Italy and Nazi Germany. Incidentally, by the end of October 1945, it seemed almost a foregone conclusion that the prince would be tried as a war criminal and sentenced to death⁴⁹.

Konoe’s suggestion in an interview that Emperor Hirohito might need to abdicate provoked unprecedented criticism. The New York Times and other media criticized MacArthur’s decision to involve Konoe in the revision project, leading MacArthur to publicly deny selecting Konoe for the task⁵⁰. In fact, Konoe stated in a press conference that while it was true that he had not received a formal order from the general, MacArthur himself suggested to the prince that he handle the review during the first meeting on October 4. However, miscommunication and controversy continued⁵¹.

Despite initial support, Acheson ultimately severed communication with Konoe, fearing that a lack of dialogue would lead to an erroneous revision. He suggested that the State Department issue a statement on proper constitutional principles, but this was not pursued⁵². This decision can be deemed erroneous, as following Konoe’s suggestion could have appeased the international waters and given Japanese bureaucrats and politicians more certainty about the revision project, since their only reference point was the limited points in the Potsdam Declaration and General MacArthur’s vague statements⁵³. In contrast, both Konoe and later Matsumoto were “abandoned,” compelled to work in the dark and somehow guess what the Americans wanted included in the revision⁵⁴.

On November 22, 1945, Konoe presented to the emperor an outline of his vision regarding the draft revision and Constitutional principles. The first issue focused on the emperor’s figure and his accountability to the Japanese people; it said, “The Emperor shall be the superintendent of sovereignty and shall be the exerciser of it, but it shall be made especially clear that its exercise shall be dependent on the support of the people.”⁵⁵

⁴⁸ Berkofsky [2010] (n.1) 13.

⁴⁹ Robinson DL and Moore RA [2002] (n.9).

⁵⁰ Koseki S [1999] (n.15).

⁵¹ Dower JW [1999] (n.14).

⁵² Koseki S [1999] (n.15).

⁵³ Robinson DL and Moore RA [2002] (n.9).

⁵⁴ Ibid [53].

⁵⁵ Berkofsky [2010] (n.1) 13.

This statement, however much the general deviated from it, was clearly the result of his suggestion⁵⁶. The rest of the issues in the outline very accurately reflected U.S. constitutional ideas, centered on increased powers of the Diet, much tighter control of the armed forces, and more significant implementation of citizens' freedoms and personal rights⁵⁷. However, U.S. headquarters soon announced the abolition of the Privy Seal Office and declared Konoe as an A-list war criminal. Faced with the imminent trial, Konoe committed suicide, ending his troubled contribution to Japan's constitutional revision⁵⁸.

2.2.2. *The Matsumoto Committee Takes Over*

While Konoe was setting up the first Committee to work on the Constitutional draft, the Japanese government underwent a series of radical changes that further complicated the issue of Constitutional revision. Indeed, on October 5, 1945, Prime Minister Higashikuni resigned in protest of one of MacArthur's edicts on civil liberties⁵⁹. Shidehara Kijuro, a veteran diplomat who favored cooperation with the United States and Britain throughout his career, formed the new cabinet. After the emperor's appointment of Konoe, concerned about the future of the 1889 Constitution, the prime minister ordered Matsumoto Joji to form a committee, the "Committee to Study Constitutional Problems."⁶⁰

This Committee included prominent figures in the Japanese political landscape. Among them emerged Minobe Tatsukichi, Japan's most famous Constitutional scholar; Shimizu Toru, a member of the Imperial Academy; and Nomura Junji, professor emeritus of law, three top bureaucrats from the Legislation Bureau, as well as Matsumoto himself, currently serving as minister without portfolio⁶¹. The committee's initial purpose was to conduct an academic study of the Constitutional issue and not to prepare a revision draft⁶².

The Committee met thirty times between October 1945 and January 1946 to pursue such a study, but MacArthur's repudiation of Konoe and the events after that forced the Committee to redefine its objectives⁶³. Toward the end of November, the Committee announced that it had concluded its studies of the Meiji Constitution and reached the conclusion

⁵⁶ Dale Hellegers, 'The Konoe Affair', *The Occupation of Japan: Impact of Legal Reform* (MacArthur Memorial 1977).

⁵⁷ Robinson DL and Moore RA [2002] (n.9).

⁵⁸ Ibid [57].

⁵⁹ Pye LW and Takemae E [2003] (n.13).

⁶⁰ Dower JW [1999] (n.14).

⁶¹ Koseki S [1999] (n.15).

⁶² Pye LW and Takemae E [2003] (n.13).

⁶³ Robinson DL and Moore RA [2002] (n.9).

that there was no need to revise the articles concerning sovereignty and imperial power⁶⁴. Moreover, the Committee strongly favored a number of provisions that were not only very narrow but also prevented the free exercise of the rights of the Japanese people⁶⁵.

A few days later, on December 8, Matsumoto was asked to submit an outline of the committee's revision ideas; this outline came to be known as "Matsumoto's 4 Principles":

1. There would be no change in the principle that the emperor can exercise his right to sovereignty;
2. The authority of the Diet is to be expanded, and limits will be placed on the emperor's prerogatives;
3. Cabinet ministers are to be responsible for every state matter and will be accountable to the Diet;
4. The rights and liberties of subjects will not be restricted except by laws enacted by the Diet⁶⁶.

Following this publication, Atcheson, concerned about the future of the revision, judged it appropriate to reopen contact with the Japanese government and the Matsumoto Committee. On December 13, he sent a very urgent memo to MacArthur asking his permission to share American ideas on Constitutional revision with Matsumoto's committee, pointing out to the general how an independent Committee could be dangerous to the Constitutional and democratic reconstruction project the Americans had in mind for the country⁶⁷. This urgency in no way moved MacArthur, who remained firm in his decision not to communicate with the Japanese and permanently closed any possibility of dialogue on the Constitutional issue⁶⁸.

2.2.3. The Draft: Matsumoto Fails

For his part, Matsumoto also had no intention of confronting MacArthur or his office about the changes to be made to the Constitution. In fact, according to the minister, he did not see any need whatsoever to completely overhaul the Meiji Constitution and believed it was sufficient to make minimal changes to the provisions already in the document, stating that "Constitutional reform is to be done spontaneously and independently. I therefore see no need to find out American intentions or reach preliminary understandings."⁶⁹ In reality, as was later

⁶⁴ Koseki S [1999] (n.15).

⁶⁵ Pye LW and Takemae E [2003] (n.13).

⁶⁶ Koseki S [1999] (n.15).

⁶⁷ Dower JW [1999] (n.14).

⁶⁸ Robinson DL and Moore RA [2002] (n.9).

⁶⁹ Berkofsky [2010] (n.1) 16.

shown, Matsumoto's interpretation of how SCAP intended to make Japan a democratic and pacifist country could not have been more wrong⁷⁰.

In relation to the revisions, the Committee initially recommended a modification to Article 3, replacing the phrase "sacred and inviolable" with "supreme and inviolable" in reference to the emperor⁷¹. As one can easily surmise, this alteration did not significantly alter the emperor's position or status⁷². Additionally, the Committee proposed other, more tangible changes, such as the removal of imperial authority over the military and the ability to suspend the Bill of Rights during times of war⁷³. Regarding MacArthur's suggestion to include an article renouncing war, Matsumoto promptly dismissed it, refusing to even consider such a provision⁷⁴.

Toward the end of January, Takagi Yasaka, a Constitutional law expert who had worked closely with Atcheson during the first draft, tried to warn Matsumoto that U.S. authorities would in no way accept this draft and that it would be wiser to consult with MacArthur and his staff before publishing such a proposal⁷⁵. Again, Matsumoto refused, disagreeing with this view on the urgency of negotiating with the Americans⁷⁶.

On February 1, 1946, a Japanese newspaper published a copy of what was believed to be a provisional draft by Matsumoto. However, it was later revealed that it was actually a copy of a second draft that was being developed by the legislation bureau under Miyazawa's supervision⁷⁷. Despite Matsumoto's attempts to distinguish his draft from the other one, it was futile as both drafts were almost identical, and, exacerbating the situation further, the public outcry against the proposed draft was too extensive to be controlled⁷⁸.

At this point, MacArthur and his associates definitively concluded that the Japanese government was unable to develop a Constitution that was in line with their vision of the future of the figure of the emperor and, more importantly, of the country as a symbol of democracy and peace⁷⁹. Therefore, the Supreme Command of the Allied Powers was "forced" to intervene. While it is true that Matsumoto's arrogance in assuming that he could go ahead with the draft

⁷⁰ Koseki S [1999] (n.15).

⁷¹ Tatsuo Sato, 'The Origin and Development of the Draft Constitution of Japan' (1957) 24(4-6) Contemporary Japan 147.

⁷² Ibid [71].

⁷³ Ibid [71].

⁷⁴ Koseki S [1999] (n.15).

⁷⁵ Robinson DL and Moore RA [2002] (n.9).

⁷⁶ Dower JW [1999] (n.14).

⁷⁷ Robinson DL and Moore RA [2002] (n.9).

⁷⁸ Koseki S [1999] (n.14).

⁷⁹ Berkofsky [2010] (n.1).

revisions without consulting the occupying forces did not contribute to the Japanese cause, part of the blame may have been attributed to MacArthur's adamant refusal to allow contact between the U.S. and Japanese staffs, which left the latter without guidance on this crucial issue⁸⁰.

2.3. The Americans Take Over

The revision of the Japanese Constitution was not a priority for the Allied forces during their occupation⁸¹. However, General MacArthur believed that Japan could only meet the requirements of the Potsdam Declaration with a new Constitution⁸². Despite this, American policies, particularly those outlined by the occupying Allied forces and the Far Eastern Commission (FEC), emphasized the importance of allowing Japan to lead the constitutional revision process independently⁸³.

Yet, everything changed when the Mainichi published an article on February 1st⁸⁴. This event shook the Japanese Cabinet, which had met just before the leak to discuss the dilemmas of the Meiji Constitution revision process⁸⁵. The leak caused great embarrassment to the Japanese government, highlighting its inability to handle the constitutional revision process⁸⁶. On the other hand, for the SCAP office, this leak was perceived as an opportunity⁸⁷. It confirmed MacArthur's concerns about the Japanese government's ability to handle the revision of the Constitutional system independently⁸⁸. As a result, the Government Section of SCAP began working on drafting a "model" Constitution for Japan after Whitney, MacArthur's right-hand man, took the lead in selecting candidates for this task⁸⁹.

⁸⁰ Robinson DL and Moore RA [2002] (n.9).

⁸¹ Berkofsky [2010] (n.1).

⁸² Shigeru Yoshida, *The Yoshida Memoirs: The Story of Japan in Crisis*. (Greenwood Press 1973).

⁸³ Thomas U Berger, *War, Guilt, and World Politics After World War II* (Cambridge University Press 2012).

⁸⁴ The Mainichi article of February 1, 1946, was published in the Mainichi Shimbun, a major Japanese newspaper. As it will be outlined, the article discussed the Matsumoto Committee's draft proposal for Japan's constitution, which was criticized for being too conservative and not aligning with the democratization goals of the Allied Occupation forces.

⁸⁵ Pye LW and Takemae E [2003] (n.13).

⁸⁶ Andrew Gordon, *A Modern History of Japan: From Tokugawa Times to the Present* (Oxford University Press, USA 2002).

⁸⁷ Pritchard JR [1990] (n.29).

⁸⁸ Robinson DL and Moore RA [2002] (n.9).

⁸⁹ Tetsuya Kataoka and Richard B Finn, 'Winners in Peace: MacArthur, Yoshida, and Postwar Japan' (1993) 19(1) *Journal of Japanese Studies* 223.

The decisions regarding the review process were kept confidential since General MacArthur and Whitney had no instructions to take charge from the Japanese government⁹⁰. The occupation policies dictated that the Allied Powers were not accountable for enforcing any government system on Japan that did not have the support of the populace will expressed freely⁹¹. It was apprehended that if the Constitutional revision appeared to be coerced from an external source, its approval and implementation might be undermined, particularly among the Japanese people⁹².

2.3.1. Before the Draft: SWNCC 228, The MacArthur Guidelines and The Rowell Report

Before all the events that took place between January and February, there was a document beyond the Potsdam Declaration that showed a precise and comprehensive plan on how the United States envisioned Constitutional revision, drafted by the Southwest Pacific Naval Command (SWNCC) titled “Reform of the Japanese Governmental System,” or SWNCC 228⁹³. The main drafter of the document was Hugh Borton, an academic expert on modern Japanese history and a State Department official⁹⁴.

Eventually considered a revolutionary work regarding Japan’s Constitutional reform project, SWNCC 228 represented a significant breakthrough in the occupation context in two aspects in particular. First, it presented a profound and precise analysis of the evolution of the Japanese system since the Meiji period; then, that analysis, which was quite detailed, gave precise directions regarding the reforms and changes to be made to the Constitution to satisfy the Potsdam Declaration⁹⁵.

Firstly, the document began by presenting the six primary goals of any Constitutional reform:

1. Universal suffrage;
2. An executive that is accountable either to the people (as in presidential systems) or to the legislature (as in parliamentary systems);
3. A fully representative legislature with the power to form and control the government budget;

⁹⁰ Dower JW [1999] (n.14).

⁹¹ Eleanor M Hadley, Theodore Cohen and Herbert Passin, ‘Remaking Japan: The American Occupation as New Deal’ (1988) 14(2) Journal of Japanese Studies 480.

⁹² Berkofsky [2010] (n.1).

⁹³ Robinson DL and Moore RA [2002] (n.9).

⁹⁴ Hugh Borton, *Japan’s Modern Century* (The Ronald Press Company 1954).

⁹⁵ Robinson DL and Moore RA [2002] (n.9).

4. Civil rights guaranteed to the people of the state and all those under its jurisdiction;
5. Local elections or appointments of local officers;
6. The writing and adoption of Constitutional amendments through the people's approval⁹⁶.

One of the fundamental issues of the draft revision concerned the emperor. The document clearly stated that retaining the figure of the emperor in its present form would be entirely at variance with the terms and conditions of the Potsdam Declaration⁹⁷. While it was particularly emphasized that the final say would be given to the expressed will of the people, Japan was to be strongly encouraged to abolish the imperial system and make the emperor a symbol rather than a leader⁹⁸.

In October, the initial drafts of the document were dispatched from Washington to the SCAP office and, while a copy of it was sent to Acheson as well, it received complete approval from the Joint Chief of Staff only in early January⁹⁹. Once approved, the document had a significant, although indirect, impact on the Committee in charge of preparing the SCAP model, validating the importance of their review and made their work more pertinent¹⁰⁰. Upon publication, the similarities between the SCAP draft and SWNCC 228 were too striking to ignore and, as a result, it evolved from being merely a recommendation to a *bona fide* guide¹⁰¹.

This document was then accompanied by an outline prepared by MacArthur on the most pressing changes to be included in the draft revision¹⁰². The document was very brief and divided into two main points: the first focusing on the emperor and the second, more general, dealing with various points of the general Japanese system, such as the abolition of the feudal system, the organization of the budget and armed forces, the issue of human rights, and, above all, the renunciation of war¹⁰³.

The document, once drafted, was given to Colonel Kades, chairman of the U.S. Constitutional Convention Steering Committee, who, not fully aligned with some of the general's positions, made several changes¹⁰⁴. Prominent among these was the treatment of the

⁹⁶ State-War-Navy Coordinating Committee, SWNCC 228, 'Reform of the Japanese Governmental System', Japan (28 May 1945).

⁹⁷ Ibid [96].

⁹⁸ Ibid [96].

⁹⁹ Kataoka T and Finn RB [1993] (n.89).

¹⁰⁰ Gordon A [2002] (n.86).

¹⁰¹ Dower JW [1999] (n.14).

¹⁰² Schaller M [1987] (n.24).

¹⁰³ Douglas MacArthur, *Three Basic Points Stated by Supreme Commander to Be "Musts" in Constitutional Revision* (1945).

¹⁰⁴ Robinson DL and Moore RA [2002] (n.9).

emperor's role: while General MacArthur still referred to him as Head of State, Kades emphasized the need to turn him into a mere "symbol."¹⁰⁵ In fact, MacArthur's decision to retain the emperor as Head of State was seen as bold and raised considerable criticism, as it would be difficult to justify in the face of the occupying forces, who were firmly opposed to the perpetuation of the imperial institution in any form.

Before he was assigned to the Constitutional Convention Steering Committee formed by Whitney, in early December 1945 Major Milo E. Rowell decided to pursue a study of Constitutional principles to be applied to the draft revision entitled "Report of Preliminary Studies and Recommendations of Japanese Constitution."¹⁰⁶ The tone of the document was highly critical of the Meiji Constitution, stating that any democratic tendencies that might be present in the Japanese system were significantly threatened by the power of extra-parliamentary institutions and the control exercised by the emperor over the armed forces and the bureaucracy¹⁰⁷.

Rowell proposed a set of Constitutional reforms for Japan that aligned with American principles of justice, freedom, and democracy¹⁰⁸. Firstly, he suggested the abolition of the Privy Council, which MacArthur implemented in the following months, marking a significant step towards restructuring Japan's political system¹⁰⁹. Furthermore, Rowell emphasized the importance of limiting direct access to the emperor exclusively to elected officials of the people¹¹⁰. He also advocated for a clear separation of powers into three distinct sections: legislative, executive, and judicial. Each section was to retain complete autonomy in its own area of responsibility¹¹¹.

On human rights, Rowell recommended the introduction of a binding bill of rights, enforceable through a fully independent judiciary, which was an essential pillar of the Constitutional revision project¹¹². In addition to these recommendations, in the very first days of January, Rowell published other comments containing "eight outstanding liberal provisions," which included measures against discrimination based on age, status, race, or

¹⁰⁵ Kataoka T and Finn RB [1993] (n.89).

¹⁰⁶ Koseki S [1999] (n.14).

¹⁰⁷ Herbert Francis Rowell, 'Report of Preliminary Studies and Recommendations of Japanese Constitution' (1945).

¹⁰⁸ Dower JW [1999] (n.14).

¹⁰⁹ Kataoka T and Finn RB [1993] (n.89).

¹¹⁰ Rowell HF [1945] (n.107).

¹¹¹ Ibid [110].

¹¹² Ibid [110].

nationality, the introduction of benefits for workers, and a proposal for a referendum granting the people the power to legislate directly¹¹³.

These proposals, along with the other documents, offered profoundly revolutionary ideas for reforming the Japanese Constitution and reflected the American ideal of an equitable and democratic society¹¹⁴. However, the crucial question that arose from February concerned the feasibility of implementing these values in a context as profoundly different as Japan's, which was closely tied to its own traditions and systems. This challenge was the focus of the work of the new Constitutional Convention, established by General Whitney, which undertook to consider how and to what extent American ideals could be integrated into Japanese reality without compromising its historical and cultural identity¹¹⁵.

2.3.2. The SCAP Constitutional Convention

On February 4, Whitney gathered around 20 members of the Government Section to discuss the possibility of calling a Constitutional Convention¹¹⁶. This was because it had become evident that the Japanese government would not be able to pursue the revision project as the occupying forces had envisioned¹¹⁷.

This Constitutional Convention consisted of several impressive figures in the occupation scene. First and foremost, the project supervisor, General Courtney A. Whitney, second in command within SCAP, was instrumental in the project through his tough and decisive interventions in the most intricate situations¹¹⁸. The convention's Steering Committee comprised four individuals: Colonel L. Kades, Commander A. Rodman Hussey Jr., Lt. Col. Milo E. Rowell, and Miss Ruth Ellerman¹¹⁹. Although Colonel Kades was utterly ignorant about Japan, which raised doubts about his competence as the Steering Committee director, he turned out to be particularly suited to his post because of his extensive knowledge of law, strong belief in written Constitutions, and dedication to American ideals and democracy¹²⁰.

Commander Hussey was an expert in civil affairs, particularly the restoration of government in conflict situations. Although he was considered peculiar and somewhat brusque, he was an excellent lawyer, and his instincts regarding constitutional form were particularly

¹¹³ Dower JW [1999] (n.14).

¹¹⁴ Gordon A [2002] (n.86).

¹¹⁵ Pye LW and Takemae E [2003] (n.13).

¹¹⁶ Schaller M [1987] (n.24).

¹¹⁷ Dower JW [1999] (n.14).

¹¹⁸ Pye LW and Takemae E [2003] (n.13).

¹¹⁹ Robinson DL and Moore RA [2002] (n.9).

¹²⁰ Koseki S [1999] (n.14).

sound¹²¹. For his part, Colonel Rowell was a politically conservative lawyer, had a great deal of experience in democratic governance, and had already started contributing to the project through his aforementioned Report¹²². Ruth Ellerman was the note-taker for the Steering Committee, but the group also included another woman, who contributed more than she was given credit for, Beate Sirota. Sirota lived in Japan throughout her teenage years until college, which she did in the United States; she proved particularly valuable because of her fluency in Japanese, so much so that Kades decided to assign her to the subcommittee devoted to the Bill of Rights¹²³.

Although the Committee was comprised of knowledgeable and highly respected members, only a few of them had deep knowledge of Japan. This lack of expertise became a problem because the Committee was tasked with reviewing Japan-related issues¹²⁴. Most members had taken classes on Japan during the war at American universities, which were adequate for that context, but their knowledge was superficial compared to the task at hand¹²⁵. Nonetheless, their training was rooted in legal doctrines imparted by reputable universities and law schools in the United States, applied at all levels of government, from federal to local. Moreover, many members had significant experience working both in Congress and in high-ranking positions in the military¹²⁶.

2.3.3. *The SCAP Drafting Process*

Once the Committee met, General Whitney gave only one week to complete the draft, following the guidelines left by MacArthur and the other documents gathered by the SCAP office during the occupation regarding proposals for the draft revision¹²⁷. The timetable was very tight simply because of a conflict over who had actual jurisdiction over the Constitutional revision¹²⁸. In fact, the Allied powers within the Far Eastern Commission were convinced that they had direct authority over the revision draft, according to the Potsdam Declaration. Yet, MacArthur, disagreeing with some of the more “aggressive” points in the Allied guidelines, preferred to control the revision himself without responding to the FEC¹²⁹.

¹²¹ Kataoka T and Finn RB [1993] (n.89).

¹²² Dower JW [1999] (n.14).

¹²³ Beate Sirota Gordon, *The Only Woman in the Room: A Memoir* (Kodansha International (JPN) 1998).

¹²⁴ Schaller M [1987] (n.24).

¹²⁵ Koseki S [1999] (n.14).

¹²⁶ Robinson DL and Moore RA [2002] (n.9).

¹²⁷ Koseki S [1999] (n.14).

¹²⁸ Robinson DL and Moore RA [2002] (n.9).

¹²⁹ Ginsburg T [2007] (n.2).

In fact, the General was very cautious about avoiding consulting with the commission or his government in Washington when he and Whitney decided to take matters into their own hands, continually stressing the urgency of the work that needed to be done¹³⁰. Just prior to Whitney establishment of the Constitutional Convention, a memo from MacArthur's staff was circulated, asserting that the Supreme Commander possessed virtually unrestricted authority to enact any changes he deemed necessary to alter the Japanese constitutional structure¹³¹. This memo was used to justify the General's action, essentially making him unaccountable to anyone regarding the draft revision decisions made from that point on¹³².

During the course of that week's work, the drafters were entrusted with an immensely challenging responsibility: bring about a complete overhaul of the entire Japanese Constitutional and political system. In the beginning, they drew inspiration from principles heavily influenced by Madisonian concepts, which emphasized the importance of clearly defined government functions, implementing a system of checks and balances among the various government institutions, and ensuring accountability of institutions to the electorate¹³³.

Later, however, they decided to move away from the American model, making executive power collective instead of unitary, concentrated in the person of a single president¹³⁴. This was because, in Japan, the executive needed to be limited while the Diet required to be strengthened; by dividing power collectively, it would be easier to achieve this goal¹³⁵. A unicameral legislature and a collective executive were the best structures for the present context and the ones most in line with the directions given by SWNCC 228.

Regarding the figure of the emperor, the central point of the entire Constitutional debate, it was necessary for the Throne to be stripped of all the myths and practices it generated¹³⁶. To achieve this goal, the American Committee declared that the emperor's position had to derive exclusively from the sovereign will of the people and no other source, whether divine or dynastic¹³⁷. The emperor was to have no governmental power, and whatever decisions he was to make were to be carried out with the advice and consent of the Diet;

¹³⁰ Robinson DL and Moore RA [2002] (n.9).

¹³¹ Douglas H Mendel and Kazuo Kawai, 'Japan's American Interlude' (1960) 13(3) *The Western Political Quarterly* 816.

¹³² Chihiro Hosoya, 'The Constitution of Japan: Its First Twenty Years.' (1970) 25(3/4) *Monumenta Nipponica* 468.

¹³³ Koseki S [1999] (n.15).

¹³⁴ This decision was heavily influenced by the ideas set forth by Alexander Hamilton in *The Federalist* n.70.

¹³⁵ Robinson DL and Moore RA [2002] (n.9).

¹³⁶ *Ibid* [135].

¹³⁷ Koseki S [1999] (n.15).

similarly, succession was to be controlled by whatever laws the Diet intended to enact on the imperial family¹³⁸.

This point was a far cry from the guidelines given by MacArthur regarding the emperor; in fact, he believed it was a mistake to punish the emperor, as he considered the imperial system essential to the cohesion of Japanese society¹³⁹. However, this reasoning was not accepted by the review board nor the Allied authorities; in fact, they firmly believed that all the problems Japan had faced in recent years could be attributed, in essence, to the imperial institution. It was fundamental that the emperor had no power or, at least, did not exercise it in independence¹⁴⁰.

The role of the Diet was one of the most revolutionary points of the American Revision Project, especially considering how weak, corrupt, and inefficient it had been in the past¹⁴¹. After a series of debates within the Constitutional Convention, in the end, the drafters decided to place their utmost trust in the Diet. Indeed, the main Article of Chapter IV of the new Constitution clearly stated that the Diet would be the highest organ of state power and represented the sole and exclusive legislative authority¹⁴². Americans strongly believed in the rule of law, and to strengthen this concept, the new government structure aimed to increase the power of the Diet and reduce the number of bureaucrats within government institutions¹⁴³. The Diet was given the authority to approve new ministerial appointments, exercise complete control over the budget and taxes, and, of course, the power of no-confidence vote¹⁴⁴.

The wide variety of viewpoints within the Constitutional Convention established by Whitney became particularly evident at the time of the debates on social issues and rights, represented by a series of compromises and cross-sections of these different views, visions, and ideals¹⁴⁵. The individuals responsible for drafting the provisions played a significant role in shaping the future system and were keen on having the Japanese government include their ideas. The Supreme Commander for the Allied Powers, as such, had the responsibility of bringing about not just a political but also a social revolution in Japan¹⁴⁶.

¹³⁸ Dower JW [1999] (n.14).

¹³⁹ MacArthur D [1945] (n.42).

¹⁴⁰ Koseki S [1999] (n.15).

¹⁴¹ Robinson DL and Moore RA [2002] (n.9).

¹⁴² Article XL: "The Diet shall be the highest organ of state power and shall be the sole law-making authority of the State."

General Headquarters Supreme Commander for The Allied Powers (GHQ SCAP), *Constitution of Japan* (1946).

¹⁴³ Dower JW [1999] (n.14).

¹⁴⁴ GHQ SCAP [1946] (n.191).

¹⁴⁵ Robinson DL and Moore RA [2002] (n.9).

¹⁴⁶ Pye LW and Takemae E [2003] (n.13).

However, some Committee members believed it would be impossible to force a new way of thinking on a country through law¹⁴⁷. General Whitney, who leaned towards the conservative side, believed that the drafters should settle and include only a general statement on social security to be provided to the Japanese people¹⁴⁸. Even though the more liberal members of the Committee were disappointed, they had to accept the compromise and let go of their vision of a complete social revolution for Japan.

On the matter of civil liberties, the Committee responsible for civil rights proposed provisions that not only ensured freedom for all individuals and barred clergymen from engaging in any form of political activities but also asserted freedom of speech and press by prohibiting libel and slander¹⁴⁹. However, the Steering Committee opposed this final point, stating that the responsibility of avoiding libel and slander lies with the individual and not with the government, deciding to strike out this clause and redraft the amendment to guarantee freedom of expression without any constitutional limitations¹⁵⁰.

Once again, vigorous debates were ignited within the convention regarding the possibility of amending the Bill of Rights. In fact, the first draft focusing on this issue clearly stated that no future law, Constitution, or ordinance could limit or erase the freedoms found in the new Constitution. Kades categorically opposed this provision, as it would have deprived future generations of the right to independently administer their own affairs, indirectly relegating them to the only possibility of making changes through a revolution¹⁵¹. On the other hand, Roest strongly opposed the Colonel, declaring that such freedom and rights were now inherent in human nature and that it was imperative for future generations not to abolish them¹⁵². Whitney was called upon once again to settle the issue, which proved Kades and the rest of the Steering Committee right: the mistakes and beliefs of the past were not to bear on the living or future generations¹⁵³.

On February 10, at the end of the short but very intensive work of the Constitutional Convention, Whitney sent MacArthur the final draft of the SCAP Constitutional model, stating how it represented a collective and well-regarded vision of a group that included virtually every

¹⁴⁷ Rowell: "You cannot impose a new mode of social thought upon a country by law."

Robinson DL and Moore RA [2002] (n.9) 104.

¹⁴⁸ Robinson DL and Moore RA [2002] (n.9).

¹⁴⁹ Pye LW and Takemae E [2003] (n.13).

¹⁵⁰ Robinson DL and Moore RA [2002] (n.9).

¹⁵¹ Koseki S [1999] (n.15).

¹⁵² Robinson DL and Moore RA [2002] (n.9).

¹⁵³ Pye LW and Takemae E [2003] (n.13).

form of American political thought¹⁵⁴. According to the general, this document would lead to a drastic departure from the extreme right while not bending to far-left concepts, representing a perfect blend of conservatism and liberal progressivism in the Japanese context¹⁵⁵.

On February 13, 1946, Whitney, Kades, Rowell, and Hussey appeared at the minister's official residence, greeted by the minister himself, accompanied by Matsumoto, Yoshida's advisor Shirasu, and an interpreter, Hasegawa Motokichi. General Whitney harshly rejected Matsumoto's constitutional revision proposals, insisting on a more "liberal and enlightened" constitution prepared by the occupying authorities.¹⁵⁶ Despite protests from the Japanese delegation, Whitney's stance remained firm, emphasizing that failure to accept the draft could lead to an even more radical constitution imposed on Japan.¹⁵⁷ Prime Minister Shidehara later met with General MacArthur, who empathized but underscored the non-negotiable points of popular sovereignty and renunciation of war. Convinced there was room for negotiation, the Cabinet agreed to use the SCAP draft as the foundation for Japan's new Constitution, despite lingering doubts about their freedom to amend it¹⁵⁸.

2.3.4. The Second Matsumoto Draft

Matsumoto attended the meeting with Whitney to inform him about the Cabinet's decision and to seek clarification on several crucial points in the Constitution's drafting process. These points included confusion about terminology and disagreements about specific provisions regarding the emperor, the Bill of Rights, the amendment process, and the composition of the Diet¹⁵⁹. Whitney's approach was much less diplomatic than MacArthur's, and as Matsumoto asked more specific questions, he realized that their room for negotiation was becoming increasingly minimal¹⁶⁰.

The U.S. general simply replied that the American draft formed one body and that they wanted to be clear that only minimal changes in unimportant points would be allowed¹⁶¹. This point of view became clearer and more evident the longer the meeting went on. Every proposal by Matsumoto was rejected, and every request for elucidation was treated with condescension

¹⁵⁴ Koseki S [1999] (n.15).

¹⁵⁵ Dower JW [1999] (n.14).

¹⁵⁶ Robinson DL and Moore RA [2002] (n.9) 109.

¹⁵⁷ Dower JW [1999] (n.14).

¹⁵⁸ Koseki S [1999] (n.15).

¹⁵⁹ Yoshida S [1973] (n.82).

¹⁶⁰ Dower JW [1999] (n.14).

¹⁶¹ Robinson DL and Moore RA [2002] (n.9).

by the general. In essence, contrary to Japanese perception, Whitney and the rest of his staff expected Matsumoto and his Committee to do a simple translation of the draft, not a revision¹⁶².

On February 26, the cabinet met again to discuss the meeting between Matsumoto and Whitney, making, at the end, two important decisions regarding the draft Constitutional reform. First, they officially agreed to accept the SCAP draft as the model for revision with the approval of most ministers except, of course, Matsumoto¹⁶³. The second decision concerned the minister himself, who was given the task of preparing the official Cabinet draft to present to Whitney and his staff. The Cabinet's goal was to have a copy ready to present to the Americans by March 11, only thirteen days later¹⁶⁴. However, Whitney insisted on having a copy by March 4, drastically reducing the - already short - time available to pursue the complex work assigned to Matsumoto's committee¹⁶⁵.

This change in the deadline left the Committee only four days to prepare a complete draft. In this short time, they had to incorporate the basic principles of the SCAP draft into a document written in literary Japanese, as used in law, as well as make the various changes that a revision work requires. Matsumoto began by rewriting the preliminary chapters regarding the emperor, the renunciation of war, and the composition of the Diet and cabinet¹⁶⁶. The minister ignored the U.S. preference for a unicameral legislature and inserted a national legislature with upper and lower chambers. The other two Committee members, Irie and Sato, worked on changes to the bill of rights and the composition of the cabinet¹⁶⁷.

Matsumoto and his staff were particularly astute in changing terminology, especially regarding the figure of the emperor. The key change lied in a single word, namely, the shift from "sovereign" to "supreme," in an attempt to avoid MacArthur's statements. In fact, the Japanese government did not accept this action of transferring sovereignty from the emperor to the people, although it was necessary to do so according to the various post-war agreements¹⁶⁸. In addition, the new draft gave the emperor the power to initiate amendments, contradicting SCAP's plan to provide this power to the Diet and its preference for popular sovereignty. Furthermore, the entire preamble was omitted despite Whitney's refusal¹⁶⁹.

¹⁶² Koseki S [1999] (n.15).

¹⁶³ Yoshida S [1973] (n.82).

¹⁶⁴ Ibid [163].

¹⁶⁵ Robinson DL and Moore RA [2002] (n.9).

¹⁶⁶ Yoshida S [1973] (n.82).

¹⁶⁷ Koseki S [1999] (n.15).

¹⁶⁸ Pye LW and Takemae E [2003] (n.13).

¹⁶⁹ Robinson DL and Moore RA [2002] (n.9).

Matsumoto firmly believed that the changes proposed had no relation with the two fundamental principles as laid out by MacArthur. On March 4, he presented the draft at the Government Section's headquarters, mentioning that it was yet to be an official draft as Cabinet approval was still pending¹⁷⁰. Kades and Sato were then assigned the task of translating and revising the draft. Immediately, Kades noticed the many discrepancies, especially the omission of the preamble in its entirety, ordering Sato to reinsert the foreign minister's original translation of the U.S. preamble¹⁷¹.

The confrontation between the two sides sharply highlighted the different interpretations regarding the work that had been entrusted to Matsumoto's committee. Kades believed that it was a basic translation job, but Matsumoto had prepared a draft that, in his incorrect interpretation of Whitney and MacArthur's instructions, allowed the Japanese government to modify the provisions as they deemed fit while keeping the two fundamental principles outlined in the SCAP draft¹⁷². The discussion became more and more intense, turning into a full-blown argument, and Matsumoto, fearing that the situation might escalate further, decided to leave, permitting Kades to initiate another drafting session¹⁷³.

2.3.5. The Marathon Meeting and The Final Draft

After translating Matsumoto's draft, Kades informed the Japanese delegation that a final draft was needed by that night and that Japanese officers were required to attend starting at 9 p.m. Sato, the only Japanese representative left, tried to contact Matsumoto for help but was unable to do so. This left him and the interpreters virtually held hostage by the U.S. delegation¹⁷⁴.

The Committee restored the preamble that Hussey had written, which Matsumoto had omitted. The chapter on the emperor was reformatted to emphasize the emperor's position as a symbol. The power to enact laws, especially concerning succession to the throne, was given back to the Diet. Surprisingly, Chapter II, which concerns the renunciation of war, was not much discussed. Following MacArthur's instructions, Matsumoto and the staff had made minimal changes in this regard¹⁷⁵.

¹⁷⁰ Koseki S [1999] (n.15).

¹⁷¹ Yoshida S [1973] (n.82).

¹⁷² Dower JW [1999] (n.14).

¹⁷³ Robinson DL and Moore RA [2002] (n.9).

¹⁷⁴ Dower JW [1999] (n.14).

¹⁷⁵ Pye LW and Takemae E [2003] (n.13).

The most complicated part to revise during that long night in March was Chapter III of the Constitution, “Rights and Duties of the People.” SCAP’s work on this chapter was one of the most revolutionary in modern Constitutions¹⁷⁶. However, for Japanese legal specialists, protecting fundamental rights was not considered one of the main goals in Constitution writing. This was made evident by the fact that Matsumoto, in revising this chapter, did not recognize the inalienability of the rights included in the chapter, categorizing those rights as existing “within the limits of law and not prejudicial to peace and order” as they were stated in the Meiji Constitution of 1889¹⁷⁷.

Beyond that, both Matsumoto and Sato viewed this chapter as the work of a foreign amateur whose goal was to transplant a new tradition of law into Japan, so they rewrote most of the articles¹⁷⁸. There were so many changes in Chapter III that the Committee had to dwell on and rewrite every single chapter, so much so that at one point, the Americans, frustrated by the excessive amount of time they were spending on this part of the document, announced that from that point on – they had reached Article 16 – the SCAP draft should be followed verbatim and the original form of each Article reinstated¹⁷⁹.

Regarding the organization of the Diet, the Americans, after a brief discussion, allowed the division into two chambers, the House of Representatives and the House of Councilors, under one condition: that all members of both chambers be representatives of the electorate¹⁸⁰. Once again, an argument over terminology opened; Matsumoto had changed that the Diet was the “sole law-making authority of the state” as written in the SCAP document to “shall alone exercise the legislative power.” Sato and Hussey clashed over the issue, but in the end, the Japanese minister had to bend to the U.S. will, and the original form was restored¹⁸¹.

The last point of the long revision work concerned the two articles pertaining to the amendments – art. 89¹⁸² – and ratification – art. 92¹⁸³ – of the Constitution. The original wording of the Constitution was created with the intention of making the amendment process of the new Constitution deliberately complicated for future governments, so to preserve the

¹⁷⁶ Koseki S [1999] (n.15).

¹⁷⁷ Formula mostly present in Chapter II “Rights and Duties of Subjects” of the Constitution of 1889. His Imperial Majesty and Privy Seal, *The Constitution of the Empire of Japan* (1889).

¹⁷⁸ Matsumoto even defined the articles contained in the chapter as “disorderly, confused and unnatural.” Robinson DL and Moore RA [2002] (n.9) 129.

¹⁷⁹ Dower JW [1999] (n.14).

¹⁸⁰ Robinson DL and Moore RA [2002] (n.9).

¹⁸¹ Pye LW and Takemae E [2003] (n.13).

¹⁸² It said that amendments were to be initiated by the Diet through a concurring vote of two thirds of *all* its members and ratified by a referendum.

¹⁸³ In contrast, for ratification, only two thirds of the member *present* was requested.

integrity of the document even after the occupying forces had left the country¹⁸⁴. The Japanese draft, which split the requirements for amendments across the two chambers, retained the exact requirements as the original version¹⁸⁵. These requirements stated that amendments required “a concurring vote of two-thirds or more of all members of each House.” However, Whitney decided to replace the Japanese wording with the American wording, which he felt was clearer¹⁸⁶. After thirty hours of non-stop work, the session concluded on March 5 at 4 p.m., with Whitney expressing gratitude to the Japanese delegation, despite having ordered their participation and demanded their continued presence until the end.¹⁸⁷.

2.3.6. The Final Act: Acceptance With Reservation

After a sporadic Cabinet review, Commander Hussey prepared thirteen copies of the new draft Constitution in English. The Cabinet Secretary Narahshi signed these copies, thus making the English version the exact and official translation of the original Japanese document¹⁸⁸. This step was taken by SCAP to avoid any possible consequences for disregarding the US government’s orders and exceeding the FEC’s directions. The February 13 draft was transformed from a basis imposed on the government to a translation of a document originally written in Japanese¹⁸⁹. After that, the Constitution was officially submitted on March 5, 1946, to the Diet.

The following day, March 6, the Japanese emperor published an imperial rescript through which the draft was made public to the Japanese people¹⁹⁰. In the Rescript there was an invitation to the people from the emperor to embrace the Constitution based on the “general will of the people and the principle of respect for fundamental human rights.”¹⁹¹ In short, as was the case with the Meiji Constitution, the people did not really have the right to reject the Constitution. In a curious twist, the 1946 imperial rescript seemingly ushered in a new era of ‘imperial democracy’ in the country, thereby aligning the roots of the 1946 Constitution with the same principles of imperial absolutism found in the 1889 Constitution¹⁹².

¹⁸⁴ Koseki S [1999] (n.15).

¹⁸⁵ Robinson DL and Moore RA [2002] (n.9).

¹⁸⁶ Dower JW [1999] (n.14).

¹⁸⁷ Robinson DL and Moore RA [2002] (n.9).

¹⁸⁸ Dower JW [1999] (n.14).

¹⁸⁹ Koseki S [1999] (n.15).

¹⁹⁰ Robinson DL and Moore RA [2002] (n.9).

¹⁹¹ Berkofsky [2010] (n.1).

¹⁹² Ibid [191].

The main problem with this draft was that it was written using extremely technical terminology, pure legalese¹⁹³. For this reason, towards the end of March, the first proposals to rewrite it in colloquial Japanese began to move¹⁹⁴. Matsumoto, who was initially not very supportive of this idea, fearing it would affect the integrity of the document, later ended up supporting it, as this rewriting “might at least make it [the draft] seem a little more Japanese.”¹⁹⁵ On the other hand, the Americans, once they heard of this proposal, were particularly concerned. First, they did not want some of the meanings of some of the provisos to be changed, and then they could not understand the very reason behind this request, not understanding what difference a rewrite would make¹⁹⁶.

Eventually, however, they were convinced by the Japanese delegation, consisting of Irie and Sato, who had offered to send the rewriting effort forward. Kades, however, was keen to warn the two Japanese officers that once the work was completed, they absolutely and promptly had to translate it back into English, annotate it, review it, and inform SCAP of any changes¹⁹⁷. Had the document been altered in any way, SCAP would have been forced to send it once again to the FEC. In any case, Irie and Sato guaranteed that the English version would be consistent and pointed out that using standard spoken Japanese in the draft would have made it easier for the average citizen to understand the democratic principles outlined in the new Constitution¹⁹⁸. In this way, understanding the Constitution would no longer be something that belonged only to the political elite but could be spread truly comprehensively throughout the country.

On March 20, it was time for the Japanese government to officially examine and accept the new Japanese Constitution¹⁹⁹. The first step was to present it before the Privy Council, whose responsibility under the Meiji Constitution was to deliberate on important matters of state when consulted by the emperor²⁰⁰. During the deliberations on what to do about the document, the councilors identified many shortcomings in the bill, particularly the fundamental principles outlined in the document²⁰¹. The language used to express these principles troubled them greatly as it was clumsy and unclear. Their frustration worsened when government

¹⁹³ Robinson DL and Moore RA [2002] (n.9).

¹⁹⁴ The proposal was moved by Watanabe Yoshihide, the youngest member of the Legislation Bureau, while the actual work was enacted by Irie and Sato.

¹⁹⁵ Koseki S [1999] (n.15) 135.

¹⁹⁶ Dower JW [1999] (n.14).

¹⁹⁷ Robinson DL and Moore RA [2002] (n.9).

¹⁹⁸ Dower JW [1999] (n.14).

¹⁹⁹ On March 20 Shidehara presented the draft translated in colloquial Japanese to the Cabinet, which then referred the document to the Privy Council for formal deliberations, which took place a month later, starting from April 22.

²⁰⁰ Dower JW [1999] (n.14).

²⁰¹ Pye LW and Takemae E [2003] (n.13).

representatives explained that no changes to the Constitutional principles or language were allowed. Gradually, in the course of the meetings, the councilors had to realize how much not only the occupying forces, but the entirety of international circumstances limited their ability to act²⁰².

For this reason, the council decided to refer the Constitutional draft to the Diet without making any changes²⁰³. At the end of the deliberations, the examination Committee presented a report to the Council's plenum, allowing the members to formulate any final comments. The Committee's report outlined the goals of constitutional reform contained in the bill and concluded that, despite some limitations, it was essential to consider the draft the most appropriate step in achieving the government's reconstruction goals, and the content of the draft could be regarded as quite in line with those goals²⁰⁴. The revision was indeed extremely revolutionary and unprecedented, but the situation, both internally and externally, was highly critical; it was undeniable that there was no alternative but to approve the general importance of the new document²⁰⁵.

Full approval of the Constitution stretched for about six months after the publication of the Draft on March 6²⁰⁶. During this period, officers in the Legislative Department, one of the main organs within the Prime Minister's Office and responsible for drafting most of the legislation under the Meiji Constitution, actively solicited comments from all the ministries concerned²⁰⁷. The office was actively involved in negotiations with the Government Section of SCAP, made minor revisions to the draft, translated it into colloquial Japanese, and closely followed the Privy Council's deliberations on the draft²⁰⁸. By mid-June, Department officials had prepared a set of questions and answers for Yoshida and Kanamori that would guide the Constitutional revision bill through the debates of the 90th Imperial Parliament²⁰⁹. They were thus ready for the final stage of this long struggle: a full and independent review and ratification²¹⁰.

²⁰² Ibid [201].

²⁰³ Koseki S [1999] (n.15).

²⁰⁴ Robinson DL and Moore RA [2002] (n.9).

²⁰⁵ Koseki S [1999] (n.15).

²⁰⁶ Pye LW and Takemae E [2003] (n.13).

²⁰⁷ Robinson DL and Moore RA [2002] (n.9).

²⁰⁸ Dower JW [1999] (n.14).

²⁰⁹ Pye LW and Takemae E [2003] (n.13).

²¹⁰ Koseki S [1999] (n.15).

2.4. Constitutional Ratification of Summer 1946: Redefining SCAP's Draft

The summer of 1946 marked a turning point in Japanese history, marked by a profound and complex undertaking: the ratification of the country's Constitution under the aegis of the Allied occupation²¹¹. Against a backdrop of postwar reconstruction efforts and the dismantling of Japan's militarist past, the summer of 1946 saw the convergence of political, legal, and ideological forces that shaped the trajectory of Japan's democratic evolution²¹². Central to this narrative were two contentious issues that emerged during the Constitutional revision process: the concept of *kokutai* and Minister Ashida's controversial amendment to Article 9, the Article concerning the renunciation of war²¹³.

In this complex historical context, Yoshida, the new Prime Minister, was particularly well suited to the task of leading Japan's Constitutional independent ratification, earning General MacArthur's trust and consistently opposing the aggressive nature of Japan's militias²¹⁴. Culturally profoundly Japanese, he deeply embraced the principles of the Potsdam Declaration without any reserves and, having much diplomatic experience, understood the parliamentary system on which the new project was based, recognizing its compatibility with Japanese and U.S. conservative values²¹⁵.

His tenure, however, included many challenges: strong resistance from the left, who advocated collectivism; skepticism from rationalists who reassured the role of myths in social cohesion; and opposition from conservatives who wanted at all costs to defend the dignity of the figure of the emperor. For these and other reasons, Yoshida recognized the complexities that a revision project would trigger, especially regarding the first three chapters, which are the most important but also the most debated²¹⁶.

2.4.1. *Reassessing National Identity in Reconstruction: The Emperor and Kokutai*

Japan's *kokutai* defined the country as a national entity wholly centered on the emperor and instructed the Japanese people to worship the emperor, deifying him for all intents and purposes²¹⁷. The problem with this concept for the occupying forces was that this concept

²¹¹ Dower JW [1999] (n.14).

²¹² Koseki S [1999] (n.15).

²¹³ Robinson DL and Moore RA [2002] (n.9).

²¹⁴ Pye LW and Takemae E [2003] (n.13).

²¹⁵ Yoshida S [1973] (n.82).

²¹⁶ Ibid [215].

²¹⁷ Carol Gluck, 'Japan's Modern Myths: Ideology in the Late Meiji Period' (1987) 107(1) *Journal of the American Oriental Society* 168.

pushed even further the arguments of racial superiority of the Japanese that had laid the foundation for Japanese militarism and imperialism that led to the dramatic decisions made during World War II²¹⁸. For this reason, SCAP was very concerned about the pleas to maintain this national character within the new Constitution; they wanted to prevent further entrenchment of these ideas from leading to additional negative turns in Japanese history, undoing their revolutionary efforts²¹⁹. It was precisely for this reason that the SCAP draft had stripped the emperor of any power entirely, making him nothing more than a mere symbol²²⁰.

This decision taken by the occupying forces was one of the most discussed measures in the entire Constitutional revision project, even after its official publication on March 6²²¹. In fact, during the first meetings of the revision Committee established by Yoshida's new government to deliberate on the revision of the new Constitution, the figure of the emperor, hence the concept of *kokutai*²²², was the central point of discussion. On July 5, Akazawa Masamichi was the first to raise the issue, which perfectly centered on what came to be known as the "Potsdam Paradox."²²³ Indeed, Akazawa pointed out how being obliged to accept without reservation the chapter of the Constitution concerning the emperor went against what had been the accepted conditions of the Potsdam Declaration, in which the Japanese citizens were promised that the establishment of a responsible and peaceful government should be "established in accordance with the freely expressed will of the Japanese people," and this, according to the young parliamentarian, included decisions concerning the emperor²²⁴.

Minister of State Kanamori decided to intervene to clarify the issue, stating that while it was true that the country itself was firmly entrenched in the figure of the emperor, the legal and governmental system did not derive from it but had to be stipulated by the Constitutional document²²⁵. For this reason, a division of powers was essential so that they did not depend on the emperor: the courts were to perform the legal function while the general administration was

²¹⁸ Berkofsky [2014] (n.3).

²¹⁹ Koseki S [1999] (n.15).

²²⁰ Robinson DL and Moore RA [2002] (n.9).

²²¹ Pye LW and Takemae E [2003] (n.13).

²²² *Kokutai* (国体) refers to the unique national identity and essence of Japan, centered on the divine status and unbroken lineage of the emperor. It emphasizes national unity, traditional values, and historically justified Japan's pre-war and wartime authoritarian and expansionist policies.

²²³ Robinson DL and Moore RA [2002] (n.9).

²²⁴ Heads of Governments of the United States, China, and the United Kingdom, *Proclamation Calling for the Surrender of Japan* (1945), 2 (12).

²²⁵ Robinson DL and Moore RA [2002] (n.9).

to be carried out by the Cabinet²²⁶. And above all, at the root of all these aspects was no longer to be the emperor but the sovereignty of the people²²⁷.

Although clarifications were made, the exact system of government envisioned for Japan remained unclear to the Diet. Would it be a monarchy, a parliamentary, or a republican system? Even Kanamori, who was tasked to define the system, was not sure which answer to give²²⁸. In the end, Kanamori decided to define the system as one “essentially founded on the emperor system derived from the aggregate will of the people.”²²⁹ However, this answer did not satisfy the Committee members, who were already frustrated by the difficulty they were having in understanding the new system²³⁰.

After this confusing clarification, the deliberations shifted to the issue of *kokutai* and whether the Japanese character could survive such a revolutionary revision. During a parliamentary debate, Minister Kanamori faced difficulties dealing with the protests and statements of the participating members, who were dissatisfied and frightened about the future of Japanese traditions²³¹. Despite their aggressive attitudes, Kanamori managed to calm the situation by acknowledging that the preamble of the new Constitution, combined with the statements of the Potsdam Declaration, was unclear and almost troubling. He recognized that the essence of Japanese identity hinges on the role of the emperor, however, the people have a deep connection with the emperor at its core, and it was precisely this connection that sustained the existence of Japan as a nation²³².

Hence, according to Kanamori, as long as this conception of national identity was maintained, there would be no doubt about the continuity of national character and the survival of the *kokutai*²³³. Following these arguments, it was thus possible to say that the new Constitution, contrary to the general perception, did not weaken the figure of the emperor but, on the contrary, strengthened it, giving even more relevance to the *kokutai*²³⁴. In reality, on a practical level, these conceptions could not be further from the truth²³⁵.

²²⁶ Koseki S [1999] (n.15).

²²⁷ Pye LW and Takemae E [2003] (n.13).

²²⁸ Pritchard JR [1990] (n.29).

²²⁹ Robinson DL and Moore RA [2002] (n.9) 196.

²³⁰ Dower JW [1999] (n.14).

²³¹ Robinson DL and Moore RA [2002] (n.9).

²³² Koseki S [1999] (n.15).

²³³ Robinson DL and Moore RA [2002] (n.9).

²³⁴ Pye LW and Takemae E [2003] (n.13).

²³⁵ Yoshida S [1973] (n.82).

2.4.2. Declared Pacifism and A New Protection of Rights

In its final version, Article 9, “Renunciation of War,” read, “(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.”²³⁶ Initially, MacArthur’s 1945 draft explicitly forbade armed forces even for self-defense, a clause seen as too radical by many Diet members who were concerned about Japan’s security and international role²³⁷.

During discussions in parliament, Hitoshi Ashida, director of the “Lower House Committee to Review the Draft Constitution” - and future prime minister - proposed minimal but significant changes to the Article in question, which would later be known as the “Ashida amendment.”²³⁸ Basically, Ashida proposed to add the phrase “for the above purpose” to the original wording of the second paragraph of the article, which Kades later changed to “in order to accomplish the aim of the preceding paragraph,” so that it could be interpreted as allowing Japan to take advantage of the right of self-defense²³⁹. Such amendment led to the formation of the Japan Self Defense Forces in 1954 to support U.S. military operations during the Korean War and future military operations from that point on²⁴⁰.

Simultaneously, the Committee focused on revising the Bill of Rights, spanning thirty articles within Chapter III of the new Constitution. Influenced by the Potsdam Declaration’s mandate to enhance democratic tendencies and protect civil liberties, the Committee addressed issues ranging from marriage and family rights to social welfare²⁴¹. Debates on Article 24, which dealt with marriage and family, highlighted gender equality concerns, with conservative members arguing against the nature of “essential equality of the sexes.” Yoshida’s intervention helped to finalize the Article, albeit with amendments that diluted its original terms, unbeknownst to SCAP²⁴².

²³⁶ The Constitution of Japan (日本国憲法 *Nihon-koku kenpō*) [1947] Chapter II.

²³⁷ Dower JW [1999] (n.14).

²³⁸ Berkofsky [2014] (n.3).

²³⁹ Robinson DL and Moore RA [2002] (n.9).

²⁴⁰ Glenn D Hook, ‘Japan’s International Relations: Politics, Economics, and Security’ (2002) 75(3) *Pacific Affairs* 454.

²⁴¹ Dower JW [1999] (n.14).

²⁴² Koseki S [1999] (n.15).

Regarding social rights, the most heated deliberations came from the Social Democrats, who proposed to include within Article 25 a type of language that could more clearly and firmly establish the commitment to social welfare that the government envisioned and promised to take through public programs²⁴³. That is why they proposed to add to the beginning of the Article the phrase “All people shall have the right to maintain minimum standards of wholesome and cultured living”²⁴⁴ so that the state would somehow be obligated to provide every citizen with the means to lead a substantially decent life. This sparked intense debates about the necessity and implications of such provisions, eventually leading to amendments that emphasized the state’s obligation to ensure a decent life for its citizens while balancing the duties of work outlined in Article 27²⁴⁵.

After extensive deliberations, the amended Constitution was presented to the House of Representatives, passing with an overwhelming majority²⁴⁶. The Upper House then formed an additional subcommittee to review the amendments, focusing on critical issues such as Article 9, the emperor’s role, and the Bill of Rights. While some changes were rejected, the overall amendments were accepted, and the bill was passed on October 5, 1946. The emperor promulgated the ratified Constitution on November 3, 1946, which officially took effect on May 3, 1947²⁴⁷.

However, the process of consolidating a solid Constitutional basis for Japan continued until the end of the entire occupation period²⁴⁸. Both MacArthur and the Japanese government engaged in extensive work to implement the new Constitution and took various political and legal actions to further the interpretation of the new provisions, until 1952, when Japan regained its independence²⁴⁹. Nevertheless, the debates and deliberations did not end in that year, continuing to the present, with discussions about the actual constitutionality of the document as a whole, any amendments needed, and what their extent should be²⁵⁰.

²⁴³ Gluck C [1987] (n.217).

²⁴⁴ The full article reads “All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.”

The Constitution of Japan [1947] Chapter III.

²⁴⁵ “All people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law. Children shall not be exploited.”

The Constitution of Japan [1947] Chapter III.

²⁴⁶ Dower JW [1999] (n.14).

²⁴⁷ Hook GD [2002] (n.240).

²⁴⁸ Dower JW [1999] (n.14).

²⁴⁹ Pye LW and Takemae E [2003] (n.13).

²⁵⁰ Robinson DL and Moore RA [2002] (n.9).

2.4.3. Theoretical and Doctrinal Perspectives on The Constitution

At the end of this long and detailed analysis of the processes that led to the adoption of the Constitution of Japan, it is important to recognize its relevance from doctrinal and theoretical perspectives. In addition to having a particularly distinctive history, the 1947 Japanese Constitution can be defined as a *sui generis* document, as it encapsulates several constitutional categories in a single, comprehensive text. First, it can be defined as a democratic constitution. Moreover, it is characterized by a rigid and pacifist nature, defined both as a constitution drafted under occupation and as an imposed constitution.

First and foremost, the Japanese Constitution can be characterized as a democratic constitution, as it explicitly establishes a system of government based on the separation of powers, the guarantee and protection of human rights, and, above all, popular sovereignty²⁵¹. This last element marks a fundamental turning point in Japan's constitutional history, replacing the principle of imperial sovereignty, which until then had been the cornerstone of Japan's political system.

Second, the characterization of the Constitution as “rigid” is widely recognized in legal and academic discourse, both domestically and internationally. This characteristic is often highlighted as the difficulty of amending the constitutional text reflects the occupying forces' specific desire to ensure stability and preserve the fundamental principles contained therein. One prominent exponent who has described the Japanese Constitution as rigid is Professor Shigenori Matsui, a renowned expert in constitutional law²⁵². He points out, in particular, that the process outlined in Article 96, regarding amendments, is remarkably strict, especially when compared with other constitutions promulgated in the post-war period²⁵³. Indeed, the Constitution requires that any amendment must first be approved by a qualified two-thirds majority in both chambers of the Diet. Only after passing this procedural stage can the proposed amendment be submitted to the people for consideration, and it must obtain the approval of a majority of voters in a referendum²⁵⁴.

The pacifist nature of the Constitution, as pointed out, is enshrined in Article 9 and is one of the most distinctive aspects of the Japanese legal system. This characteristic is not strictly related to government structures, constituent powers, the role of the people, or

²⁵¹ John M Maki, 'The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights' (1990) 53(1) *Law and Contemporary Problems* 73.

²⁵² Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Hart Pub. 2011).

²⁵³ *Ibid* [252].

²⁵⁴ The Constitution of Japan (日本国憲法 *Nihon-koku kenpō*) [1947].

government-citizen relations, all of which are usually the focus of concern in a constitutional drafting context²⁵⁵. Despite the obvious strength of constitutional pacifism, which has now become an integral part of Japanese identity, there is a persistent opposition movement emerging²⁵⁶, which will be explored in subsequent chapters.

Moreover, the Japanese Constitution can be interpreted, for all intents and purposes, as a constitution drafted during an occupation. Although it is a matter of debate whether the Constitution was actually drafted by the occupying forces, it is undeniable that it was established and promulgated when the United States and the Allies exercised *de facto* control over Japanese territory²⁵⁷. The 1947 document almost perfectly embodies the definition of “Occupation Constitution,” as it was created through effective coordination between various political and military entities, both internal and external, a collaboration that still contributes to the ambiguity of its constitutional legitimacy today²⁵⁸. As analyzed in the previous chapter, with regard to the characteristics of the Constitution as a document drafted during the occupation, it is clear that it represents a *sui generis* case, especially considering its extraordinary durability compared to other constitutional documents produced in similar contexts²⁵⁹.

Finally, with regard to the alleged “imposed” nature of the constitution, this remains hotly contested to this day, both in the Japanese and international contexts. As David Law notes, any constitution can be considered “imposed,” since it is more the narrative that is constructed around the process of adopting a constitution that determines its perception as imposed, rather than the process itself²⁶⁰. The Japanese constitution is a clear example of this. This chapter has analyzed the processes that led to the promulgation of the 1947 Japanese Constitution, and these events clearly suggest that it was imposed by SCAP on the Japanese government and people. However, a deeper and more critical analysis may reveal that reducing the complexity of constitutional dynamics to a single term is not sufficient to fully capture the essence of the document²⁶¹, as will be demonstrated in more detail in later chapters.

²⁵⁵ Sylvia Brown Hamano, ‘Incomplete Revolutions and Not So Alien Transplant: the Japanese Constitution and Human Rights’ (1999) 1(3) *Journal of Constitutional Law* 415.

²⁵⁶ Yongwook Ryu, ‘Departing from the Postwar Regime: The Revision of the ‘Peace Constitution’ and Japan’s National Identity’, *Routledge Handbook of Japanese Foreign Policy* (Routledge 2018).

²⁵⁷ Jean L. Cohen JL, ‘The Role of International Law in Post-Conflict Constitution-Making: Towards a Jus Post-Bellum for Interim Occupations’ (2006) 51[3] *New York Law School: Perspective on Post-Conflict Constitutionalism*.

²⁵⁸ Ginsburg T [2007] (n.2).

²⁵⁹ *Ibid* [258].

²⁶⁰ David Stephen Law, ‘Imposed Constitutions and Romantic Constitutions’, *The Law and Legitimacy of Imposed Constitutions* (Routledge 2018).

²⁶¹ *Ibid* [260].

In essence, the Japanese constitution, the product of numerous influences and heated debates, is a complex document that is difficult to define with a single label. Its multifaceted nature reflects not only the unique historical circumstances surrounding its birth but also the variety of interpretations and meanings attributed to it over the years. This text represents a key reference point for Japanese constitutional law and an emblematic case study when one wants to analyze constitutional dynamics in particular contexts such as those of transition or occupation. In subsequent chapters, an attempt will be made to further explore these dynamics by exploring how the 1947 constitution continues to influence the legal and political landscape of contemporary Japan.

Conclusion

The purpose of this chapter was to explore and examine in detail the various political, historical, and constitutional processes that led to the birth of Japan's new Constitution. This document, in addition to being particularly discussed throughout history, represented at the time of its establishment the definitive turning point toward the path of democratization that the Allies, along with the entire international community, envisioned for the political and social system of the peninsula. To achieve this goal, the chapter has been divided into four detailed paragraphs, which have been divided in turn into further sub-sections to make the analysis as straightforward as possible. This analysis was opened with a historical survey of the context immediately following the end of the conflict and the dropping of the atomic bomb on Hiroshima and Nagasaki.

The Japanese government's acceptance of the Potsdam Declaration marked a key turning point, initiating the period of Allied occupation that lasted seven years until 1952. As the analysis explains, the occupation of Japan actually turned out to be a purely U.S.-led operation, with General MacArthur in command. His view of the mission as a sacred destiny and his belief in the superiority of American values greatly influenced the decisions made during the draft reviews.

Before analyzing the final draft drawn up - almost entirely by the Americans- the chapter focused on the constitutional attempts that the Japanese government decided to pursue independently. The first attempt, led and directed by Prince Konoe Fuminaro, although it had solid premises and was quite in line with U.S. perspectives of revision, was unsuccessful from its inception. The excessive controversy of the figure of the prince, his contribution during the government responsible for several war crimes, and the decision of the Allies to finally indict

him ensured that the project collapsed almost immediately and led to a particularly sad denouement: the suicide of Prince Konoe.

The second attempt, carried out by Joji Matsumoto, was less tragic but equally unsuccessful, mainly because both Matsumoto and MacArthur refused to open up to dialogue between the delegations, preventing the revisionists from fulfilling the demands and conditions that the Allies had outlined for the construction of a new Constitution. For this reason, MacArthur and his staff decided to intervene directly in the constitutional revision process despite the fact that they had yet to be ordered to do so by either Washington or the FEC, the central bodies to which they were accountable.

This U.S. intervention was the focus of the third section of this chapter, highlighting the project's intensity and the various controversies surrounding it. The constitutional process that began in early February 1946 was marked by numerous tensions and conflicts of interest between the occupying forces and the Japanese government, as well as compromises and, perhaps, forced acceptances. Indeed, although the Japanese government was severely constrained by the political and military realities of occupation, it showed significant resistance to SCAP directives and impositions, seeking to influence and negotiate in the revision process.

Despite this great fortitude, the government was much more limited than they had initially perceived. In the end, acceptance was motivated, not only toward the people but also toward themselves, by pragmatic considerations of the need to assure the people of a new Constitutional arrangement while avoiding possible sanctions or harsher impositions from the occupying forces. The government and the emperor then accepted the American draft, which was published on March 6 through an Imperial Rescript, aiming for future independent ratification.

The chapter concluded by examining this very ratification draft in the two main chambers of government that preceded the enactment of the Constitution in May 1947. These final revisions of the Constitution had as their main points disputes over the figure of the emperor and amendments to the main articles, particularly Article 9 on the renunciation of war. Through the amendment proposed by Ashida, in fact, the possibility was left for Japan to rearm for self-defense purposes, as happened later in 1954. In the last section of the paragraph, the doctrinal analysis carried out in the context of the theory explained in the precedent chapter, closed the analysis enriching the historical approach with a more functional and technical perspective.

After this in-depth and detailed analysis, the possibility emerges that, indeed, the Japanese Constitution was imposed on the country by outside forces, in this case, the United States, represented by the strong and controversial figure of MacArthur. However, it is crucial to consider the entire context outlined in this chapter, which suggests that such imposition may have been necessary for the ultimate democratization of Japan. Indeed, today, Japan stands out as one of the most stable and robust democracies globally²⁶², which could justify, at least in part, outside intervention.

The analysis carried out in this chapter has not only revealed the complex web of events and decisions that shaped Japan's Constitution but also the still unresolved issues that sparked heated debates and discussions about its actual legitimacy. These controversies, which remain the focus of attention to this day, will form the focus of subsequent chapters in these theses. It is crucial to consider the longevity of this constitutional document, which makes it unique and raises fundamental questions about its validity and relevance in the contemporary context.

²⁶² Indeed, as per the latest Freedom in the World Report released by Freedom House in 2023, Japan has achieved remarkable results. It boasts an overall score of 96 out of 100, with a perfect score of 40 out of 40 for Political Rights and an impressive 56 out of 60 for Civil Liberties. Freedom House, 'Japan: Freedom in the World 2023 Country Report | Freedom House' (*Freedom House*, 2024) <<https://freedomhouse.org/country/japan/freedom-world/2023>> accessed 17 May 2024.

Chapter III

Results and Implications of the U.S. - “Imposed” Constitution

Introduction

The discussion of the 1947 Japanese Constitution is a complex issue. Its origins were unconventional: crafted in English by Americans and enforced upon a resistant and politically conservative government¹. Nevertheless, the key feature of this constitutional document is its unprecedented endurance without any amendments throughout its existence, which could be read as a testament to the profound impact of the U.S.-Imposed Constitution on post-conflict Japan.

While the absence of amendments to the Constitution might be seen as a sign of stability and public satisfaction, a closer look reveals a different story. The failure to modify the text in line with established procedures², coupled with the allowance of legal actions and political practices that contradict the Constitution, could be a sign of decay rather than resilience, hinting at a possible lack of adherence to the rule of law³.

This chapter will meticulously examine the process of adaptation and contestation of the Constitution post-occupation, focusing on how Japan has navigated the tensions between its imposed framework and evolving societal and political needs. The analysis will start at the political level, examining the evolution of democratic institutions and their adaptability in the post-conflict Japanese context. It will delve into the legal level, analyzing how the Supreme Court and the legal system have applied and interpreted constitutional principles over the years. It will then reach the popular level, exploring the attitude and perception of Japanese citizens toward the Constitution and their accounts regarding its longevity.

Particular attention will be paid to the issues of Article 9 of the new Constitution, which prohibits the maintenance of armed forces and the use of war as a means of settling international disputes. This article provides a significant reference point for understanding Japan’s security policy and international relations. In addition, the balance between individual rights and duties to the community, as enunciated in the Bill of Rights, will be examined to understand how the Japanese Constitution has shaped national identity and civic values since its adoption. These

¹ Sylvia Brown Hamano, ‘Incomplete Revolutions and Not So Alien Transplant: The Japanese Constitution and Human Rights’ (1999) 1(3) *Journal of Constitutional Law* 415.

² To revise the Japanese Constitution, a proposal must be approved by a two-thirds majority in both houses of the National Diet. It is then put to a national referendum, where a majority of voters must approve it. After successful approval, the amendment is promulgated by the emperor and becomes effective.

³ Brown Hamano S [1999] (n.1).

provisions, along with the fundamental principle of popular sovereignty, outline the pillars on which the new Constitution of Japan is based, reflecting the intent of the United States to promote a democratic and human rights-oriented Japanese society after the Second World War.

In the first section of the chapter, the analysis will focus on the first decades following the Constitution's enactment. The 1947 document has always faced much criticism and continued external scrutiny. Nevertheless, the judiciary gained review powers despite initial resistance but faced challenges in asserting independence against political influences. As the focus shifted toward economic growth in the 1960s, attempts at constitutional revision lost momentum, highlighting the tensions between political stability and social change in postwar Japan. The historical context has dramatically influenced modern Japan's legal and political framework, highlighting the need to balance the preservation of constitutional principles with the evolving challenges of contemporary times. Thoroughly analyzing this context is essential to providing a proper foundation for subsequent analysis.

The second section of the chapter will delve into the Constitution's two central issues: the renunciation of war and the protection of human rights. It will examine the political and legal dynamics that arose during the initial post-occupation period of revision and how they evolved over the following decades. Article 9, with its explicit prohibition of war, together with the Bill of Rights, has stimulated intense political debate and raised significant interpretive questions regarding national security and the role of Japan's Self-Defense Forces (SDF). The Japanese judiciary, addressing the balance between human rights protection and political pressures, has played a central role in shaping Japan's modern constitutional framework while showing particular deference to the governmental system.

This reluctance of the Japanese judiciary to vigorously enforce constitutional protections has led to a situation where enforcement actions and laws often trump constitutional principles such as pacifism or human rights. Despite these challenges, analyses show signs of change, especially among the younger generation, suggesting a potential future in which judicial independence and the protection of rights may become more relevant.

In the third and final part of the chapter, the analysis will focus on another critical element inherent in the implications of the new Constitution, namely popular perception as an explanation for the document's longevity. Several interrelated factors explain why the Japanese Constitution has yet to be amended: post-conflict politics, the structure of the Constitution, judicial restraint on constitutional issues, and an assessment of the need for constitutional amendments. All of these elements create a culture that treats the Constitution as unamendable or irrelevant.

The analysis will also consider another important factor in the challenge of amending constitutions: amendment culture. This concept, as defined and analyzed by Tom Ginsburg and James Melton, refers to attitudes about the desirability of amendments, irrespective of the specific issue being considered and the pressure for change⁴. In Japan, this culture is evident in two groups: the *Goken-ha*, who are anti-revisionists, and the *Kaiken-ha*, who are pro-revisionists. An investigation on the differences between the two groups is essential for understanding how popular perception may influence the resilience of constitutional texts. Such investigation aims to provide a comprehensive view of why the Japanese Constitution has remained unchanged and the implications of such ‘stability’ for democracy and the rule of law in Japan.

3.1. Contested Implementation of the 1947 Constitution

As widely recognized, the works regarding Japan’s new Constitution did not conclude on November 3, 1946, when the emperor promulgated the document by imperial rescript, nor on May 3, 1947, when the Constitution went into effect⁵. Over the next five years of occupation, both the Japanese government and U.S. personnel diligently worked on interpreting and implementing the constitutional provisions⁶. Criticism concerning the Constitution was widespread from the beginning of the occupation, but the strict control exercised by the Supreme Commander and his staff over the media succeeded in silencing many critics, even within the political scene, through purges that removed particularly influential conservative figures⁷.

However, MacArthur failed to suppress criticism from the Far Eastern Commission (FEC), whose constant focus on constitutional reform ensured that the debate remained somewhat alive until it was fully revived at the end of the occupation⁸. This conflict between MacArthur and the FEC culminated in a series of meetings in Washington in late 1946, during which the Commission members expressed their final views on the draft constitution⁹.

⁴ Tom Ginsburg and James Melton, ‘Does the Constitutional Amendment Rule Matter at All? Amendment Cultures and the Challenges of Measuring Amendment Difficulty’ (2014) (682) Coase-Sandor Institute for Law and Economics 1.

⁵ Ray A Moore and Donald L Robinson, “Broaden and Deepen the Debate”: Fifty Years Without Revision’, *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (Oxford University Press 2002).

⁶ Ibid [5].

⁷ Ibid [5].

⁸ Ibid [5].

⁹ Ibid [5].

In fact, once the Constitution went into effect, despite the fact that the country was still under the control of the occupying U.S. forces, the document ended up in the hands of those who had strenuously opposed it since 1945¹⁰. In particular, the independent review of the Constitution, considered by the FEC as the second step needed to fully legitimize the document, was left in the hands of the new strongly conservative government led by Prime Minister Yoshida¹¹.

3.1.1. Immediate Reactions

On October 17, 1946, the Far Eastern Commission voted in favor of a review of the new Constitution no later than two years following its entry into force, adding that the Commission could also call for a referendum or other appropriate measures to ascertain Japanese opinion on the new document¹². The goal was to ensure that no future doubts arose regarding the effective acceptance of the Constitution by the emperor and the government and, more importantly, by the people¹³.

MacArthur informed Yoshida of the Commission's decision through a letter dated January 3, 1947, explicitly enjoining the prime minister to offer the people the opportunity to approve or amend the new Constitution¹⁴. The main concern of the foreign powers, in fact, was the need for the values of the Constitution to be freely accepted by the Japanese, so as to provide a clear opportunity to overcome the highly undemocratic process by which the Constitution had been drafted¹⁵.

Yet, the Yoshida government decided to not move in this direction. In fact, it was clear to the government, which was strongly conservative, that the majority of the population supported the new Constitution, which was perceived as a symbol of Japan's commitment to democracy, peace, and human rights¹⁶. Thus, a clear and unequivocal act of demonstrating popular support for the Constitution would have undermined the possibility of implementing a comprehensive and conservative revision of the Constitution, removing the claim that the Constitution had been imposed from outside¹⁷.

¹⁰ Brown Hamano S [1999] (n.1).

¹¹ Ibid [10].

¹² Moore RA and Robinson DL [2002] (n.5).

¹³ Brown Hamano S [1999] (n.1).

¹⁴ Shōichi Koseki, *The birth of Japan's postwar constitution* (Westview Press 1997).

¹⁵ Ibid [14].

¹⁶ Andrew Gordon, 'Japan Reborn, *The Wages of Affluence: Labor and Management in Postwar Japan* (Harvard University Press 1998) 5.

¹⁷ Brown Hamano S [1999] (n.1).

The news about the possibility of a referendum was not disclosed to the public until March 1948, and the actual revisionist movement did not commence until August of that year, when the Yoshida Cabinet faced a crisis, which ultimately led to the government effectively collapsing due to a series of scandals and the arrests of numerous senior officials¹⁸. Nevertheless, in 1949, Yoshida returned to power, continuing to ignore the issue of both revision and popular referendum. The prime minister, in fact, as the two-year deadline proposed by the Commission approached, lied to the Diet, denying that he was aware of the decision to request a revision and also stating that his government had no intention of amending the Constitution¹⁹.

Meanwhile, discontent regarding the Constitution was also growing outside the political arena, with the creation of strong and influential revisionist academic groups, which would soon lead to a strong backlash against it²⁰. Although leading conservative politicians had been purged before the Constitution arrived at the Diet in 1946, many other government members were soon influenced by such groups²¹.

Some Diet members from the conservative, liberal, and progressive parties denounced the preamble and various provisions relating to the emperor, his family and property, the renunciation of war, the rights and duties of citizens, the judiciary, and the organization and powers of the Diet itself²². Thus, the arguments that many revisionists would later make, were already being discussed in the press and the Diet in the fall of 1946. Although this initial agitation subsided after the promulgation of the Constitution, it resumed in the early 1950s when the conservative leaders of the prewar period were rehabilitated²³. Their return to the political scene after the start of the Korean War in June 1950 marked the beginning of the first sustained attack on the new Constitution²⁴.

During the post-war era, conservatives had two possible ways of revising the Constitution: revision via “installments” and revision via “re-interpretation.”²⁵ In the first case, the government acts in stages as if the Constitution had actually been amended, placing tiny

¹⁸ Koseki [1997] (n.14).

¹⁹ Moore RA and Robinson DL [2002] (n.4).

²⁰ Ibid [19].

²¹ Ibid [19].

²² Ibid [19].

²³ Ibid [19].

²⁴ Ibid [19].

²⁵ Yoshio Sugimoto, ‘The Establishment: Competition and Collusion’, *An Introduction to Japanese Society* (Cambridge University Press 1997).

changes until the meaning of the Constitution, in practice, is changed²⁶. The second strategy, in contrast, relies entirely on active input from the judiciary to transform the meaning of the Constitution²⁷.

This political resistance thus reflected an attempt to avoid a direct and open challenge to the seemingly consolidated consensus around the new Constitution. Nevertheless, political developments and growing criticism of the Constitution would soon lead to the creation of a formal Commission to examine proposed revisions, marking a turning point in discussing the future direction of Japan's constitutional framework²⁸.

3.1.2. The New Commission on The Constitution

In the autumn of 1953, Liberal Party leader Hatoyama Ichirō strongly urged Prime Minister Yoshida to create an official committee focused on constitutional revision²⁹. Various party groups and movements rallied behind this cause in the following years, persistently advocating for a completely independent constitution. The pivotal moment came in 1955 when the two primary parties united to establish the Liberal Democratic Party (LDP), with its primary objective being constitutional revision³⁰.

August 13, 1957, finally marked the first official meeting of the “Cabinet Commission on the Constitution.”³¹ From this initial meeting, it emerged that the majority of members leaned toward a simple revision of the existing Constitution, while others advocated the adoption of a new independent constitution that would continue to adhere to the principles of pacifism, human rights, and democracy³².

The most persistent demand within the Commission was for a constitution written in true “Japanese style,” although research went beyond mere form or style. For example, a majority of commissioners were in favor of rewriting the preamble, wishing to abandon the American wording and style that were perceived as a weak commitment to dependent

²⁶ It refers to making incremental changes to a constitution or legal framework rather than overhauling it in one go. An example may be the South African Constitution, whose approach reflects a gradual process of fine-tuning and expanding the legal framework to address evolving political, social, and economic challenges, illustrating the concept of “revision by installments.”

Sugimoto [1997] (n.24).

²⁷ Brown Hamano S [1999] (n.1).

²⁸ Moore RA and Robinson DL [2002] (n.5).

²⁹ Ibid [29].

³⁰ Ibid [29].

³¹ Ibid [29].

³² Ibid [29].

pacifism³³. Still, a majority wished to preserve the emperor system as a pure symbol subordinate to the sovereignty of the people, but with a more unambiguous statement that the emperor was “head of state” and the country’s representative abroad³⁴.

A minority of the commissioners saw the emperor as the spiritual foundation of the nation, continuing to oppose the concept of “symbol,” which they considered disparaging and detrimental to the unity of the nation, again relying on the concept of *kokutai*, pushing for a democracy under a sovereign emperor³⁵. In addition, the majority of commissioners intended to amend the anti-militarist clause in Article 9, which was a whirlwind of controversy central to the political scene³⁶.

Overall, the proposals of the Constitution Revision Commission were purely conservative in nature. The revisionists aimed to amend the Constitution to strengthen public rights over individual private rights, enhance the power of the government and the executive branch, and reduce the prerogatives of the Diet, local governments, and political parties³⁷. Although, in the end, these amendments were not implemented through the formal revision process, some were implemented through the two previously mentioned strategies: installment and re-interpretation³⁸.

Although the implementation of these strategies was indeed met with opposition, their success depended largely on the absence of effective judicial actions or challenges against these government-implemented contrivances³⁹. Despite the fact that many individuals were willing to take legal action to ensure the effective implementation of the new Constitution, the Supreme Court, from the outset, proved itself to be particularly passive toward constitutional issues⁴⁰.

However, the momentum for revision faded as Japan focused on economic growth from the early 1960s onward⁴¹. Conservative defenders of Japan’s political traditions found themselves unable to overcome the united opposition of the Socialists and Communists in the Diet, who held more than a third of the seats – a majority needed for constitutional amendments⁴².

³³ Moore RA and Robinson DL [2002] (n.5).

³⁴ Ibid [33].

³⁵ Ibid [33].

³⁶ Ibid [33].

³⁷ Ibid [33].

³⁸ Brown Hamano S [1999] (n.1).

³⁹ Ibid [38].

⁴⁰ Ibid [38].

⁴¹ Joji Watanuki, ‘Japan’, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press 1975).

⁴² Ibid [41].

After years of intense debate and political pressure, the 1957 Constitution Committee was a pivotal moment on the path to constitutional revision in Japan. The proposals that emerged from this committee reflected a strong conservative orientation, aiming to strengthen public rights, empower the government, and reduce the prerogatives of the Diet and local governments⁴³. This dynamic further weakened the momentum for constitutional revision, especially during the economic growth era of the following decades when national priorities shifted to other areas⁴⁴.

The conservatives' inability to overcome opposition from the Socialists and Communists in the Diet put a significant brake on constitutional amendments, further complicating the search for a broad consensus on these reforms⁴⁵. However, as Japan's political landscape evolved, attention also shifted to the role of the judiciary in the post-constitutional context.

3.1.3. Japanese Post-Constitutional Judiciary: Ensuring Justice?

The post-constitutional transition period of the last years of the occupation was crucial to the consolidation of democracy in Japan, aiming for procedural and administrative reforms that would make justice more accessible and fairer. Crucial to this was the establishment of an autonomous legal system that could effectively protect the new document from conservative attacks and, consequently, protect the rights of citizens.

According to Article 81 of the new Japanese Constitution, the power of judicial review is vested in the Supreme Court⁴⁶, which can decide whether to delegate this power to the lower courts (Art. 77)⁴⁷. This mechanism represented a first for the Japanese legal tradition, as judicial review of government actions was not provided for in the previous Meiji constitution, thus introducing a new dimension of legal review in line with other modern democracies⁴⁸. This mechanism is a vivid representation of the influence of the United States in the shaping of the newly established Japanese judiciary. In fact, the United States Supreme Court was one

⁴³ Kenneth Mori McElwain and Christian G Winkler, 'What's Unique About the Japanese Constitution? A Comparative and Historical Analysis' (2015) 41(2) *The Journal of Japanese Studies* 249.

⁴⁴ Moore RA and Robinson DL [2002] (n.5).

⁴⁵ Watanuki [1975] (n.41).

⁴⁶ "The Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or act."

The Constitution of Japan (日本国憲法 *Nihon-koku kenpō*) [1947] Chapter VI.

⁴⁷ "[...] The Supreme Court may delegate the power to make rules for inferior courts to such (inferior) courts." The Constitution of Japan [1947] Chapter VI.

⁴⁸ Kenneth M Holland, 'Rights Protection in Japan: The Political Dimension' (2009) 44(1) *Australian Journal of Political Science* 79.

of the first to establish the power of judicial review, through the landmark case *Marbury v. Madison* of 1803⁴⁹.

In addition to this change, the most impactful innovation in the judiciary was purely organizational in nature but nonetheless fundamental: control of the judiciary was removed from the hands of the Minister of Justice, making the judiciary an autonomous and independent branch of government⁵⁰. In fact, the Constitution of Japan explicitly provides that the judiciary must be independent, with judges proposed initially by the Prime Minister, then reviewed and approved by the Cabinet and then subject to a public review every ten years, in which voters can decide whether to retain or dismiss a judge⁵¹. This newly established organization was a crucial step in ensuring judicial independence and the separation of powers, issues that were particularly close to the hearts of the occupying forces, whose goal was to strengthen democracy and the rule of law in the country⁵².

In the United States, the independence of the judiciary is similarly protected by the Constitution, with Supreme Court justices appointed for life, assuring that they are insulated from political pressure⁵³. Here, the lifetime tenure contrasts with the renewable terms of Japanese judges sought by the American framers, highlighting a different approach to equally maintain judicial independence⁵⁴.

In reality and practice, such a drastic revolution of the judiciary encountered considerable difficulties in its implementation. Given the traditional and conservative background to which the judiciary was accustomed, the system found it very difficult to adapt to its new role under the Constitution, especially in a context characterized by rapid changes and social revolutions such as that following the publication of the new Constitution and the end of the occupation⁵⁵.

⁴⁹ The case arose when William Marbury sued James Madison, the Secretary of State, for not delivering his commission as justice of the peace in the new presidency. Chief Justice John Marshall ruled that, even though Marbury had the right to the commission, the Court had no authority in obliging Madison to deliver his commission, because the Judiciary Act of 1789 that granted such authority was found unconstitutional. This decision established the judiciary's role as a co-equal branch of government with the power to review and nullify legislative or executive actions that violated the Constitution.

Marbury v. Madison, 5 US (1 Cranch) 137 (1803).

⁵⁰ Brown Hamano S [1999] (n.1).

⁵¹ They serve only until they reach the age of 65. However, Supreme Court Justices serve until the age of 70 and are subject to periodic review through popular referenda, according to Article 79.

Holland KM [2009] (n.48).

⁵² Holland KM [2009] (n.48).

⁵³ Linda Greenhouse, *The U.S. Supreme Court: A Very Short Introduction* (OUP 2012).

⁵⁴ Kyle Felter, 'Adjudicating Harmony: The Impact of Cultural Values on the American and Japanese Legal Systems' (2019) (Fall) Harvard Undergraduate Law Review.

⁵⁵ Brown Hamano S [1999] (n.1).

Indeed, the Supreme Court adopted a policy of deference to the legislative and executive branches, to the point of actually reverting to a model very similar to that of the Meiji period, in which laws determined the content of the Constitution⁵⁶. Given the judiciary's consistent history of supporting the government's positions and rejecting any action taken against it, it is not surprising that, from the earliest years of the new system's operation, numerous doubts and concerns about the effective independence of the judiciary emerged.

Indeed, as the Supreme Court has upheld the constitutionality of almost all laws and most administrative actions filed since 1947⁵⁷ and considering that the Liberal Democratic Party has maintained almost uninterrupted control of the Diet and the executive, many critics argue that the LDP secretly controls the judiciary⁵⁸. Increased political control dates back to the late 1960s in response to growing signs that judges were more willing to rule against the government⁵⁹. A purge of judges through direct LDP interventions and the subsequent strengthening of indirect controls continue to this day to raise questions about the independence of the judiciary⁶⁰. In contrast, the United States Supreme Court has a history of exercising its power of judicial review more assertively, often ruling against the executive or legislative branches when constitutional rights and principles are at stake⁶¹. However, it is important to note that Japan and the United States differ significantly across numerous perspectives, suggesting that this contrast likely stems from deeply rooted cultural matrices. While theoretical, almost utopian systems are easy to implement in a written text, embedding modes of behavior or thought in everyday practice is far more complex.

The authors of the 1947 Constitution intended to give the Supreme Court a role within the government comparable in power and dignity to those of the legislative and executive branches⁶². However, in practice, the Court has often acted as a brake on the lower courts when judges have sought to challenge the constitutionality of laws or executive actions⁶³. Although

⁵⁶ Brown Hamano S [1999] (n.1).

⁵⁷ In the seventy-seven years of operation of the new Constitution, the justices have exercised judicial review rather infrequently: just seven times.

Holland KM [2009] (n.48).

⁵⁸ Brown Hamano S [1999] (n.1).

⁵⁹ Ibid [58].

⁶⁰ Ibid [58].

⁶¹ Important decisions, now landmarks in the history of the Supreme Court such as *Brown v. Board of Education* of 1954 and *Roe v. Wade* of 1973 (which has now been overturned), illustrate the Court's role in shaping civil society and protecting human rights despite political pressure.

⁶² Holland KM [2009] (n.48).

⁶³ Herbert F Bolz, 'Judicial Review in Japan: The Strategy of Restraint' (1980) 4 *Hastings International and Comparative Law Review* 87.

Japanese judges rhetorically express a commitment to the protection of rights, the Court almost always tends to support government policies that are challenged for violating those rights⁶⁴.

Japan's Supreme Court has adopted several strategies over the years to avoid conflicts with the Diet and Prime Minister regarding judicial review of government actions. First, the political question principle stipulates that specific issues should be resolved by the political branches rather than the judiciary, even though they seem suitable for judicial decisions⁶⁵. In addition, the "public welfare" clause of Article 13⁶⁶ of the Constitution allows the Court to deny claims of individual rights if they interfere with the public welfare, such as in the case of limited freedom of expression to prevent defamation⁶⁷. Or, again, the Court practices the principle of legislative discretion, believing that the limitation of rights is up to the Diet, and the Court, therefore, simply refers to its judgment. In fact, when it agrees with a complaint, the Court prefers to recommend policy changes to the legislative and executive branches rather than declaring an act unconstitutional⁶⁸.

Finally, the principle of standing implies that the Court dismisses lawsuits if plaintiffs do not suffer direct harm from the government's unconstitutional actions, thus avoiding direct decisions on the constitutionality of sensitive disputes such as the Self-Defense Forces of Japan, perceived as a direct violation of Article 9 of the Constitution⁶⁹. Due to the weakness of the judiciary, the primary responsibility for protecting individual rights has shifted to political and administrative bodies, mainly the Diet, Cabinet, Prime Minister, and political parties⁷⁰. However, these institutions, dominated as they are by the Liberal Democratic Party, lack the will to eliminate the causes of rights abuses decisively⁷¹.

These issues, particularly Article 9 and the protection of human rights, formed the core of the constitutional debate even at the end of the occupation, at the same time representing both the most significant challenges and the most incisive revolutions promoted by the new Constitution. These issues continued to influence Japan's political and legal process over the ensuing years, underscoring the importance of critically - and legally - addressing constitutional dynamics to ensure an effective balance between political stability and social progress.

⁶⁴ Brown Hamano S [1999] (n.1).

⁶⁵ Holland KM [2009] (n.48).

⁶⁶ "[The peoples'] right to life, liberty and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and other governmental affairs." The Constitution of Japan [1947] Chapter III.

⁶⁷ Holland KM [2009] (n.48).

⁶⁸ Ibid [67].

⁶⁹ Ibid [67].

⁷⁰ Ibid [67].

⁷¹ Ibid [67].

3.2. The Issue of Article 9 and The Protection of Human Rights: A Political and Judicial Perspective

As anticipated, during the review work of the official committee established by the Diet, the most pressing issues were, once again, Article 9, with its explicit waiver of war, and the Bill of Rights, with its explicit responsibility to protect the rights enshrined therein. These issues not only stimulated intense political debate but also raised significant legal issues involving constitutional interpretation and the role of the judiciary.

Article 9, also known as the pacifist clause, prohibits Japan from maintaining armed forces to settle international disputes⁷². Since its drafting, this principle has been the subject of numerous controversies and re-interpretations, especially in the context of national security and military alliances, particularly with the United States⁷³. In the early 1950s, the United States pushed Japan into rearmament despite having devised the waiver of the war clause themselves. This shift in American priorities led to further debates, particularly concerning the legitimacy of the Japanese Self-Defense Forces, which were established in 1954⁷⁴.

Similarly, constitutionally enshrined protection of human rights has seen the Japanese judiciary confronted with a form of protection foreign to the tradition brought by the Meiji Constitution of the late 1800s⁷⁵. Both the Supreme Court and the Japanese government have had to balance the need to protect these rights with the realities of their tradition, political pressures, and social changes⁷⁶. In parallel, the issue has been particularly criticized, as mentioned, by the deference shown by the Court to government bodies, which has undermined and continues to undermine its effective independence and ability to act as a guarantor of constitutional rights.

⁷² “Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.”

The Constitution of Japan [1947] Chapter II.

⁷³ Yongwook Ryu, ‘Departing From the Postwar Regime. The Revision of the ‘Peace Constitution’ and Japan’s National Identity’, *Routledge Handbook of Japanese Foreign Policy* (Routledge 2018).

⁷⁴ Moore RA and Robinson DL [2002] (n.5).

⁷⁵ McElwain KM and Winkler CG [2015] (n.43).

⁷⁶ Ibid [75].

3.2.1. *The Issue of Article 9 in The Revision Committee and The Diet*

As the Cold War intensified, American policymakers began to view Japan as a potential ally against Soviet influence in East Asia. However, Japan faced mixed signals from the U.S. occupiers in both Tokyo and Washington, particularly regarding the commitment to permanent disarmament mandated by Article 9⁷⁷. At times, MacArthur praised Japan's moral leadership position in renouncing war and armed forces, even comparing it to the "Switzerland of the Pacific" in March 1949, thus encouraging advocates of a policy of neutrality for post-occupation Japan⁷⁸.

Meanwhile, officials in Washington began to reconsider imposing total disarmament on Japan. As U.S. policy shifted toward supporting European economic recovery and containing Soviet expansion, the State Department became concerned that SCAP reforms might make Japan vulnerable to Communist pressure⁷⁹. As a result, while there was initially strong resistance from the government to U.S. pressure and demands for massive and rapid rearmament, Prime Minister Yoshida caved in and, in 1954, authorized the formation of the Japanese Armed Forces, called the Self-Defense Forces (SDF or JSDF)⁸⁰. Only three years after adopting the Constitution renouncing war, Japan had an army of 300,000 soldiers to support U.S. military operations on the Korean Peninsula⁸¹.

For this reason, years later, Prime Minister Hatoyama accused Americans of blatant hypocrisy during committee meetings on the revision and was one of the first members to press for a revision of Article 9⁸². In general, committee members agreed that every nation had a right to self-defense and, consequently, to maintain some form of war potential⁸³. Still, this did not justify U.S. behavior.

The government, predominantly conservative, faced criticism for the means by which Japan had secured permission to maintain an armed force⁸⁴. Safeguarding this force was paramount despite the challenge posed by Article 9's explicit renunciation of war. Conservative members advocated for a complete revision of the article to address issues related to the Self-Defense Forces and the country's cooperation with the United States in a wartime context.

⁷⁷ Moore RA and Robinson DL [2002] (n.5).

⁷⁸ John W Dower, 'Gifts from Heaven', *Embracing Defeat: Japan in the Wake of World War II* (Northon & Co. 1999).

⁷⁹ George F Kennan, *Memoirs: 1925 - 1960* (Little Brown & Co. 1967).

⁸⁰ Moore RA and Robinson DL [2002] (n.5).

⁸¹ Ibid [80].

⁸² Ibid [80].

⁸³ Ibid [80].

⁸⁴ Ibid [80].

Conversely, some argued for amending the article by adding a sentence formally legalizing the armed forces instead of altering the existing formula⁸⁵.

Still, other members believed that Japan could maintain a high moral standing by renouncing the war while retaining its self-defense forces. In the end, this last re-interpretation was the one that had the most consensus within the committee and the Diet in general, viewing the second part of the article as an implicit authorization to maintain armed forces with the objective of self-defense and not declaring war⁸⁶.

Since then, changes regarding Article 9 were purely interpretive in nature, resulting in an expansion of both the size and functions of the Japanese Self-Defense Forces. For example, in 1968, Japan affirmed the right of “defensive defense” (*senshu bōei*), or the ability to protect oneself within one’s own territory without taking defensive military action⁸⁷. In addition, the so-called “Article 9 regime,” which complies with the principles of the peace clause, includes several key policies: the three non-nuclear principles, a ban on arms exports, and a cap on defense spending set at one percent of GDP⁸⁸.

After the end of the Cold War, however, Japan faced increasing pressure, particularly from its principal ally, the United States, to participate in international peacekeeping operations (PKO)⁸⁹. In response to these pressures, a new PKO law was enacted in 1992, allowing the SDF to participate in UN humanitarian missions, which was further amended in 1998 to allow SDF participation in UN peacekeeping forces⁹⁰. The SDF’s first overseas mission took place during the 1991 Gulf War when SDF Navy minesweepers were sent to the Persian Gulf. Subsequently, the SDF participated in peacekeeping and refugee assistance missions in Cambodia (1992) and Rwanda (1994)⁹¹.

In addition, the increasing need to participate in international missions has prompted Japan to reconsider its role on the global stage. This process of adaptation has involved a delicate balancing act between maintaining the pacifist principles enshrined in the Constitution and the need to contribute to international security⁹². As a result, the domestic debate over the

⁸⁵ Moore RA and Robinson DL [2002] (n.5).

⁸⁶ Ibid [85].

⁸⁷ Richard J Samuels, ‘Baking the Pacifist Loaf’, *Securing Japan: Tokyo’s Grand Strategy and the Future of East Asia* (Cornell University Press 2007) 48.

⁸⁸ McElwain KM and Winkler CG [2015] (n.43).

⁸⁹ Ibid [88].

⁹⁰ Ibid [88].

⁹¹ Ibid [88].

⁹² Shigenori Matsui, ‘Fundamental Human Rights and ‘Traditional Japanese Values’: Constitutional Amendment and Vision of the Japanese Society’ (2018) 13(1) Asian Journal of Comparative Law 59.

re-interpretation of Article 9 and the legitimacy of SDF operations has continued to evolve, reflecting the tensions between tradition and modernity in Japanese security policies.

3.2.2. Article 9 and the Self Defense Force at the Judicial Level

In any case, the Constitution, including the disputed article, remained unchanged. The judiciary generally dismissed litigation challenging this state of affairs⁹³. The Supreme Court, using mechanisms such as the political question doctrine, creative interpretation of laws, and manipulation of the legitimacy doctrine, has consistently avoided ruling directly on the constitutionality of the SDF and the U.S.-Japan Security Treaty⁹⁴. Prominent cases include Sunakawa, Eniwa, Sakane, the Naganuma Nike missile base case, and the more recent Hyakuri base case⁹⁵. The judiciary's reluctance to address the constitutionality of Article 9 is often seen as a preference to defer political disputes to the legislative process, although this view may be overly simplistic⁹⁶.

It can be argued that the judiciary has succumbed to government pressure. Reliance on the doctrine of political issues and excessive deference to executive authority have profound implications, especially concerning potential violations of pacifism, one of the fundamental principles of the Constitution⁹⁷. The conflict regarding the Naganuma missile base case began when the Minister of Agriculture and Forestry decided to revoke the conservation status of a virgin forest in Hokkaido to facilitate the construction of a Nike missile base for the Air Self-Defense Forces⁹⁸. Local citizens challenged the minister's decision, arguing that it increased the risk of flooding due to the loss of the watershed⁹⁹. They later argued that the revocation was not in the public interest and that the construction of the missile base violated Article 9¹⁰⁰.

Prior to the final decision, Chief Judge Kenta Hiraga of the Sapporo District Court wrote to Presiding Judge Shigeo Fukushima, stating that the judiciary did not have the authority to rule on the constitutionality of SDFs and urging acceptance of the government's position

⁹³ John M Maki, 'The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights' (1990) 53(1) *Law and Contemporary Problems* 73.

⁹⁴ *Ibid* [93].

⁹⁵ Brown Hamano S [1999] (n.1).

⁹⁶ Christopher A Ford, 'The Indigenization of Constitutionalism in the Japanese Experience' (1996) 28(1) *Case Western Reserve Journal of International Law* 3.

⁹⁷ Brown Hamano S [1999] (n.1).

⁹⁸ *Ito v. Minister of Agriculture and Forestry*, Sapporo High Court, 23 January 1970, 581 (Japan).

⁹⁹ *Uno et al. v. Minister of Agriculture, Forestry and Fisheries*, Supreme Court, 9 September 1982, 1679 (Japan).

¹⁰⁰ *Ibid* [98].

rejecting the Article 9 claim¹⁰¹. Judge Fukushima publicly revealed this undue pressure, sparking a significant controversy. Initially, Fukushima was recalled to Tokyo and eventually, both Fukushima and Hiraga faced impeachment procedures in the Diet due to pressure from conservative politicians¹⁰².

In time, impeachment proceedings against Hiraga were dropped, allowing him to continue his career. In contrast, Judge Fukushima suffered a severe reprimand from the Diet Prosecutors Committee, which slowed his career and led to his discharge before the mandatory retirement age¹⁰³. In 1973, Fukushima ruled that the law establishing the SDF violated Article 9 and that the forest had been illegally delisted, rejecting the political issues doctrine¹⁰⁴. The High Court, as is customary in Japan, heard witnesses in nine hearings and then, in a very unusual action, abruptly ended the hearings and quickly ruled that the plaintiffs had no standing to bring suit, and the Supreme Court upheld the decision¹⁰⁵. The political message was clear: the doors of Japanese courts are firmly closed to Article 9 cases, and judges who oppose the government in politically relevant cases do so at their own peril¹⁰⁶.

Indeed, there are more than 60 years of experience with which to evaluate the performance of Japan's highest judicial Court¹⁰⁷. The Court has not met the high expectations of the American drafters of the Constitution. The general attitude has been one of deference to the prime minister, the Cabinet, and the Diet¹⁰⁸. One of the critical variables in explaining the lack of confrontation between the Court and the government is the one-party nature of Japanese democracy¹⁰⁹. This political context contributes to what is known as the counter-majoritarian difficulty—the challenge of ensuring judicial review in a system where the judiciary might avoid decisions that could directly confront or disrupt the prevailing majority's policies, reflecting a broader issue in balancing judicial independence with democratic governance.

The drafters of the 1947 Constitution intended the Supreme Court to be a branch of government equal in power and dignity to the legislature and the executive, but, in reality, the Court has acted more as a restraint on the lower courts whenever the justices attempt to

¹⁰¹ Setsuo Miyazawa, 'Administrative Control of Japanese Judges', *Law and Technology in the Pacific Community* (Routledge 1991).

¹⁰² Brown Hamano S [1999] (n.1).

¹⁰³ Ibid [102].

¹⁰⁴ *Naganuma Nike Missile Site Case* (1973) 24 (Sapporo District Court).

¹⁰⁵ Japan Supreme Court [1982] (n.99).

¹⁰⁶ Brown Hamano S [1999] (n.1).

¹⁰⁷ Holland KM [2009] (n.48).

¹⁰⁸ Ibid [107].

¹⁰⁹ Ibid [107].

challenge the constitutionality of a law or executive action¹¹⁰. This attitude virtually removed any form of legitimacy or relevance that the Court should have in the system.

Given that the judicial environment has remained essentially unchanged, what will the fate of pacifism be as a constitutional principle? The answer lies in the times to come: the future of pacifism is closely linked to the fate of constitutionalism and democracy in Japan¹¹¹. Once Japanese society continues to evolve in this period of convulsive change, the hope is that Constitution will assume increasing importance as a framework for containing an orderly struggle over the restructuring of Japanese society, but the fear is that the Constitution is so weakened and drained of meaning that it won't be able to fulfill this role¹¹².

3.2.3. Guarantee and Protection of Fundamental Human Rights: A New Reality

The Constitution of Japan contains an articulated declaration of rights, protecting individual rights as “basic human rights,” which is considered one of the Constitution’s fundamental principles¹¹³. The need to protect fundamental human rights was already a policy of the occupation forces and was incorporated in one of the three basic principles contained in the notes prepared by MacArthur for the occupation forces’ draft¹¹⁴.

The idea of “fundamental human rights” was rooted in the natural law philosophy that saw a revival after World War II and was consistent with the position contained in the Universal Declaration of Human Rights, which states that every person possesses certain universal human rights¹¹⁵. The very notion of “fundamental human rights” was a clear manifestation of the universal nature of human rights¹¹⁶.

Article 11 reflects this understanding. It declares that “the people shall not be deprived of the enjoyment of any of their fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred on the people of this and future generations as eternal and inviolable rights.”¹¹⁷ Unlike the rights of subjects under the Meiji Constitution, fundamental human rights are conferred on every individual as natural rights that

¹¹⁰ Holland KM [2009] (n.48).

¹¹¹ Maki [1990] (n.93)

¹¹² Brown Hamano S [1999] (n.1).

¹¹³ Matsui [2018] (n.92).

¹¹⁴ Ibid [113].

¹¹⁵ Daniel Mirabella, “The Death and Resurrection of Natural Law” [2011] *The Western Australian Jurist* 251.

¹¹⁶ United Nations General Assembly, *Universal Declaration of Human Rights* (1948).

¹¹⁷ The Constitution of Japan [1947] Chapter III.

existed before the Constitution was promulgated¹¹⁸. They are universal and inherent to all people as human beings, thus, their protection does not entail any specific limitation¹¹⁹.

However, Article 12 states that “the freedoms and rights guaranteed to the people by this Constitution must be maintained through the constant efforts of the people, who must refrain from any abuse of these freedoms and rights and must always be responsible for their use for the public welfare.”¹²⁰ Article 13 adds that the people’s “right to life, liberty and the pursuit of happiness, insofar as it does not interfere with the public welfare, shall be the supreme consideration in legislation and governmental affairs.”¹²¹ Although the Supreme Court of Japan has invoked these two articles to allow the government to restrict fundamental human rights in order to protect public welfare, many believe that fundamental human rights should never be restricted solely for the benefit of society¹²².

Since the creation of the Commission on the Constitution, the Declaration of Rights has been one of the highlights of the entire debate. As the commissioners moved from the renunciation of war to national defense, they addressed another set of principles in Chapter III (Rights and Duties of the People) that concerned every community and individual in Japan¹²³. This chapter contained the most emphatic statement of Western individualism, embodying values that were often an affront to Japanese culture with its commitment to collective and communal values¹²⁴. Indeed, in Japan, the role of codified rules and public law appears considerably less central and less decisive in maintaining order¹²⁵. Companies, for example, tend to avoid written codes of conduct, nor are unions particularly insistent on explicit statements of rights and obligations¹²⁶.

Public legislation tends to avoid the option of direct legal control in favor of allowing administrative latitude to make decisions on a case-by-case basis¹²⁷. Consistent with this, Japanese police have a high degree of autonomy to make decisions on the spot about what

¹¹⁸ Matsui [2018] (n.92).

¹¹⁹ Of course, while Article 11 asserts the importance and inviolability of fundamental human rights, the application of these rights in practice involves balancing them against other societal needs and legal considerations. Thus, while rights are fundamentally protected, they are not entirely immune to limitations within a legal framework that seeks to balance various interests.

¹²⁰ The Constitution of Japan [1947] Chapter III.

¹²¹ Ibid [120].

¹²² Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Hart Publishing 2011) 164.

¹²³ Moore RA and Robinson DL [2002] (n.5).

¹²⁴ Ibid [123].

¹²⁵ Thomas P Rohlen, “Order in Japanese Society: Attachment, Authority, and Routine” (1989) 15 *Journal of Japanese Studies* 5.

¹²⁶ Ibid [125].

¹²⁷ Ibid [125].

procedure to follow when arresting offenders¹²⁸. For example, the simple act of apology is used by them as an effective way to restore order without formal proceedings¹²⁹. Mediation and conciliation have long been the officially preferred means of dispute resolution, significantly reducing the practice of formal litigation¹³⁰. Even high court rulings seem to avoid setting broad precedents as if they do not want to make authoritative statements contrary to the notion of circumstantial relativity¹³¹.

In any case, it is hard to imagine elected officials expressing a desire to reduce “people’s rights;” in fact, none of the commissioners did so openly, but many wished to revise the entire Chapter III of the 1946 Constitution¹³². They believed that Japan’s Basic Law should strike a better balance between the rights and duties of the people, giving more weight to duties and a better balance between individual freedom and social responsibility¹³³. They argued that the modern welfare state requires more emphasis on the rights of the community and society and less on the rights of the individual¹³⁴. Some even suggested that “welfare and obligations of the people” should replace the concept of “rights and duties.”¹³⁵ While recognizing the importance of the welfare of society to the ultimate freedom of the individual, advocates of Chapter III rejected the revision in favor of adjustments through legislation and judicial decisions¹³⁶. In the end, this argument prevailed in the Committee.

3.2.4. Continuous Shortcomings in The Judiciary: A Definitive Destiny?

Aside from the political level, despite the social and political changes after World War II, the Japanese judiciary has not been effective in enforcing essential parts of the Constitution. Many theories explain the decline of human rights by Japanese courts in the years since the Constitution was enacted¹³⁷. The legacy of the prewar civil code, institutional inertia, and the ruling elite’s cultural values, including the judiciary’s bureaucratic elite, have played significant roles in this decline¹³⁸.

¹²⁸ Rohlen TP [1989] (n.125).

¹²⁹ Hiroshi Wagatsuma and Arthur Rosett, “The Implications of Apology: Law and Culture in Japan and the United States” (1986) 20 Law & Society Review 461.

¹³⁰ Wagatsuma H and Rosett A [1986] (n.129).

¹³¹ Rohlen TP [1989] (n.125).

¹³² Moore RA and Robinson DL [2002] (n.5).

¹³³ Ibid [132].

¹³⁴ Ibid [132].

¹³⁵ Ibid [132].

¹³⁶ Ibid [132].

¹³⁷ Maki [1990] (n.92).

¹³⁸ Brown Hamano S [1999] (n.1).

It is essential to understand the development of human rights protections in a broader historical context. The push for social change to establish a “democracy from below” was hindered¹³⁹. The judiciary, led by the General Secretariat of the Supreme Court and the Supreme Court itself, contributed to amending the Constitution by not enforcing it¹⁴⁰. Japanese courts have largely restored the critical element of the Meiji Constitution by deferring to the executive and legislature, meaning that executive actions and laws determine the extent of constitutional protection¹⁴¹. In this context, the three core principles of popular sovereignty, pacifism, and human rights were diminished from their original scope in 1946¹⁴².

The Constitution guarantees over 30 rights to protect against government denial or injustice¹⁴³. The judiciary has the authority to enforce these rights in criminal and civil cases. Additionally, the judiciary can declare government acts, such as decrees, null and void if they are inconsistent with the Basic Law, in fact, the Supreme Court of Japan is one of the few courts of last resort with the power to declare national laws unconstitutional¹⁴⁴.

The rights and freedoms protected by the Constitution include the right to vote, freedom of religion, freedom of assembly, freedom of speech and the press, the right of the criminally accused to due process, and the prohibition of racial and sexual discrimination, among many others commonly protected in the constitutions of Western countries¹⁴⁵. The expectation of the drafters of the Japanese Constitution is clear: they believed that the newly established High Court would vigorously assist in the transformation of a militaristic, imperial dictatorship into a modern, functioning democracy in which individual freedoms would be secure¹⁴⁶. The Court would make this vital contribution by bravely exercising its constitutional prerogative of judicial review¹⁴⁷.

However, as has been mentioned, with their avoidance of implementing judicial review and preference for deference to government offices, they have rendered all such efforts and expectations completely futile¹⁴⁸. In their rhetoric, Japanese judges express a commitment to the protection of human rights, yet when it comes to government policies, the Supreme Court

¹³⁹ Brown Hamano S [1999] (n.1).

¹⁴⁰ Ibid [139].

¹⁴¹ Ibid [139].

¹⁴² Ibid [139].

¹⁴³ Holland KM [2009] (n.48).

¹⁴⁴ Ibid [143].

¹⁴⁵ Ibid [143].

¹⁴⁶ Ibid [143].

¹⁴⁷ Ibid [143].

¹⁴⁸ Karel Van Wolferen, *The Enigma of Japanese Power: People and Politics in a Stateless Nation* (Vintage Books 1989).

almost always favors maintaining the policy that is challenged as violating those rights¹⁴⁹. However, studies indicate that these attitudes are changing with younger generations, who, in terms of the value of personal fulfillment and freedom, are beginning to resemble their European and American counterparts¹⁵⁰. The attitude of judicial deference is rooted not in Asian cultural values, in general, but in those of East Asia, home to countries whose societies were strongly influenced by the Chinese philosopher Confucius¹⁵¹.

However, there are signs that the restrictions that have held back the judiciary are weakening, and that the protection of rights may become a judicial, as well as executive and legislative, responsibility in the not-too-distant future¹⁵². This represents another critical element in the constitutional context, namely the importance of popular perception toward a constitutional document.

3.3. The Impact of Popular Perception on The Constitutional Debate

According to extensive statistical research conducted on constitutions around the world since 1789, the average life expectancy of a constitution is 17 years, and the median duration is 19 years¹⁵³. In addition, the longevity of constitutions enacted during a foreign occupation is generally short¹⁵⁴. However, Japan's Constitution has remained unchanged since its promulgation on November 3, 1946, and its enactment on May 3, 1947, under occupation, making it the oldest unamended Constitution in the world¹⁵⁵.

The stability of the Japanese Constitution can be attributed to various factors, including the sincere support of the Japanese people, nevertheless, questions on why it has remained so stable and what may influence or, on the contrary threaten, this stability¹⁵⁶. For one, the Liberal Democratic Party, which has supported the revision of the Constitution since its founding, has been the dominant party for almost the entire post-war period¹⁵⁷. Moreover, a recent study of opinion polls regarding the Constitution of Japan since the postwar period found that the people

¹⁴⁹ Van Wolferen K [1989] (n.148)

¹⁵⁰ Holland KM [2009] (n.48).

¹⁵¹ Ibid [150].

¹⁵² Ibid [150].

¹⁵³ Tom Ginsburg, Zachary Elkins and James Melton, "The Lifespan of Written Constitutions," *American Law & Economics Association Annual Meetings* (2007).

¹⁵⁴ Ibid [153].

¹⁵⁵ "Constitution Rankings" (*Comparative Constitutions Project*)

<<https://comparativeconstitutionsproject.org/ccp-rankings/>> accessed June 19, 2024.

¹⁵⁶ Satoshi Yokodaido, "Constitutional Stability in Japan Not Due to Popular Approval" (2019) 20 *German Law Journal* 263.

¹⁵⁷ Ibid [156].

do not see the Constitution as something so sacred that it can never be changed¹⁵⁸. Therefore, the conventional explanation for Japan's constitutional stability seems to be either incorrect or inadequate.

Since a majority of the political scene is always been in favor of constitutional change, why is the Japanese Constitution still intact? This fact forces us to reconsider the relationship between constitutional stability and widespread approval. There are several interrelated reasons why the Japanese Constitution has yet to be amended: post-war politics, the structure of the Constitution, judicial moderation on constitutional issues, and an assessment of the need for constitutional amendments¹⁵⁹. All these factors create a culture that treats the Constitution as unamendable or, worse, irrelevant.

In addition to these reasons, one rather important element in the difficulty of changing the Constitution or of adequately understanding the attitude of the Japanese population towards the document is the concept of cultures in the amendability context. The cultures of the amendment are defined as sets of attitudes on the desirability of the amendment, regardless of the substantive issue under consideration and the degree of pressure for change¹⁶⁰.

In other words, there is a basic level of resistance to formal constitutional change in any system; as this basic level increases, the viscosity of the constitutional amendment process decreases even under identical institutional arrangements¹⁶¹. This culture in Japan is represented explicitly by a dual movement: *Goken-ha*, anti-revisionist groups, and *Kaiken-ha*, pro-revisionist groups¹⁶².

3.3.1. Amendment Cultures and Attitudes

Constitutional amendments are crucial not only at the political and practical level for the proper function of the system and consistency of the constitutional text but also at the popular level, from the perspective of the citizens. Indeed, amendments offer the citizenry a say in how they are governed, providing a mechanism for each generation of citizens to acquiesce to the edicts of their Constitution, potentially generating greater attachment to the text, a prerequisite for the Constitution to constrain government effectively¹⁶³.

¹⁵⁸ Yokodaido S [2019] (n.156).

¹⁵⁹ Ibid [158].

¹⁶⁰ Ginsburg T and Melton J [2014] (n.3).

¹⁶¹ Ibid [160].

¹⁶² Yokodaido S [2019] (n.156).

¹⁶³ Barry Weingast, "The Political Foundation of Democracy and the Rule of Law" [1997] American Political Science Review 245.

For this reason, a key indicator in the study of the difficulty of amending a constitutional text lies precisely in the amendment cultures. It is defined by Tom Ginsburg and James Melton as the set of attitudes regarding the desirability of amendments, regardless of the substantive issue under consideration and the degree of pressure for change¹⁶⁴. In essence, according to Ginsburg and Melton, there is a base level of resistance to formal constitutional change in any system, and as this base level increases, the stickiness of the constitutional amendment process decreases even under identical institutional arrangements¹⁶⁵.

The term “amendment culture” is not meant to assert that attitudes regarding amendments are immune to change: any social phenomenon is particularly subject to the context in which it develops and evolves. Indeed, the formative value assigned to constitutional change may vary over time within a given country, depending on political and social conditions¹⁶⁶.

For example, the United States has seen waves of constitutional amendments: in fact, the Civil War and the Progressive Era saw a particularly significant number of amendments, while other eras of rapid change, such as the New Deal and the Civil Rights era, saw fewer¹⁶⁷. This may show that there may be cultural factors surrounding the degree of constitutional veneration, which may influence both the number of proposals and the likelihood of their passage¹⁶⁸.

The determinants of these cultural factors are not easy to articulate. Ginsburg and Melton states that they could be hypothesized to be sensitive to the institutional structure so that a high threshold for amendments signals to the citizenry that the Constitution is sufficiently sacred that it need not or cannot be amended¹⁶⁹. Or, again, cultural factors could work against the amendment rule in which a high threshold causes political actors to propose numerous amendments because few will actually be adopted¹⁷⁰. Conversely, a shallow threshold might lead people to be cautious about constitutional reform precisely because it is so easy, or it might lead them to experiment with too frequent reforms¹⁷¹.

For this reason, amendment culture is a very complicated concept to measure. In the study carried out by Ginsburg and Melton, based on a statistical analysis of constitutional

¹⁶⁴ Ginsburg T and Melton J [2014] (n.4).

¹⁶⁵ Ibid [164].

¹⁶⁶ Ibid [164].

¹⁶⁷ Ibid [164].

¹⁶⁸ Ibid [164].

¹⁶⁹ Ibid [164].

¹⁷⁰ Ibid [164].

¹⁷¹ Ibid [164].

changes whose variables were both institutional systems and culture itself to measure the difficulty to amend, it was found that the only consistently significant predictor was precisely amendment culture¹⁷².

None of the procedural variables have an effect, and all the other constitutional variables – the electoral system, the constitutional provision concerning the process, etc. – have no consistent effect among the various models analyzed by the scholars. From a constitutional design perspective, these results are particularly surprising, in that they suggest, rather strongly, that constitutional designers have far less influence than might be expected on the flexibility of their product¹⁷³. In essence, the formal rule of amendment may not matter in predictable ways across countries.

Alternatively, some theories have labeled certain cultures of constitutional amendment as “pathological.” Kathleen Sullivan, a U.S. constitutional law scholar, refers to this phenomenon as “constitutional amendment fever” or “amendmentitis,” highlighting concerns about the increase in proposed amendments such as budget balances, term limits and presidential elections¹⁷⁴. Sullivan argues that too-frequent amendments can threaten the stability, consistency, and generality of the Constitution and, most importantly, the role of the judiciary¹⁷⁵. She states that constitutions should be amended only with extreme reluctance and as a last resort¹⁷⁶.

Vicki Jackson counters Sullivan’s argument by pointing out, to the contrary, that the difficulty in amending constitutions through their formal process has resulted in the creation of a political culture resistant to amendments¹⁷⁷. Jackson argues that this resistance encourages dependence on judicial interpretations, undermining the importance of citizen consent in constitutional legitimacy¹⁷⁸. Jackson highlights how an over-reliance on the legal system diminishes the fundamentally democratic legitimacy of the Constitution¹⁷⁹. She warns against “amendo-phobia,” the irrational fear of constitutional amendments even when appropriate, much like Sullivan’s concerns about the opposite concept¹⁸⁰.

¹⁷² Ginsburg T and Melton J [2014] (n.4).

¹⁷³ Ibid [165].

¹⁷⁴ Kathleen M Sullivan, “Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever” (1996) 17 *Cardozo Law Review*.

¹⁷⁵ Ibid [174].

¹⁷⁶ Ibid [174].

¹⁷⁷ Vicki C Jackson, “The (Myth of Un) Amendability of the US Constitution and the Democratic Component of Constitutionalism” (2015) 13 *International Journal of Constitutional Law*.

¹⁷⁸ Ibid [177].

¹⁷⁹ Ibid [177].

¹⁸⁰ Ibid [177].

Such arguments seem to be a valuable reference when considering Japan's constitutional situation. On the one hand, the *Kaiken-ha* group, in favor of the revision, appears to be suffering from “amendment fever,” as formulated by Sullivan. On the other hand, the *Goken-ha* group, opposed to the revision, appears to be affected by an “amendo-phobia” as warned by Jackson. Both groups have shaped the perception of the Japanese people toward the Constitution and constitutional changes, creating a dichotomy that rather negatively affects public debate and understanding of the Constitution's fundamental role in ensuring both the stability and adaptability of the Japanese political system¹⁸¹.

3.3.2 Dichotomy in the Constitutional Debate: *Goken-ha* vs *Kaiken-ha*

Jed Rubenfeld, an American commentator, in exploring the origin of constitutional attitudes in different cultures, points out that in order for a constitution to take root, it is necessary for the people to develop a national commitment to the history and narrative of a self-imposed constitution, enacted by the people themselves¹⁸². If the Constitution has not been democratically enacted, there will always be doubts about its legitimacy, preventing it from taking firm root¹⁸³.

Considering the Japanese context, the occupying forces' veiled imposition of the constitutional text, and the government's refusal to enshrine its approval through a popular referendum, this reflection gives excellent starting points in analyzing the dichotomy present within Japan's constitutional revision debate.

Traditionally, debates on constitutional amendment have been dominated by two extreme positions: the *Goken-ha* and the *Kaiken-ha*¹⁸⁴. In general, the *Goken-ha* are anti-revisionist groups that seek to prevent any constitutional amendment, while the *Kaiken-ha* are pro-revisionist groups that attempt to amend any constitutional provision¹⁸⁵. Underlying these attitudes, as analyzed by Satoshi Yokodaido, is the idea that “a little leak can sink a big ship”: according to Yokodaido's analysis, the ship in this context is Article 9 with its renunciation of war and of the maintenance of any war potential¹⁸⁶.

¹⁸¹ Yokodaido S [2019] (n.156).

¹⁸² Jed Rubenfeld, “The Moment and The Millenium,” *Freedom and Time: A Theory of Constitutional Self-Government* (Yale University Press 2001) 3.

¹⁸³ Ibid [182].

¹⁸⁴ Yokodaido S [2019] (n.156).

¹⁸⁵ Ibid [184].

¹⁸⁶ Ibid [184] 264.

On the one hand, the *Goken-ha* believe that in order to prevent the revision of the pacifist clause in Article 9, no constitutional amendment should be allowed, as it would represent a flaw in the system, showing weakness and irresponsibility to the commitments enshrined in the text. On the other hand, the *Kaiken-ha* believe that in order to achieve a revision of Article 9, it is necessary to accustom people to constitutional amendments, changing the narrative to which the people are accustomed.

In this context, the main problem is that constitutional amendments in the Japanese Constitution are either seen as fundamental changes or are outright rejected or obstructed, with no middle ground¹⁸⁷. This approach makes it impossible to act on individual articles that need revisions to improve the constitutional text, which is highly regrettable and risks of rendering the process undemocratic. Politically, right-wing and conservative parties such as the Liberal Democratic Party have been *Kaiken-ha*; the party has always supported the revision of the Constitution as its very platform¹⁸⁸. In contrast, progressive and leftist parties such as the Socialist and Communist parties have been *Goken-ha*, opposing the LDP's attempts to change the Constitution, regardless of its content¹⁸⁹.

The two groups have proposed different explanations for the stability of the Japanese Constitution. The *Goken-ha* argue that the stability is due to the people's deep adherence to the Constitution and its philosophy, citing a survey done in 1946 by the Mainichi Shimbun, in which they showed great confidence in the new constitutional text¹⁹⁰. However, this explanation did not reflect the actual public opinion of the time, as the survey mainly reflected the opinions of the intellectual classes, not accurately representing the general demographic composition¹⁹¹. According to in-depth research carried out by Shirō Sakaia, a professor of political science at the University of Tokyo, in reality, the Japanese never regarded the Constitution as perfect and inviolable and have maintained a critical attitude to this day¹⁹².

For their part, pro-revisionists strongly criticized the threshold of the constitutional amendment procedure as being too high to allow any amendment to be proposed to the people, an argument carried by the LPD since the party's inception¹⁹³. Still, the threshold of the Japanese Constitution is not so unusually high as to prevent any amendment.

¹⁸⁷ Yokodaido S [2019] (n.156).

¹⁸⁸ Ibid [187].

¹⁸⁹ Ibid [187].

¹⁹⁰ 85% of respondents supported the new imperial system, with the emperor as a symbol of the country; 70% supported the idea that a war-renouncing article was necessary for the new system, and 65% showed support for the new formulation of rights and duties of the people.

¹⁹¹ Yokodaido S [2019] (n.156).

¹⁹² Ibid [191].

¹⁹³ Yokodaido S [2019] (n.156).

For example, using the legislative voting requirement as the primary factor, political scientist Arend Lijphart measured the difficulty of amending the Constitution in 36 democratic countries¹⁹⁴. While it is true that Japan is ranked in the most rigid category, six other countries, including the United States, are in the same category, which, however, have implemented many constitutional amendments¹⁹⁵. Further studies that used different scales to analyze the difficulty of amending constitutions never ranked Japan's 1947 Constitution as the strictest¹⁹⁶.

It is true that the difficulty in obtaining a two-thirds majority in each chamber depends heavily on the electoral system; however, it is essential to note that the procedures for amending the Constitution are only one of the factors determining the difficulty of constitutional amendments in Japan¹⁹⁷. The provisions of the Constitution are determined by a variety of factors, such as the complexity or simplicity of the rules, the kind of standards that the people and the government attach to the Constitution, the clear separation between reality and the Constitution due to political and social changes, people's views on the role of constitutional interpretation in filling gaps, and whether there is sufficient political capital to carry out an amendment¹⁹⁸. Therefore, the difficulty of amending the Constitution must be evaluated from multiple perspectives.

Considering also the fact that the Japanese Constitution has not been amended once since its promulgation, it can be inferred that it has the flexibility to deal with changes in social circumstances without the need for revisions¹⁹⁹. The Japanese concluded that the constitutional text need not reflect reality and can be interpreted flexibly by the government²⁰⁰. Due to the postwar politics, social environment, and passivity of the judiciary mentioned above, the Japanese Constitution has gradually lost its normative force among the people²⁰¹.

¹⁹⁴ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1999) 206.

¹⁹⁵ Lijphart A [1999] (n.194).

¹⁹⁶ For example, in a 1994 study, Donald Lutz ranked the United States Constitution as the most rigid, while the Japanese Constitution ranked tenth out of thirty-two countries.

¹⁹⁷ Yokodaido S [2019] (n.156).

¹⁹⁸ Ibid [197].

¹⁹⁹ Ibid [197].

²⁰⁰ Ibid [197].

²⁰¹ Ibid [197].

Conclusion

The implementation of the 1947 Japanese Constitution has been marked by a complex and controversial path. Despite its initial imposition by U.S. occupying forces and subsequent controversy, the document has remained unchanged, reflecting both its pivotal role in Japan's postwar democracy and persistent challenges. This stability underscores a unique interplay between adaptation and contestation in Japanese constitutional history.

The early years were marked by intense debates and power struggles between political and international actors. The Far Eastern Commission (FEC) and General MacArthur clashed over the need for constitutional revision. The conservative government of Prime Minister Yoshida resisted a popular referendum, fearing it would undermine their revision agenda. These early disputes highlight the initial contestation surrounding the Constitution and set the stage for ongoing adaptation challenges.

In the 1950s, the push for constitutional revision culminated in the creation of the Cabinet Committee on the Constitution in 1957, with conservative proposals aimed at strengthening government powers and limiting individual rights. However, these efforts were hampered by political opposition and the judiciary's reluctance to challenge the government. This period reflects the tension between conservative and progressive forces, revealing the challenges of adapting constitutional principles within a complex political landscape.

The judiciary, conceived as an independent arbiter of constitutional principles, has often shown deference to the executive and legislative branches of power. The conservative attitude of the Supreme Court limited its role in protecting individual rights and maintaining checks and balances. This passivity shifted rights protection to the political and administrative bodies, which have not always fulfilled that task. The conservative attitude of the Supreme Court, coupled with its reluctance to challenge government actions, underscores the struggle to balance constitutional fidelity with political realities.

Nevertheless, the Legacy of the 1947 Constitution underscores the importance of critical and ongoing examination and adaptation to contemporary needs while preserving democratic principles and the rule of law. The changing political and legal dynamics highlight the need for a judiciary that actively upholds constitutional protections and a political environment that promotes genuine democratic engagement and respect for human rights.

Another critical element in this context is the debates over Article 9 and the protection of human rights. The Japanese judiciary has generally avoided ruling on the constitutionality of the SDF and the U.S.-Japan Security Treaty, using doctrines such as political questions. The

Naganuma case, among others, showed government pressure on the judiciary, limiting its independence and ability to guarantee constitutional rights.

In addition, the Japanese Constitution protects basic human rights as inviolable and universal rights. However, the Supreme Court has allowed the government to restrict these rights for the public welfare, raising criticism about its deference to executive authorities. Nevertheless, the rights and duties chapter of the Constitution represents a solid commitment to individual rights, although there are pressures to balance individual rights with social responsibilities better. In essence, even in the contemporary historical context, Article 9 and the protection of human rights remain central to Japanese constitutional discourse, reflecting the tensions between tradition and modernity and the importance of a judiciary that actively defends constitutional protections.

In conclusion, it was crucial to focus on popular perception in the context of the debate over the longevity of the Japanese Constitution. This part of the analysis began by focusing on the concept of “amendment culture.” This “amendment culture” reflects social attitudes that view the Constitution as enduring and potentially destabilizing if altered too frequently. This cultural factor has reinforced the political hesitancy toward revision despite periodic public support for specific amendments. The dichotomy between pro-amendment and anti-amendment groups has shaped the public debate. This polarization has contributed to a cautious approach toward constitutional amendments, perpetuating the status quo.

In sum, Japan’s constitutional stability is the result of a complex intertwining of historical, political, judicial, and cultural factors. These elements collectively influence perceptions of the Constitution’s role and authority in Japanese society, maintaining a balance between adapting to social change and preserving constitutional foundations.

This guiding thread illuminates how the 1947 Constitution has served as a starting point for a prolonged and intricate evolution, reflecting the ongoing tensions between the preservation of political stability, the interpretation of legal principles, and the responses and expectations of Japanese society. The Constitution has not merely been a static document but a dynamic framework that has had to navigate the complexities of a rapidly changing socio-political landscape. Its role in shaping and being shaped by political, judicial, and societal forces underscores the interplay between maintaining constitutional continuity and adapting to contemporary challenges. This evolution illustrates the Constitution’s pivotal role in mediating between entrenched stability and the need for progressive adaptation in response to societal demands and judicial interpretations.

Chapter IV

Contested Imposition and the Threat of Revisionism

Introduction

Every Constitutional system has a rich and intricate history, a fact exemplified by the Constitution of Japan, which remains the oldest unamended Constitution in the world to this day¹. The endurance of Japan's postwar Constitution, contrasted with persistent calls for revision, has long fascinated comparative constitutional scholars. The narrative often promoted by Japanese political elites, that the Constitution was imposed on Japan in 1947 and is therefore foreign, gains relevance in this context. While the 1946 Constitution was a compromise between American and Japanese elites, with legal interpretation left to lawyers on both sides, its elite-driven construction did not significantly concern ordinary Japanese citizens. However, the argument of constitutional imposition and consequent invalidity is problematic, risking confusion in practical application and, more critically, undermines the entirety of postwar Japanese politics².

Despite conservative reservations about Western cultural imports being inconsistent with Japanese tradition, the indirect participation in the constitution-making process did not fatally undermine the Constitution's endurance³. Moreover, the Constitution was embraced by most Japanese as a democratic foundation, making the imposition argument outdated, if not outright erroneous. For Japan, the Constitution of 1947 is fundamental to its postwar statehood, shaped by the aftermath of war and acceptance of the Potsdam Declaration. It cannot be divorced from Japan's imperial history and crucial role in East Asian security, including its relationships with the United States and other countries. Therefore, any repudiation of the Constitution would have profound implications for these relationships.

The debate over constitutional revision is not just a matter of policy; it is pivotal to Japan's national identity and foreign and defense policies. Proponents seek to "normalize" Japan by amending the Constitution to enhance national pride and international military engagement⁴. Conversely, opponents argue that preserving the current Constitution is crucial to maintaining Japan's postwar peace and prosperity. The potential revision of the Constitution,

¹ Adam N Sterling, 'Implicit Limits on Amending the Japanese Constitution' (2019) 28(1) Washington International Law Journal 243.

² Takeshi Inoue, 'The Constitution of Japan and Constitutional Reform' (2016) 23(2) Asia-Pacific Review 1.

³ Chien-Chih Lin, 'Survival of the Fittest (?): The Endurance of the ROC Constitution and the Constitution of Japan' (2014) 62(3) The American Journal of Comparative Law 775.

⁴ Yongwook Ryu, 'Departing from the Postwar Regime: The Revision of the 'Peace Constitution' and Japan's National Identity', *Routledge Handbook of Japanese Foreign Policy* (Routledge 2018).

particularly Article 9, which renounces Japan's right to war, could significantly alter Japan's international standing and ability to navigate global politics.

Despite the divide between revisionists and preservationists, the Constitution's inherent design ensures its durability despite debates over its origins. It reduces incentives for both conservatives and reformists to violate its provisions while enhancing its legitimacy by enshrining fundamental rights previously unavailable to Japanese citizens. The passing of Shinzo Abe further complicates this landscape, raising questions about the continuity of his revisionist legacy. This chapter aims to comprehensively analyze these elements shaping Japan's constitutional discourse.

In the first part, the analysis will focus on challenging the narrative that the American forces imposed the Constitution on Japan in 1945-46 by considering the long-lasting impact of the document. The oversimplification of imposition overlooks the complex interactions between the occupying authorities and Japanese governance. This prompts the consideration of a collaborative "conspiracy" theory to explain the Constitution's durability within historical and political complexities. Secondly, the focus will shift to two critical elements inherent to the discussion of constitutional endurance: the Japanese system's remarkable and unique capability to adapt the constitutional text to different situations and the continuous influence of the United States in various social and political aspects of the system.

In the second part of the paragraph, the analysis will dedicate itself to the more technical parts of the durability discourse, considering the issue of unamendability and eternity clauses, as illustrated by Richard Albert and Silvia Suteu. Then, the doctrine will be applied to the Japanese amending rule itself, which may represent a peculiarity of its own, and to the possibility of amending it, analyzing eventual consequences and how the process may occur.

The analysis will also analyze some of the implicit limits to an eventual amendment of the Constitution in general since it lacks explicit distinctions between amendment and revisions. Historical practices and the "August Revolution doctrine," emphasizing popular sovereignty, further limit potential amendments. The Constitution's stability is reinforced by its human rights protections, pacifism, and the principle of popular sovereignty, creating a delicate and weighty balance and making amendments challenging.

The concluding section of the chapter will be the most detailed, starting with an exploration of Shinzo Abe's role, moving on to examine various revisionist movements, and concluding with an analysis of Abe's legacy following his untimely passing. The revision of Japan's pacifist Constitution is a topic of significant controversy. Advocates, primarily from the Liberal Democratic Party under Shinzō Abe's leadership, aim to "normalize" Japan by

bolstering national pride and military capabilities. On the other hand, opponents argue that the current Constitution has been instrumental in maintaining peace and prosperity since the postwar period. Despite Abe's efforts to push for revision, substantial opposition persists, including robust grassroots movements and constitutional scholars. Abe's passing has further complicated the discourse, leading to uncertainty regarding the future of constitutional amendment in Japan.

4.1. Constitutional Imposition: A Fallacious Narrative

By all standards studied in Constitutional and comparative law, the endurance of the 1947 Constitution is certainly noteworthy. This longevity becomes even more challenging to understand when one adopts the conventional narrative that the Constitution was forcibly imposed on an unwilling nation. Japan is often cited as an example of the triumph of a form of imposed Constitutionalism unprecedented in the last century⁵.

Yet scholars and comparatists have had difficulty understanding how a seemingly imposed Constitution remained entirely unchanged for such an extended period. According to the literature, the primary explanations for *Kenpō*'s success are attributed to internalization and the remarkably acquiescent Japanese nature⁶. In fact, one might speculate that Japan possesses cultural, historical, and institutional attributes that made the Constitution particularly malleable, to the point that formal amendments were unnecessary⁷.

From another, less supported perspective, one might speculate that the narrative of the imposition of the Constitution is an oversimplification, if not outright erroneous. In fact, when the Constitution was drafted, roles and arguments were reversed in ways that made it complicated to label it as imposed⁸. On the one hand, the occupying authorities aimed to protect and respect the rights and wills of the people by reinforcing and "imposing" their directives; on the other hand, the Japanese government pursued anti-egalitarian, reactionary, and anti-democratic goals that would have been incompatible with the conditions set forth in the Potsdam Declaration and presented Japanese needs as incompatible with those that could be conceived in a foreign constitutional framework⁹.

⁵ David S Law, 'The Myth of the Imposed Constitution' in Denis Galligan and Mila Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013).

⁶ Ibid [5].

⁷ Ryu Y [2018] (n.4).

⁸ Lin C-C [2014] (n.3).

⁹ Ibid [8].

In sum, it is difficult to accept both the narrative of imposition and the narrative of complete Japanese acceptance. For this reason, many assume the “conspiracy” theory between MacArthur and the Japanese government, a kind of collaboration that could meet the political and social needs of the occupation period.

4.1.1. Imposition, Collaboration, or Conspiracy?

The question of whether and to what extent the *Kenpō* should be considered an external imposition goes far beyond academic or theoretical interest; it concerns the long-standing ambitions of conservatives to amend Article 9 and the equally long-standing resistance of the left against any changes that might facilitate Japanese militarization¹⁰. On the one hand, labeling the Constitution as imposed undermines the legitimacy of the document in its current form, thus paving the way for amendments; on the other hand, defending it as an expression of deeply rooted values and aspirations serves to counter arguments for such amendments¹¹.

The imposition narrative has been criticized by numerous scholars and constitutional analysts for intentionally overlooking key differences between the draft and its final version¹². Additionally, it is argued that this conservative and nationalist narrative underestimates the participation of the Japanese side and disregards differences of opinion on both sides. While it is true that the Americans initially wrote the Constitution and later presented it to the Japanese, the process of enacting the document was far from the straightforward process commonly described¹³.

Prior to the introduction of the American draft, political parties, academic movements, and Japanese associations had put forward several proposals. The Supreme Commander of the Allied Powers staff was notably influenced by these proposals, reflecting the significant Japanese influence in the process¹⁴. The various meetings, negotiations, and pacts between the two sides between 1945 and 1946 were not just attempts to ‘Japanize’ the American draft, but crucial steps in transforming it into a fundamentally Japanese document¹⁵.

¹⁰ Thomas U Berger, ‘Ripe for Revision? The Strange Case of Japan’s Unchanging Constitution’ in Bryce Wakefield (ed), *A Time for Change? Japan’s Peace Constitution at 65* (Woodrow Wilson International Center for Scholars 2012).

¹¹ Lawrence Ward Beer and John M Maki, *From Imperial Myth to Democracy: Japan’s Two Constitutions, 1889-2002* (University Press of Colorado 2002).

¹² Ibid [11].

¹³ Lin C-C [2014] (n.3).

¹⁴ Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Hart Pub. 2011).

¹⁵ Lin C-C [2014] (n.3).

The diversity of opinions and interests within Japan at the time of the Constitution's alleged imposition was significant. It is both wrong and misleading to claim without qualification that the Constitution was imposed on Japan, as such claims reflect two main errors. The first error is to confuse the preferences of the Japanese people with those of the Japanese government; in 1945 as at any other time in its history, Japan was not a monolithic entity¹⁶. If the question is whether the Constitution was imposed on the conservative elites who controlled the government at the time of its adoption, the answer is a qualified yes. Qualified from the fact that those elites successfully negotiated and maneuvered to secure several significant successes along the way¹⁷. However, if the question is whether the Constitution was imposed on the Japanese public, the answer is probably no.

The second mistake is to minimize the impact of the public on the Constitution-making process and to consider only the sentiments of the political elites. Political leaders are the most visible participants in any constitution-making process, and this can lead to the temptation to infer that they are the most important, if not the only important, participants¹⁸. This distinction between political elites and the general public creates a false dichotomy between what is politically necessary and what is normatively desirable. The idea that the support of the people for a new constitution is desirable on democratic grounds might seem to imply that such support is merely desirable rather than absolutely necessary¹⁹.

The Japanese public was not simply a passive mass that could be ignored or expected to welcome any constitutional agreement made by politicians behind closed doors. On the contrary, public support protected the Constitution from the hostility of conservative politicians and continued to do so long after the end of the occupation, as evidenced by the absence of formal amendments²⁰. The central premise of this model is based on the fact that the public not only preferred and continues to prefer the new status quo over the old one but also now possesses the power to defend it against unwanted changes²¹.

A second narrative contrary to the one based on imposition is outlined in the book "Partners for Democracy: Crafting the New Japanese State under MacArthur," in which Professors Moore and Robinson argue that the whole process must be explained as a conspiracy between General Douglas MacArthur and Japanese politicians. In fact, both sides wanted to

¹⁶ Law DS [2013] (n.5).

¹⁷ Ibid [16].

¹⁸ Ibid [16].

¹⁹ Ibid [16].

²⁰ Ibid [16].

²¹ Ibid [16].

create the illusion that the Japanese people adopted the Constitution according to their free will²². This would have allowed MacArthur to relieve pressure from the Allied powers and the Far Eastern Commission and defend his authority as supreme commander in Japan. At the same time, the Japanese government could have stabilized its regime through the democratic enactment of a new, more modern constitution²³. Although it is true that the document was strongly American in nature originally, the government was able to cooperate in some of the most crucial changes, like the Ashida Amendment to Article 9-, and the narrative of imposition would have allowed both sides to disguise this conspiracy²⁴.

Additionally, the Japanese government would have had the option of either sanctioning the acceptance of the Constitution by referendum or revising the document without foreign influence one year after its promulgation²⁵. Despite this, the government decided not to implement either option, increasingly confirming the conspiracy theory. In the end, the Constitution had fairly widespread support despite all the controversy. This stood to mean that it did not matter who wrote the document, the important thing was that one of the most fundamental preconditions of constitutions, namely inclusiveness, was met, even if indirectly²⁶.

These scenarios reflect a key element of the longevity of the Japanese Constitution, namely, its adaptability. Despite these seemingly imposed origins, the Constitution, or at least those charged with implementing and interpreting it, has been able to evolve and adapt to changing political and social needs. Indeed, for a written constitution to be successful, success is defined as a combination of longevity, acceptance, and practical relevance that must be at least partially adapted to its environment²⁷.

In Japan, the need for such adaptation has been accentuated by the unusual manner in which *Kenpō* was adopted and by subsequent geopolitical upheavals²⁸. The most obvious way in which constitutional adaptation can occur is through the formal amendment process. However, formal amendment processes tend, by their nature, to be somewhat laborious. Even under the best of circumstances, constitutional revisions happen in hiccups; in the case of Japan, they did not happen at all. In contrast, the Japanese experience offers a clear demonstration of how even relatively significant constitutional evolutions can bypass not only

²² Ray A Moore and Donald L Robinson, “‘Only as a Last Resort’: The Americans Take Over’, *Partners for Democracy* (Oxford University Press 2002).

²³ Moore RA & Robinson DL [2002] (n.22).

²⁴ Lin C-C [2014] (n.3).

²⁵ Moore RA & Robinson DL [2002] (n.22).

²⁶ Lin C-C [2014] (n.3).

²⁷ Law DS [2013] (n.5).

²⁸ Ibid [27].

the formal amendment process but, as the analysis was able to show in the previous chapter, the courts as well²⁹.

4.1.2. Japanese Constitutional Adaptation

The history of Article 9 illustrates one important way in which a written constitution, whether imposed or not, can, over time, be adapted to actual practice and the wants and needs of the present without the need for formal amendments. The first is lack of enforcement; the second is creative interpretation³⁰. For constitutional law scholars, who are accustomed to studying judicial decisions, the notion that the meaning of a constitution can change radically through interpretive processes is not new.

What distinguishes and illuminates the Japanese experience, however, is the degree of judicial disengagement from the interpretation and application of the Constitution³¹. From the outset, the court has effectively abdicated its responsibility to interpret or enforce Article 9 by erecting insurmountable jurisdictional barriers: in fact, as mentioned earlier, Japan's Supreme Court has invalidated a law on constitutional grounds only eight times in its entire history³². Notable examples of the Court's reluctance to actively enforce constitutional limits include the decision on December 16, 2015, which upheld the requirement that married couples must share the same surname despite arguments that it violated constitutional rights, and the judgment on June 4, 2008, where the Court declared a law denying citizenship to children born out of wedlock as unconstitutional, marking a rare instance of intervention³³.

Japan's subsequent participation in peacekeeping operations, such as in Cambodia, East Timor, and South Sudan, further underscored this evolving stance. Japan's participation in peacekeeping operations in Cambodia (1992-1993), East Timor (1999-2002), and South Sudan (2012-2017) marked significant milestones in its post-World War II international engagement³⁴.

²⁹ Law DS [2013] (n.5).

³⁰ Ibid [29].

³¹ Matsui [2011] (n.14).

³² John M Maki, 'Court and Constitution in Japan. Selected Supreme Court Decisions, 1948-60.' (1967) 22(1/2) *Monumenta Nipponica* 228.

³³ In the realm of electoral redistribution, a significant decision on November 20, 2013, acknowledged the unconstitutionality of vote disparity in the 2012 general elections, though it did not invalidate the results. Further decisions on electoral issues were made on November 25, 2020.

³⁴ Yuki Tatsumi and Hiromi Nagata Fujishige, 'Japan's Evolving Role in U.N. Peacekeeping Operations' (Stimson Center).

In Cambodia, Japan deployed Self-Defense Forces (SDF) for the first time in a UN mission, focusing on demining and infrastructure support³⁵. In East Timor, Japan contributed to post-conflict reconstruction and electoral assistance. In South Sudan, Japan's longest and most complex mission involved infrastructure development and humanitarian aid³⁶. These operations demonstrated Japan's growing role in global peacekeeping while navigating the constraints of its pacifist Constitution; and involved logistical support, engineering, and medical assistance, highlighting Japan's commitment to contributing to international peace while adhering to the pacifist principles of its Constitution. Despite these changes, Japan's involvement in peacekeeping operations remains a contentious issue domestically. Debates continue over the extent to which Article 9 allows military engagement abroad, reflecting ongoing tensions between maintaining constitutional pacifism and adapting to new security challenges.

The result is that Article 9 has never meant in practice what it says on paper or, indeed, what it was said to mean at the time of its adoption. Although amendment of Article 9 has long been and still is a central agenda item of the Liberal Democratic Party (LDP) and, recently, of the Democratic Party of Japan (DPJ), it could be argued that formal amendment has become increasingly superfluous as a practical matter³⁷. Non-application and creative interpretation are not, however, the only ways to reconcile a written constitution with actual constitutional practice or bypass formal amendment³⁸.

It is not at all unusual for a constitution to stipulate provisions that persist in form and theory but not in substance or practice. Such provisions remain capable of performing their originally intended functions but no longer do – or probably never did – because changes elsewhere in the political system have rendered them functionally obsolete, irrelevant, or useless³⁹. Provisions of this kind endure formally but are, for all their practical intents and purposes, dead: for this reason, the literature tends to refer to them as “zombie provisions.”

Japan has its fair share of zombie dispositions. A little-known but interesting example, illustrated by David Law, concerns the practice of *hanken koryu*, or the routine exchange of people on a temporary basis between the judiciary and the Ministry of Justice. The Constitution

³⁵ William L Brooks, ‘The Self-Defense Forces and Postwar Politics in Japan’ (2019) 32(2) Contemporary Japan 262.

³⁶ Hiromi Nagata Fujishige, Yuji Uesugi and Tomoaki Honda, ‘South Sudan: The SDF and “Protection of Civilians”’, *Japan's Peacekeeping at a Crossroads* (Springer International Publishing 2022).

³⁷ Christopher W Hughes, ‘Japan, Constitutional Reform, and Remilitarization’ in Bryce Wakefield (ed), *A Time for Change? Japan's “Peace” Constitution at 65* (Woodrow Wilson International Center for Scholars 2012).

³⁸ Law DS [2013] (n.5).

³⁹ Ibid [38].

provides strong guarantees of judicial independence comparable to those in the U.S. Constitution, but the reality is very different. The Japanese judiciary has become, in the words of a former Supreme Court member, “just another bureaucratic organization.”⁴⁰

Article 80 stipulates that judges are appointed by the Council of Ministers and “shall hold office for a period of ten years with the possibility of renewal,”⁴¹ subject to a mandatory retirement age. In other words, once appointed as a judge, a prosecutor who decides he or she prefers such a position cannot be constitutionally required to return to his or her previous job. A Japanese district court judge explained that the temporary assignment of prosecutors to judicial posts is reconciled with Article 80 through the practice that prosecutors are required to resign from their judicial posts upon request and invariably comply⁴². When asked by Law why prosecutors agree to such a request, despite the fact that Article 80 seems to give them the right to refuse, the often-expressed idea that Japanese culture emphasizes *wa* or harmony, was invoked, and it was stated without further detail that “judges and prosecutors know that it would cause problems to refuse to resign in such a situation.”⁴³

There is virtually nothing to prevent political actors from developing expectations and coordinating behavior in such a way that formal constitutional rules become virtually irrelevant⁴⁴. Furthermore, it can be argued that *Kenpō*’s longevity is partly due to features of the Japanese language and culture that allow for various interpretations. Concepts such as “democracy,” “justice,” and “rule of law” are widely accepted because they are open to interpretation⁴⁵. Similarly, a constitution that can mean different things to different people is less likely to provoke strong opposition. While the Japanese language may not be inherently imprecise, intentional vagueness and ambiguity are typical in its actual usage⁴⁶. American editors have expressed frustration with the way their Japanese counterparts use ambiguous ideographs. It has also been suggested that Japanese legal and linguistic culture tends to avoid literal interpretations⁴⁷.

⁴⁰ Law DS [2013] (n.5).

⁴¹ The Constitution of Japan (日本国憲法 *Nihon-koku kenpō*) [1947] Chapter VI.

⁴² Law DS [2013] (n.5).

⁴³ Ibid [42].

⁴⁴ Ibid [42].

⁴⁵ David Collier, Fernando Daniel Hidalgo and Andra Olivia Maciuceanu, ‘Essentially Contested Concepts: Debates and Applications’ (2006) 11(3) *Journal of Political Ideologies* 211.

⁴⁶ Edwin O Reischauer, *The Japanese Today: Change and Continuity* (Belknap Press of Harvard University Press 1995) 381.

⁴⁷ Charles L Kades, ‘The American Role in Revising Japan’s Imperial Constitution’ (1989) 104(2) *Political Science Quarterly* 255.

The idea that Japanese legal culture can treat constitutional principles and language as malleable seems, at least superficially, at odds with the conception of civil law of adjudication as a largely technical task. It is, however, consistent with the idea that Japan is a “non-axial society,” which means that the notion of absolute or transcendental truth is largely absent from Japanese society and thought⁴⁸. The absence of a higher sense of truth and, more specifically, the substitution of status and consensus for truth as normative and evaluative criteria presumably have legal and political implications, one of which may be a constitutional culture that does not grant scriptural status to the formal Constitution or treat the principles set forth in the document as categorical commands⁴⁹.

In addition to this, it is crucial to consider that the adaptability of a constitution is also related to its flexibility and ability to respond to social and political changes. In Japan, the adaptation of the Constitution has allowed the country to navigate through various geopolitical and domestic challenges while maintaining relative stability and continuity⁵⁰. This process of adaptation, although not always formal, ensured that the Constitution remained relevant and accepted by the population, thus contributing to its longevity.

In conclusion, the Japanese experience shows that a constitution can evolve and adapt over time without the need for formal amendments through creative interpretation and non-application of specific provisions⁵¹. This approach has enabled Japan to maintain a constitution that, while originally envisioned as imposed, has become a living and dynamic document capable of responding to the needs of an ever-changing society.

4.1.3. Ongoing U.S. Influence Beyond Constitutional Transplant and “Imposition”

The continuing influence of the United States on Japan goes beyond simply transplanting and imposing the 1947 Constitution. This influence extends to various aspects of Japanese governance, including national security policies, foreign relations, and domestic policy decisions. The U.S., through bilateral agreements and strategic cooperation, has maintained a significant role in shaping Japan’s constitutional environment, influencing not only its political stability but also discussions on possible constitutional revision⁵².

⁴⁸ David S Law, ‘Why Has Judicial Review Failed in Japan?’ (2011) 88 Washington University Law Review 1425.

⁴⁹ Law DS [2013] (n.5).

⁵⁰ Tokujin Matsudaira, ‘Japan: A Case Against the Amendment Politics?’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023) 176.

⁵¹ Law DS [2013] (n.5).

⁵² Adam P Liff, ‘Japan’s Defense Policy: Abe the Evolutionary’ (2015) 38(2) The Washington Quarterly 79.

It is surprisingly little known that the United States has been a driving force for Constitutional change since the new Constitution was enacted. As the shadow of the Cold War deepened, within SCAP, the anti-communist faction represented by the G-2 began to prevail over the New Dealers, who had led the drafting of the Constitution⁵³. As early as February 1948, SCAP urged the Japanese government to consider revising Article 9⁵⁴.

Moreover, during his first visit to Japan in 1954, then Vice President Richard Nixon told Japanese officials that the U.S. disarmament of Japan in 1946 had been a “mistake”⁵⁵. At a minimum, the U.S. believed that the Japan-U.S. Security Treaty, revised in 1960, was in violation of Article 9 and that having signed it, Japan would have no choice but to amend the Constitution⁵⁶. However, the Japanese government accepted the normalization of the presence of U.S. forces in Japan and the de facto existence of the Self-Defense Forces as a strategic reserve force for the U.S. military in East Asia without amending the Constitution⁵⁷.

Indeed, since 1997, the United States has succeeded in getting the Japanese government to agree to revise the Japan-U.S. Defense Cooperation Guidelines to involve Japan in any military crisis that might occur on the Korean Peninsula and in the Taiwan Strait⁵⁸. The Guidelines are not legally binding, but Japan has enacted special statutes to implement them. Prior to the revision of the Guidelines in 2015, new laws were enacted in 2013 to establish the National Security Council (NSC) and to designate information on military and diplomatic matters as state secrets⁵⁹. The former, in particular, is a Japanese version of the U.S. NSA of 1947 that concentrates national security power on the prime minister with the NSC’s council of members independent of the Cabinet⁶⁰.

The Japanese Supreme Court’s position on the Japan-U.S. Security Treaty is a significant factor in this analysis. It highlights the problem raised by John Dower, an American historian, that postwar Japan was granted only ‘subordinate independence’ by the United States⁶¹. In 1959, before overturning a lower court ruling declaring the Japan-U.S. Security Treaty in violation of Article 9, Kōtarō Tanaka, then Chief Justice of the Supreme Court, held

⁵³ Matsudaira T [2023] (n.50).

⁵⁴ Koseki Shoichi, *Taibei Jūzoku no Kōzō (The Structure of Dependence on the United States)* (Misuzu Shobo 2020).

⁵⁵ Michael Schaller, *Altered States: The United States and Japan Since the Occupation* (Oxford University Press 1997).

⁵⁶ Matsudaira T [2023] (n.50).

⁵⁷ Koseki S [2020] (n.54).

⁵⁸ Ibid [57].

⁵⁹ Ibid [57].

⁶⁰ Ibid [57].

⁶¹ John Dower, ‘The San Francisco System: Past, Present, Future in U.S.-Japan-China Relations’ (2014) 12(2) *The Asia-Pacific Journal* 1.

a secret meeting with the U.S. ambassador in Tokyo and promised that there would be no situation that would embarrass the United States⁶². This interaction and the subsequent decision of the Court to maintain the treaty, unless “apparently and unequivocally unconstitutional and invalid,” raises serious concerns about the Court’s independence and its role in upholding the Constitution⁶³.

How to explain this contradiction? Political scientist Satoshi Shirai argues that the United States, in a significant historical shift, replaced the emperor as the new *kokutai* after Japan’s defeat⁶⁴. According to Shirai, the American victory turned Japan into a vassal state; Japanese politicians serve the United States as collaborators, just as they once served the emperor as advisors. Shirai then points to the postwar collapse of the *kokutai* from the early 1990s to the present. In this time of crisis, right-wing movements that thrived under the U.S.-Japan alliance seem to further idolize Americans as their current emperor⁶⁵.

Shirai’s argument may seem too radical. However, it is significant in that it clarifies a dual system of Japanese norms, which has been a problem for some Japanese scholars. The prewar *kokutai*, which ordinary people accepted as a ‘moral and spiritual organization,’ coexisted with limited constitutionalism but eventually transformed to fit wartime fascism⁶⁶. Similarly, popular support for Article 9 hides the reality of Japan’s remilitarization under the Japan-US security regime, constituting a state of exception. At the same time, however, the very existence of the invisible Constitution exerts a force to change the visible Constitution to fit it⁶⁷.

The persistent discrepancy between Japan’s elite and popular sentiment on defense issues suggests that politics may hinder Japan’s SDF contributions, which could emerge as divisive issues in future elections⁶⁸. These issues will remain political. Both countries’ interests and regional and global peace and stability are most effectively served by a strong alliance and politically stable and mutually beneficial relations with Japan’s neighbors - especially China and Korea⁶⁹.

⁶² Kyodo News, ‘U.S. coerced court in ‘59 base case’ (*Tokyo Times*, 1 May 2008) <www.japantimes.co.jp/news/2008/05/01/national/history/u-s-coerced-court-in-59-base-case/> accessed 22 July 2024.

⁶³ Matsudaira T [2023] (n.50).

⁶⁴ Satoshi Shirai, *Kokutai-ron (On Kokutai)* (Shueisha 2018).

⁶⁵ Ibid [64].

⁶⁶ Matsudaira T [2023] (n.50).

⁶⁷ Ibid [66]

⁶⁸ Liff AP [2015] (n.52).

⁶⁹ Ibid [68].

The challenge for Washington and Tokyo is to strengthen alliance cooperation and deterrence without exacerbating regional tensions or undermining popular support within Japan for further reform. Proactive diplomatic engagement and transparency are crucial⁷⁰. Allies must guard against gaps in expectations that could undermine the alliance in a crisis. U.S. leaders should understand the nuances regarding significant but limited changes and entrenched domestic sensitivities in Japan⁷¹. They should not exaggerate the changes or assume that they are irreversible.

Essentially, Japan has cultivated its own constitutional identity, but the persistent presence and involvement of the United States have consistently influenced and, at times, restricted the potential for constitutional revision. This enduring and multifaceted influence has significantly contributed to Japan's intricate and often deeply divided internal dialogue. More than seventy years have elapsed since the end of the occupation, yet the U.S. presence continues to exert a lasting and multifaceted impact, which remains a central element in Japan's ongoing discourse over its constitutional sovereignty, adaptability, and political and judicial approach.

4.2. Eternal Threads: Article 96 and Constitutional Longevity

Having discussed the misconception of American imposition of the Constitution on Japan and having identified the Constitution's incredible adaptability as the first cause of durability and resilience, it is essential to focus on other important key elements in the longevity of the Constitution, namely the amendment rules and the so-called "eternity clauses."

Amendment rules are the bedrock of constitutionalism, with no aspect of a constitution being more crucial than the rules governing its potential amendments⁷². Beyond distinguishing constitutional laws from ordinary laws, the most vital role of amendment rules is their corrective function. They not only safeguard the text of the Constitution but also empower political actors to revise the text when time and experience reveal flaws in its design and new challenges emerge in constitutional continuity⁷³.

⁷⁰ Liff AP [2015] (n.52).

⁷¹ Ibid [70].

⁷² Richard Albert, 'Amending Constitutional Amendment Rules' (2015) 13(3) *International Journal of Constitutional Law* 655.

⁷³ Brannon P Denning and John R Vile, 'The Relevance of Constitutional Amendments: A Response to David Strauss' (2002) 77 *Tulane Law Review* 247.

Hence, in general, rules for amending the Constitution should not be too rigid as they may hinder the proper evolution of the constitutional text. Nonetheless, they should be distinct from regular amendments⁷⁴. The primary and most essential objective should be safeguarding the constitutional text from political actors seeking to misuse formal institutions to achieve undemocratic aims⁷⁵. Striking this balance, although often challenging and complex, is vital. It frequently involves avoiding the two extremes of rendering a constitution unamendable or making amendment provisions entirely meaningless⁷⁶.

Amendment rules are generally entrenched in three ways: ordinarily, specially, and absolutely. Most commonly, they are entrenched according to the ordinary amendment rules and consequently enjoy no greater protection than any other constitutional provision⁷⁷. Surprisingly, the amendment rules in Japan reflect this standard design. To date, a new current of unconstitutional constitutional amendments is emerging that not only undermine the focal point of democratic constitutionalism but also the entire judicial system, such as those proposed by conservative revisionist movements in the Japanese government⁷⁸.

These developments cannot deny the potential usefulness of unamendability as a palliative against the erosion of democratic constitutionalism, but they do require a greater awareness of the delicate institutional dynamics that determine how courts operationalize unamendability over time⁷⁹. While eternity clauses and doctrines of implied inadmissibility can serve a proper defensive function, we should not look away from their “dark side,” whether textually enshrining constitutional exclusion and impeding democratic progress or as a tool of unbridled judicial self-emancipation⁸⁰.

4.2.1. Amendment Rules and The Issue of Eternity Clauses

Thus, amendment rules should not be immune from amendments themselves but should enjoy “special” protection other than ordinary protection, as suggested by Richard Albert. Yet, to date, amendment rules do not adequately protect themselves against these various attacks⁸¹. Indeed, this flawed design of constitutions, which oscillates between absolute unamendability

⁷⁴ Albert R [2015] (n.72).

⁷⁵ Ibid [74].

⁷⁶ Albert R [2015] (n.72).

⁷⁷ Ibid [76].

⁷⁸ Ibid [76].

⁷⁹ Silvia Suteu, ‘Eternity Clauses as Tools for Exclusionary Constitutional Projects’, *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (Routledge 2021).

⁸⁰ Ibid [79].

⁸¹ Albert R [2015] (n.72).

and weak protection, fails to insulate amendment rules against circumvention and political majorities.

The three implicit limitations related to constitutional amendments — the distinction between amendment and revision, judicial constitutional review, and unwritten unamendability — each present specific problems⁸². Unwritten unamendability and the distinction between amendment and revision require enforcement by the same political actors who might challenge them. Unless expressly authorized, judicial constitutional review can be perceived as democratically illegitimate and impractical in constitutional democracies, such as Japan, with conservative courts⁸³.

Recently, there has been a growing consideration, if not complete acceptance, by the courts of unconstitutional constitutional amendment doctrines⁸⁴. These doctrines, whether in the form of enforcing a formal constitutional eternity clause or defending implicitly immutable basic principles and structures, are based on the belief that unamendability can protect against the abuse of amendment processes⁸⁵. However, it's crucial to recognize that unamendability itself can be particularly susceptible to unconstitutional abuse, necessitating a cautious and vigilant approach.

Constitutional rigidity mechanisms, in general, ultimately contribute to the complete isolation of political elites from social realities and democratic needs, slowing or altogether preventing the democratic evolution that any system needs instead of protecting against the erosion of the system itself⁸⁶. Especially in contexts where the system is particularly divided, such as in cases of fragility or post-conflict situations, non-issue is more likely to fall back on abuse. The paradox, as illustrated by Silvia Suteu, lies precisely in the fact that in the very contexts in which unamendability is most needed, it is also most vulnerable and most likely to act as a cover for a democratic erosion coming from the system itself⁸⁷.

While amendment rules may be written, their effectiveness is contingent on their perceived legitimacy. They must be seen as legitimate constraints, worthy of public acceptance, and thus genuinely binding on political actors⁸⁸. Their legitimacy and binding force are rooted in social and political support, which in turn enhances the document's instrumental value as a

⁸² Albert R [2015] (n.72).

⁸³ Ibid [82].

⁸⁴ Suteu [2021] (n.79).

⁸⁵ Richard Albert, 'Constitutional Amendment and Dismemberment' (2017) 43 The Yale Journal of International Law 1.

⁸⁶ Melissa Schwartzberg, *Democracy and Legal Change* (Cambridge University Press 2009).

⁸⁷ Silvia Suteu, 'Eternity Clauses in Post-Conflict and Post-Authoritarian Constitution-Making: Promise and Limits' (2017) 6(1) Global Constitutionalism 63.

⁸⁸ Albert R [2015] (n.72).

safeguard for democracy⁸⁹. Amendment rules can successfully preside over the “rules of the political game” only if they are not allowed to become “the political game” themselves. Therefore, their protection must be perceived as a collective responsibility⁹⁰.

It is of utmost importance to ensure that rules for amending the constitution and eternity clauses are crafted to strike a balance. This balance should safeguard the Constitution from misuse while accommodating changes in society and democracy. The legitimacy and effectiveness of these rules depend on their recognition and backing from political institutions and civil society. To achieve this balance between flexibility and rigidity, constitutions allow for different types of revisions, usually classified as rationalization changes, modernization processes, and ideological or philosophical changes⁹¹.

The first category refers to revisions aimed at rationalization. These amendments correct power imbalances or improper political procedures that have emerged since the original constitutional provision was created⁹². The most well-known example of this type of amendment is the French system, where lawmakers revised the constitutional provision regarding the presidential term of office to prevent cohabitation situations. The amendment reduced the term of office from seven to five years, aligning it with the term of legislative office⁹³.

The second category concerns implementations of new policy approaches, where amendments generally modernize administrative frameworks to align government with the needs of the changing times⁹⁴. Also generally included in this second category are Constitutional reforms, through which Constitutional courts were created in the early twentieth century. After World War II, many European countries began establishing constitutional court systems, followed by South Korea and Belgium, which established them through Constitutional amendment⁹⁵.

In recent years, many constitutional revisions have centered on philosophical principles, serving as ideological elements that can bestow a constitution with its unique character⁹⁶. Take, for example, the recent amendment to Article 34 of the French Constitution, enacted in early 2024, which introduced a clause explicitly safeguarding the right to abortion.

⁸⁹ Mats Lundström, ‘The Moral Standing of Democracy’, *Why Constitutions Matter* (Routledge 2017).

⁹⁰ Daryl J Levinson, ‘Parchment and Politics: The Positive Puzzle of Constitutional Commitment’ (2011) 657 *Harvard Law Review* 745.

⁹¹ Inoue T [2016] (n.2).

⁹² *Ibid* [91].

⁹³ *Ibid* [91].

⁹⁴ *Ibid* [91].

⁹⁵ *Ibid* [91].

⁹⁶ *Ibid* [91].

This amendment embodies fundamental values and human rights. By incorporating such a provision into the constitutional text, not only is the legislative framework modernized, but a clear and distinctive ideological principle is also affirmed. This decision positions France in alignment with a progressive and humanitarian vision.

In these contexts, Japan's consistently unchanged constitutional framework differs profoundly from the conditions of the democratic nations by which the system was modeled and continues to be inspired⁹⁷. Indeed, Germany has revised Basic Law as many as sixty times since it was enacted in 1949, France twenty-five times since 1958, and the U.S. Constitution has been amended since 1788 eighteen times, six since the end of World War II. Of course, it is vital to consider not just the number of revisions but also the substance of those revisions and how they have contributed to the evolution of the system as a whole⁹⁸.

In each of these countries, the evolution of constitutionalism has not stopped with the enactment of the Constitution; on the contrary, legislators have continuously sought to create more prosperous and more effective constitutional structures, reflecting ongoing political and social changes through provisions amended on new approaches and principles. This trend abroad is also particularly relevant to Japan, where political principles are an area of great interest. Although Japan's commitment to pacifism remains central to its political identity, it is possible for lawmakers to broaden their perspective and consider constitutional revisions that address "responsibility for future generations" or the "principle of balanced finance" - two concepts that could help the country navigate pension problems, financial instability, and other issues plaguing Japanese society today⁹⁹.

Although Japan's current political structure supports institutional changes and offers some administrative flexibility in a changing social environment, it often deviates from the fundamental doctrines of constitutionalism that limit power. To strengthen the regulatory power of the Japanese Constitution, lawmakers must incorporate more detailed provisions¹⁰⁰. This would involve implementing constitutional reforms to enable the Constitution to function more fluidly as a legal instrument. It is of utmost importance for Japanese lawmakers to understand the urgency of updating and strengthening their constitutions to address current and future challenges¹⁰¹. However, this discussion must take into account the significant impact of Article 96 of the Japanese Constitution. This article, which governs the amendment process

⁹⁷ Inoue T [2016] (n.2).

⁹⁸ Ibid [97].

⁹⁹ Ibid [97].

¹⁰⁰ Ibid [97].

¹⁰¹ Ibid [97].

and appears to be unamendable, presents a considerable obstacle to constitutional reform. It is essential to thoroughly examine how Article 96 hinders Japan's ability to adapt and modernize its constitution and to identify the necessary changes to overcome these obstacles and enable a coherent and flexible evolution of the constitutional framework.

4.2.2. Article 96: Written Unamendability?

Modern Japanese constitutional dynamics offer an interesting case study to test the theory that amendment rules should be protected against ordinary amendments. Article 96 of the Japanese Constitution provides three steps for an amendment: a qualified majority vote in both houses of the national parliament to propose the amendment, a majority vote in a referendum to ratify the proposal, and final promulgation by the Emperor¹⁰². Although Japan's Constitution is considered only marginally challenging to amend, it has never been amended since 1946, despite the fact that reformers have long called for an independent Constitution to replace the "American" document imposed by the postwar Allied occupation¹⁰³. Recently, political actors have intensified calls for constitutional change, notably to amend both the Constitution's amendment rules and its Pacifism Clause.

First, let's consider the inevitability of amendments. Democratic constitutions sometimes include provisions that cannot be amended, effectively protecting them from any changes¹⁰⁴. Another way to safeguard amendment rules is to set higher thresholds for making amendments. Additionally, democratic constitutions may have more than one formal amendment procedure, each applying to specific constitutional provisions or principles, and disabled with respect to others¹⁰⁵.

However, even in truly democratic regimes, escalation offers a weak defense against temporary but strong majorities forming behind political movements¹⁰⁶. Temporary majorities may be able to meet the high thresholds required to amend amendment rules, but the popular legitimacy of strong majorities that quickly disintegrate must be questioned¹⁰⁷. These temporary supermajorities are not durable enough to legitimately express the community's

¹⁰² The Constitution of Japan [1947], Chapter IX, Art. 96.

¹⁰³ Robert E Ward, 'The Origins of the Present Japanese Constitution' (1956) 50(4) American Political Science Review 980.

¹⁰⁴ Albert R [2015] (n.72).

¹⁰⁵ Ibid [104].

¹⁰⁶ Kim Lane Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis' (2014) 51 Transnational Law and Contemporary Problems 60.

¹⁰⁷ Albert R [2015] (n.72).

considered judgment. Only more permanent supermajorities, reflecting the principle of intertemporality and lasting for several years, can qualify as legitimately representing the will of the community¹⁰⁸.

In Japan, the Constitution establishes only one amendment rule, making the Japanese amendment rules amendable by ordinary amendment. Even if the Japanese amendment rules were amended to make them formally unamendable under the standard design of unamendability, they would not actually be unamendable, given their susceptibility to double amendment¹⁰⁹. Even if a higher threshold protected Japanese amendment rules, as it is currently in Canada or South Africa, they would be susceptible to amendment either through formal democratic control or by temporary majorities¹¹⁰. These threats to constitutional democracy are particularly problematic in Japan in light of the dissonance between parliamentarians and the public over the Pacifism Clause: only 50 percent of voters but as many as 89 percent of parliamentarians favor its amendment¹¹¹.

In Japan, political actors opposed to the amendment of Article 96 or even the constitutional values in Article 9 could argue that these changes amount to a revision and are therefore not feasible by ordinary amendment but only by a more deliberative or representative form of democratic approval¹¹². They could also argue that the amendment rules in Article 96 cannot be used to amend either Article 96 or 9 because they apply only to amendments, not revisions. However, these political actors would be forced to acknowledge that although Articles 96 or 9 are not amendable, they are fully amendable, if only through more rigorous procedures¹¹³.

This is where the theory of amendment and revision collides with the politics of constitutional law. Although political actors may have valid reasons, anchored in the theoretical distinction between amendment and revision, for opposing efforts to amend the amendment rules, those reasons are valid only to the extent that they are considered authoritative in the

¹⁰⁸ Albert R [2015] (n.72).

¹⁰⁹ Ibid [108].

¹¹⁰ Ibid [108].

¹¹¹ Linda Seig, 'Japan Voters Split on Revising Pacifist Constitution: Poll' (*Reuters*, 27 January 2013) <www.reuters.com/article/2013/01/28/us-japan-politics-constitution-idUSBRE90R01M20130128/> accessed 22 July 2024.

¹¹² Since there is no distinction, substantive nor rhetorical, between amendment and revision, although political actors refer to revision when discussing changes to article 9 and 96, such distinction becomes irrelevant. They are acting in accordance with the amendment rules enshrined in article 96, intending to follow the process for ordinary amendments.

¹¹³ Albert R [2015] (n.72).

political arena and where political opponents recognize the legitimacy of those reasons or acquiesce in them¹¹⁴.

The fact that this distinction is not included in the text of the Japanese Constitution weakens it, reducing it to a matter of constitutional politics. In Japan, political actors face similar contestability. The strength of the argument that amending Articles 96 or 9 amounts to a revision, not an amendment, would depend on how political actors and citizens evaluate the change¹¹⁵. Absent a textual signal to the contrary, what Jason Mazzone calls the “practicalities” of the theoretical argument about amendment versus revision threaten to frustrate efforts to identify and impose limits on amendments¹¹⁶.

Identifying and imposing these limits falls to the political process and depends on the same actors who would work to amend a constitutional provision, principle, or rule, including the amendment rules themselves, which should be protected against ordinary amendments. Without a textual limitation distinguishing what is subject to amendment from what is subject to revision, it should not be assumed that political actors’ intent on using the modalities of a narrow amendment to bring about a broader revision will self-regulate, even in constitutional democracies¹¹⁷.

Some constitutional scholars argue that protected provisions are implicitly unamendable. Amar points out that protected provisions can be amended simply by first amending the protective clause and then amending the previously unamendable provision¹¹⁸. Others argue that there is no need to follow a formalistic “double amendment” process: a single amendment can accomplish both. Albert similarly proposes a “mutuality rule,” based on the principles of symmetry and legal continuity, to act as a counterweight against any constitutional dismantling. Under this rule, any amendment, or the Constitution itself, can be legally repealed “using only at least the same procedure that was used to ratify it.”¹¹⁹

There is also theoretical support for amendments that exceed the scope of Article V, based on the history of the Constitutional Convention, which exceeded its purpose of amending the Articles of Confederation and instead proposed an entirely new constitution¹²⁰. This

¹¹⁴ Albert R [2015] (n.72).

¹¹⁵ Ibid [114].

¹¹⁶ Jason Mazzone, ‘Unamendments’ (2005) 1747 Iowa Law Review 1836.

¹¹⁷ Albert R [2015] (n.72).

¹¹⁸ Akhil Reed Amar, ‘The Consent of the Governed: Constitutional Amendment Outside Article V’ (1994) 94(2) Columbia Law Review 457.

¹¹⁹ Albert R [2017] (n.85).

¹²⁰ Richard Albert, ‘America’s Unamendable Constitution’ (*Cato Unbound: A Journal of Debate*, 11 December 2015) <www.cato-unbound.org/2015/12/11/richard-albert/americas-unamendable-constitution/> accessed 22 July 2024.

historical precedent provides valuable insight into the potential for amendments to go beyond their intended scope. A similar historical argument exists in Japan, as the 1946 Constitution far exceeded the scope of what an amendment could theoretically accomplish under the Meiji Constitution¹²¹.

If a completely new constitution can be adopted under the guise of an amendment, do the protective provisions truly hold significance?¹²² Once more, Japanese courts are expected to adopt a balanced approach. This balanced approach, which acknowledges the potential for change while respecting the importance of protective provisions, should provide reassurance in the face of potential challenges to the Constitution's integrity¹²³.

Suppose a conflict is unavoidable, and applying the doctrine of implied repeal would produce results that are “contrary” to the Constitution under Article 98. In that case, the Supreme Court may be compelled to reject such an amendment¹²⁴. The presumption against the implied repeal of constitutional provisions would be more assertive and possibly insurmountable if the conflicting language is part of the core principles of the 1946 Constitution rooted in Chapter X¹²⁵.

To paraphrase, Article 99 would require the court to presume that a challenged constitutional amendment is intended to “respect and uphold” the inviolability of “fundamental human rights” without compromising the Constitution's status as the “supreme law of the nation”: any irreconcilable conflict would thus be unintended and should be avoided at all costs¹²⁶.

For instance, if the LDP aims to diminish individual rights in Chapter III, which are implicitly protected by Article 97, it would first need to amend the entrenchment provision. Similarly, to alter many of the provisions regarding the Emperor in Chapter I, Articles 99 and potentially 98 would need to be amended to eliminate support for the core principle of popular sovereignty explicitly¹²⁷. In cases where the conflict is less direct, the Court would still be justified in avoiding any implied repeal of other provisions without clear and undeniable public approval¹²⁸.

¹²¹ Sterling AN [2019] (n.1).

¹²² Matsui [2011] (n.14).

¹²³ Sterling AN [2019] (n.1).

¹²⁴ Ibid [123].

¹²⁵ Ibid [123].

¹²⁶ Ibid [123].

¹²⁷ Ibid [123].

¹²⁸ Ibid [123].

4.2.3. Possible Limits on Amending the Amendment Rule Itself

Having outlined the implicit limitations of Article 96, the next question concerns the implications for attempts to change the amendment process itself. More specifically, what textual arguments in the Constitution might prevent the LDP from lowering the voting threshold of Article 96 and then removing the other constraints of Chapter X with that lower threshold? The two-thirds vote requirement is significant because a contextual analysis shows that this supermajority requirement is used elsewhere in the 1947 Constitution. This is in contrast to the Meiji Constitution, which required a supermajority only for the amendment process and did not allow any bill to be reconsidered if either House rejected it in the same session¹²⁹.

These supermajority provisions protect a value not recognized in the Meiji Constitution: popular sovereignty. This value forms the core of Articles 98 and 99. Lowering the threshold for amendments to a simple majority would directly undermine the Constitution's supremacy. If the Constitution is the "supreme law," logically, it cannot be easier to amend than ordinary legislation; otherwise, it loses its supremacy¹³⁰.

Any action that requires a supermajority vote would hold a higher status than a simple amendment. For instance, would a bill passed despite the objections of the House of Councilors under Article 59 be considered superior to an amendment? Given that these articles establish supermajority barriers that contradict the LDP's proposed version of Article 96, the Court would need to decide whether to implicitly repeal Article 98, thus undermining the entire Constitutional structure, or repeal the other supermajority requirements¹³¹. As these supermajority requirements are closely tied to popular sovereignty, lowering the threshold for amendment could be interpreted as a move towards a return to authoritarian rule¹³².

These concerns are not purely theoretical. They have been recognized and expressed by Japanese bar associations and other groups, which adds weight to the opposition to the amendment of Article 96¹³³. Reducing the voting threshold for amendments under Article 96 would create a conflict with the basic standards of Articles 98 and 99, justifying the Court in declaring that the proposed amendment exceeded the implicit limits placed on Article 96¹³⁴.

¹²⁹ The Constitution of the Empire of Japan (大日本帝国憲法 *Dai-Nippon Teikoku Kenpō*) [1889].

¹³⁰ Sterling AN [2019] (n.1).

¹³¹ Ibid [130].

¹³² Ward [1956] (n.104).

¹³³ Sterling AN [2019] (n.1).

¹³⁴ Ibid [133].

Fundamentally, it is challenging to imagine an amendment to Article 96 that would pass constitutional muster. One possibility is that the Court might interpret such an amendment not as abolishing the existing amendment process but as creating a new process limited to technical corrections and minor changes¹³⁵.

In summary, in order to amend Article 96, the LDP must navigate a way around Articles 98 and 99 without dismantling the entire constitutional structure. This does not mean that Article 96 is entirely unamendable. If the Diet explicitly aims to nullify Articles 98 and 99, and the public consents to such nullification, those limitations should cease to exist, thereby allowing for the amendment of Article 96¹³⁶. The importance of public consent in this process should not be underestimated. However, this would likely necessitate a “total amendment,” involving the repeal and replacement of the entire Constitution, a process that appears impractical given the historical difficulty of passing any amendment to the 1946 Constitution. The LDP’s focus on amending Article 96 is due to the difficulty of attempting a comprehensive constitutional revision with the supermajority barrier intact. Under the current structural understanding, a “piecemeal” approach to first amend Article 96 and then easily dismantle the rest of the Constitution is essentially precluded¹³⁷.

Given the circumstances in Japan, where only a minority supports amending the Constitution and the public has given supermajority control in both houses to a revisionist party, any amendment in the near future seems unlikely¹³⁸. Although the political process alone may not protect the people’s interests, Article 96 requires the public to have a direct say on any proposed revision. Textual and structural arguments have their limitations, and this commentary only attempts to establish a text-based understanding of the implicit limitations of Article 96¹³⁹. Ultimately, the concept of popular sovereignty implies that the public must decide, and given the disconnect between the LDP’s ambitions and public opinion on the need for constitutional revision, it is hoped that this debate will remain hypothetical¹⁴⁰.

¹³⁵ Sterling AN [2019] (n.1).

¹³⁶ Ibid [135].

¹³⁷ Ibid [135].

¹³⁸ Ibid [135].

¹³⁹ Albert R [2015] (n.120).

¹⁴⁰ Sterling AN [2019] (n.1).

4.2.4. *Beyond the Process: Tacit Limits on Amending the Constitution*

In addition to the technical process of amendment, historical practice can be beneficial in explaining other potential limitations to the process itself. While many contemporary Constitutions either place explicit limits on the purposes of amendments or distinguish precisely between simple amendments and large-scale revisions, the 1947 Constitution presents none of these distinctions or definitions. On the contrary, a purely textual analysis of Article 96 seems to support that the restraint of the same procedure was intended to apply to all types of amendments, whether total revisions or minor amendments¹⁴¹.

It is relatively easy to explain this deficiency when taking into consideration the primary model to which the Constitution was fashioned after, the U.S. Constitution. In fact, Article V does not provide a clear distinction between amendment and revision. However, earlier amendments can strongly influence the format and content of various amendments. For instance, the Bill of Rights – the first ten amendments – served as the primary model for later amendments over time¹⁴².

In Japan's historical context, the only amendment to the Meiji Constitution was the creation of the Constitution of 1946, which was adopted and ratified according to the amendment process under Article 73 of the Meiji Constitution¹⁴³, proving the hypothesis of historical practice. Amendments are not something the Japanese tradition is accustomed to: there are no precedents to guide future processes¹⁴⁴.

However, there is a theory that does not support this view of the 1947 Constitution as a revision of the Meiji Constitution but rather a new Constitution with new principles¹⁴⁵. The idea that Japan made a complete break with its original Constitution is at the heart of the “August Revolution doctrine,” a theory advanced by Constitutional jurist Toshiyoshi Miyazawa. Miyazawa argues that it was legally impossible for the revision of the Meiji Constitution to abandon the principle of imperial sovereignty and base the Constitution on popular sovereignty¹⁴⁶. This impossibility breaks the legal continuity between the Meiji Constitution and the Constitution of Japan. Instead of revising the Meiji Constitution, this

¹⁴¹ Sterling AN [2019] (n.1).

¹⁴² Ibid [141].

¹⁴³ When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial Order. 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.

¹⁴⁴ Albert R [2015] (n.72).

¹⁴⁵ Sterling AN [2019] (n.1).

¹⁴⁶ Matsui [2011] (n.14).

doctrine asserts that the 1947 document is a new document with new principles and that the government used the revision process only for convenience¹⁴⁷.

The August Revolution doctrine points to Japan's acceptance of the Potsdam Declaration in August 1945 as the pivotal moment. Paragraph 12 of the declaration specifies that the Allied forces would withdraw from Japan "as soon as these objectives are reached, and a responsible and peacefully inclined government is established in accordance with the freely expressed will of the Japanese people."¹⁴⁸ By agreeing to the phrase "in accordance with the freely expressed will of the Japanese people," the country effectively shifted sovereignty from the emperor to the people¹⁴⁹.

Because the Constitution developed following the acceptance of the Potsdam Declaration, Miyazawa argues that it was already implicitly grounded in the popular sovereignty of the Japanese people. The declaration represented a legal revolution that redefined the Constitution's fundamental principles. So, the Constitution of Japan is a new document based on an entirely new fundamental principle¹⁵⁰.

Therefore, this doctrine further limits possible Constitutional revisions, firmly anchored in one of the most powerful principles of modern democracy: popular sovereignty. Considering that it is a cornerstone of the Constitution and the differences in opinions and perceptions between the government and the people, outlined above, it is unlikely that any referendum would lead to actual changes in the Constitution¹⁵¹. Incidentally, Japan has only recently enacted a law governing the implementation of national referenda, a crucial stage in the constitutional reform process¹⁵².

Before the Constitution of Japan Amendment Act was enacted in 2007, referenda on amendments were virtually impossible. If constitutional revision is seen as the most vital manifestation of popular sovereignty, the absence of a legal framework for national referenda means that the Japanese people spent the first sixty years under their Constitution without the ability to exercise that autonomy¹⁵³.

A further limiting element in the subject of amendability or constitutional revision is also the presence of a new, revolutionary part absent from the previous Constitution: The Bill

¹⁴⁷ Matsui [2011] (n.14).

¹⁴⁸ Heads of Governments of the United States, China, and the United Kingdom, *Proclamation Calling for the Surrender of Japan* (1945), 2 (12).

¹⁴⁹ Matsui [2011] (n.14).

¹⁵⁰ Sterling AN [2019] (n.1).

¹⁵¹ Ibid [150].

¹⁵² Inoue T [2016] (n.2).

¹⁵³ Ibid [152].

of Rights. As the most enduring constitutions in Asia, the stability of the Constitution stems mainly from the more excellent protection it offers the Japanese people than its predecessor¹⁵⁴. The human rights enshrined in this Constitution seventy years ago still function effectively today, even if the judiciary is perceived as overly deferential and conservative.

As mentioned earlier, despite its relatively unique nature, constitutional revision in Japan is diligently executed by legal elites in the Cabinet, who are accountable to the will of the people. Therefore, the Constitution of Japan continues to evolve, and it is interpreted directly by the representatives of the Japanese people¹⁵⁵.

In addition to the Bill of Rights, which has contributed to its popularity and longevity, and the guarantee of the fundamental principle of popular sovereignty, the Constitution of Japan also addresses the issue of pacifism, which is now regarded as a virtually untenable element¹⁵⁶. All these elements extend the document's longevity and endurance in two significant ways. First, it highlights the focal points and provides acceptable solutions, effectively functioning as a coordinator, which is essential for any enduring constitution. While it is true that the solutions may not be perfect and may be unlikely to satisfy everyone, at least they offer temporary conclusions to allow people to discuss and debate¹⁵⁷. In the Japanese context, the Constitution explicitly renounces war and states that the emperor's position is derived from the will of the people¹⁵⁸. Not all Japanese are satisfied with these articles, but they are willing to deliberate within the constitutional framework.

Secondly, the 1947 document effectively strikes a balance, offering ample incentives for both proponents and opponents of pacifism and the emperor dispute to operate within its framework. While each side insists on upholding one solution and rejecting the other, neither can alter the status quo unilaterally¹⁵⁹. However, as each side is content with at least one of the two solutions, there is little impetus for renegotiation, resulting in an equilibrium where there are neither absolute winners nor absolute losers¹⁶⁰.

¹⁵⁴ Lin C-C [2014] (n.3).

¹⁵⁵ Ibid [154].

¹⁵⁶ Ibid [154].

¹⁵⁷ Ibid [154].

¹⁵⁸ The Constitution of Japan [1947] Chapter II, Art. 9.

¹⁵⁹ Tom Ginsburg, James Melton and Zachary Elkins, *Endurance of National Constitutions* (Cambridge University Press 2009).

¹⁶⁰ Lin C-C [2014] (n.3).

In essence, Japan's Constitution is a concrete example of how the factor of design plays a particularly crucial role in explaining its endurance and resilience without any change, more so than the environment around it. First, it is stable because it meets - even if indirectly - the necessary preconditions for self-enforcing constitutions. Moreover, the protection of human rights and the absolute guarantee of popular sovereignty diminish the incentives that could lead the people to revolution. Furthermore, its ability to evolve through executive interpretations has made the possibility of amendments almost obsolete.

Yet, this condition may have begun to change with the advent of revisionist movements and the growing influence of Shinzo Abe's figure and personality. Abe's leadership has brought to the fore a new policy agenda aimed at revising critical aspects of the Constitution, particularly Article 9. This revisionist movement has sparked intense and polarizing debate within Japanese society, raising questions about the future stability and integrity of the Constitution.

4.3. Japanese Revisionism: Endurance Faces the People

Revising the so-called "pacifist Constitution" is one of the thorniest and most controversial issues in Japanese politics. On the one hand, proponents of constitutional revision aim to "normalize" (*futsuka* or *seijoka*) Japan by amending the Constitution, where "normalization" implies greater national pride and a more significant military role in international affairs¹⁶¹. On the other hand, those opposed to the revision seek to preserve the current Constitution, believing it has been a crucial factor in Japan's postwar peace and prosperity. Few issues are more relevant than the constitutional revision of Japan's national identity and domestic and foreign defense policies¹⁶².

The leading proponents of the push for revision are members of the Liberal Democratic Party, who have considered constitutional reform a pillar of their program and goals for years. For several years, the discussion remained purely theoretical. Still, in the past decade, it has taken concrete form thanks to the emergence of a prominent new figure at the helm of the party and the country: Prime Minister Shinzō Abe.

¹⁶¹ Ryu Y [2018] (n.4).

¹⁶² Ibid [161].

Abe believes the Constitution contributes to Japan's lack of independent spirit and its weakness in the face of foreign pressure (*gaiatsu*)¹⁶³. His idea of constitutional revision is to instill a sense of national pride and patriotism, emphasizing Japan's "splendid history, culture and traditions." Therefore, he advocated elevating the status of the emperor to head of state and called the Self-Defense Forces the "National Defense Forces"¹⁶⁴.

The primary points driving the ongoing discussion among conservatives, including Abe, are that the U.S. Occupation Forces imposed the current Constitution unilaterally, and that Article 9 explicitly hinders Japan from taking on a more active role in upholding international security. It is argued that Japan should now craft and ratify its own Constitution, enabling the country to lawfully maintain a military and play a more substantial part in global stability and security.

However, there seems to be a tendency in Japan to overemphasize the existence of a powerful revisionist movement backed by the ruling party, forgetting both the presence of numerous anti-revisionist grassroots movements and the data on public opinion¹⁶⁵. The most vigorous opponents of abusive constitutional borrowing are constitutional scholars. Faced with the 2012 system, most of them expressed opposition to the two Constitutional amendments proposed by the LDP, believing that these amendments were anti-constitutional. Following the 2015 countermovement, anti-amendment scholars transformed "constitutionalism"¹⁶⁶ from a theoretical term to a magic word to gain public support¹⁶⁷.

President Abe's sudden death, however, has helped complicate the debate on the revision, creating uncertainties as to whether his political legacy will feature constitutional revisionism. His passing has left a leadership vacuum in the party, with several members likely to have divergent views on the issue. Without a strong figure like Abe to lead the charge, the revision movement may lose momentum.

¹⁶³ Yoshiko Sakurai and Shinzo Abe, 'Jiminto no Gojunen [50 Years of LDP]' in Yoshiko Sakurai (ed), *Abe Shinzo Taidanushu: Nihon o Kataru (Collection of Conversations with Abe Shinzo: On Japan)* (PHP Institute 2006).

¹⁶⁴ Ryu Y [2018] (n.4).

¹⁶⁵ Matsudaira T [2023] (n.50).

¹⁶⁶ Usually, indicates a doctrine according to which government's authority is determined by a body of laws or constitution. Although constitutionalism is sometimes regarded as a synonym for limited government, that is only one interpretation and by no means the most prominent one historically. More generally constitutionalism refers to efforts to prevent arbitrary government.

Richard Bellamy, 'Constitutionalism: Law, Government & Rights.' [2016] Encyclopedia Britannica.

<<https://www.britannica.com/topic/constitutionalism>> accessed 23 July 2024

¹⁶⁷ Matsudaira T [2023] (n.50).

4.3.1. Shinzo Abe: the Architect of Constitutional Transformation in Japan

Shinzō Abe, who became Japan's youngest postwar-born prime minister in September 2006, was a prominent advocate of expanding Japan's military role in the international community and the need to revise the 1947 Constitution¹⁶⁸. He came from a particularly conservative and nationalist political family; his grandfather, Kishi Nobusuke, was minister of armaments during World War II. He was imprisoned as a war criminal during the occupation but was released without charge due to the 'emergence of the Cold War, as the Americans aimed to strengthen conservative political doors against the growing influence of communism'¹⁶⁹.

Kishi later joined the LDP and became prime minister in 1957. Like his grandson, Kishi was a nationalist and robust supporter of constitutional revision, seeking to reintroduce patriotic elements into the national educational curriculum. Abe's policy initiatives, therefore, are not to be considered entirely new but reflect a continuation of his grandfather's legacy¹⁷⁰.

Driven by a firm conviction for change rather than doing a systematic analysis of policy options, as a first step toward the path of revision, Abe led the Japanese parliament on May 14, 2007, to pass legislation detailing all the procedures necessary for a national referendum suitable for constitutional revision, the aforementioned Japan Amendment Act¹⁷¹. This legislation was essential to the revision program, a significant policy initiative supported by Abe even before he took office. A few years earlier, in 2004, Abe had already argued that the Constitution had been imposed and that the time had come for the country to draft its own, with some articles now obsolete in contemporary values¹⁷². Abe strongly believed that Japan's new society needed a new, proper, and personal constitution.

Returning to power in December 2012, Abe accelerated defense reforms, backed by strong support from political and social elites. The new administration's initiatives were significantly driven by North Korea's advanced missile and nuclear programs and China's increasingly provocative claims about Japanese-administered islands in the East China Sea¹⁷³. Within a year, his government established the three pillars of Japan's current security policy:

¹⁶⁸ Takamichi Mito, 'Japan's Constitutional Revision Debate under Prime Minister Abe Shinzō and its Implications for Japan's Foreign Relations' (2008) 28(1) Japanese Studies 59.

¹⁶⁹ Ibid [168].

¹⁷⁰ Ibid [168].

¹⁷¹ Ibid [168].

¹⁷² Ibid [168].

¹⁷³ Ibid [168].

the first National Security Council, the first National Security Strategy, and updated National Defense Program guidelines¹⁷⁴.

A decisive action in the context of Abe's constitutional revisionism was the publication, also in 2012, of a comprehensive and detailed draft amendment to the Constitution. This draft, submitted by the party in April 2012, represented a direct challenge to fundamental and established constitutional values and principles, proposing radical changes¹⁷⁵.

First, the draft proposed replacing the current preamble, which emphasizes the "universal principles" of humanity, with a text that affirms Japan's uniqueness, emphasizing its distinction from other civilized societies in Asia and the world¹⁷⁶. This amendment reflected a heavily nationalist intent to emphasize Japan's cultural, social, political, and historical distinctiveness. In addition, while formally retaining Article 9, the pacifist article, the draft aimed to restore war powers through new provisions on emergency powers. This change would have allowed Japan to have a more active and independent military role and respond decisively to external threats¹⁷⁷.

Subsequently, the draft downsized the concept of the dignity of the citizen as an individual, turning Democratic values into mere abstract legal personalities with predominantly private rights¹⁷⁸. This suggested a reduction in the importance of individual rights in favor of a more collective and hierarchical view of society, following Japan's centuries-old tradition before the end of World War II¹⁷⁹. Finally, the draft envisioned a restructuring of constitutional rights, eliminating many of the rules on economic freedom while allowing restrictions on free speech in the name of "public interest and public policy" to give the government more control and flexibility in managing financial and social policies¹⁸⁰.

Numerous scholars and constitutional critics argue that the Liberal Democratic Party draft aims to restore Japan's pre-war system. They see it as a concrete attempt to return to the Meiji Constitution, which was revised and submitted to MacArthur seventy years ago but was discarded for its incompatibility with democracy, human rights, and a peaceful Japan¹⁸¹. Fundamentally, the PLD draft seeks to return Japan toward a pre-war state and family structure

¹⁷⁴ Liff AP [2015] (n.52).

¹⁷⁵ Matsudaira T [2023] (n.50).

¹⁷⁶ The Liberal Democratic Party of Japan (LDP), *Draft for the Amendment of the Constitution of Japan (In Contrast to the Current Constitution)* (2012).

¹⁷⁷ Matsudaira T [2023] (n.50).

¹⁷⁸ LDP [2012] (n.176).

¹⁷⁹ Matsudaira T [2023] (n.50).

¹⁸⁰ LDP [2012] (n.176).

¹⁸¹ Naoko Kumada, 'Theocracy Vs Constitutionalism in Japan: Constitutional Amendment and The Return of Pre-War Shinto Nationalism' (2018) 310 S. Rajaratnam School of International Studies 1.

based on the *kokutai* ideology, placing the emperor above a purely symbolic role, but effectively as head of state, not bound by obligations of respect for the Constitution¹⁸².

Informally, the draft seeks to establish the family as the fundamental unit of the nation, emphasizing respect for family and social hierarchies and consequently abolishing individual human rights and incorporating morality, among other elements. Within this ideological framework, the constitutional amendment goes beyond individual changes, with Article 9 amended only as a tool for a broader goal¹⁸³. Indeed, this draft appears similar to the proposals made by Konoe and Matsumoto in 1945. Constitutionalist Yōichi Higuchi compared the draft to a shogunate¹⁸⁴ proclamation rather than a modern Constitution. Yet despite heavy criticism, on Oct. 18, 2016, the Democratic Constitutional Reform Promotion Headquarters declared the draft submitted four years earlier as the party's official document¹⁸⁵.

Public opinion is the main obstacle to revising Japan's Constitution, which shows varying support. An August 2016 Asahi Shimbun poll indicated that 63 percent of respondents supported starting discussions on constitutional revision, but only 27 percent supported revising Article Nine. An April 2016 NHK poll showed that only 27.3 percent believed the constitutional revision was necessary, while 30.5 percent were against it, with the protection of Article Nine as the main reason for opposition. A March 2016 Yomiuri Shimbun poll reported a balance between supporters and opponents of the revision (49 percent in favor and 50 percent opposed), while a December 2016 Mainichi Shimbun poll showed that 50 percent were in favor of starting discussions on the revision in the Diet, with 21 percent opposed¹⁸⁶.

These opinion polls suggest three main things. First, it is unclear whether the Japanese public favors constitutional revision, as the results are mixed. However, the Abe administration could mobilize sufficient support if it chooses the right time. Second, the public does not support the revision of Article Nine, as evidenced by the protests against the 2015 Security Law Drafts (*anpo hosei*)¹⁸⁷. This is problematic for Abe and other supporters, as Article Nine is one of the main provisions they want to change. Finally, there is more public support (over

¹⁸² Kumada N [2018] (n.181).

¹⁸³ Ibid [182].

¹⁸⁴ Government of the Shogun, or hereditary and military dictator, of Japan from 1192 to 1867; it was under the control of the emperor, and the Shogun's authority was limited to control of the military of the country, but the increasingly feudal character of Japanese society created a situation in which control of the military became tantamount to the control of the country.

Michael Ray, "Shogunate" *Encyclopedia Britannica* (July 20, 1998)

<<https://www.britannica.com/topic/shogunate>> accessed July 24, 2024.

¹⁸⁵ Kumada N [2018] (n.181).

¹⁸⁶ The statistics presented are based on Kumada N [2018] (n.175), as the original sources are in Japanese and not directly accessible for citation.

¹⁸⁷ Ryu Y [2018] (n.4).

50 percent) for amending other parts of the Constitution, such as environmental rights and local governance¹⁸⁸.

In conclusion, Shinzo Abe has been a central figure in Japan's political landscape, embodying the continuity of his family's political tradition and advancing a nationalist and revisionist vision of Japan's Constitution¹⁸⁹. Although he has achieved significant progress in defense reforms and strongly influenced the debate on constitutional revision, his legacy is complex and controversial. Abe polarized public opinion and sparked a fervent national debate that continues to influence Japanese politics. His legacy is that of a determined leader, convinced of the need for radical change to adapt Japan to contemporary challenges, but also a divisive figure whose vision was not accepted by all with the same enthusiasm¹⁹⁰.

A deeper analysis of revisionist and anti-revisionist movements outside the Diet can provide a more comprehensive perspective on Japan's constitutional debate. In addition to parliamentary initiatives and public opinion, the political landscape is influenced by various organizations, pressure groups, and social movements. Proponents of constitutional revisionism, such as Nippon Kaigi, an influential nationalist group, have worked tirelessly to promote a vision of a stronger and more independent Japan, often working closely with conservative politicians to advance their agendas¹⁹¹.

On the opposite side, anti-revisionist movements, including many pacifist groups, academics, and civil society organizations, strongly oppose the proposed changes. These groups stress the importance of peace and democracy, core values of the 1947 Constitution, and fear that the proposed changes could lead to militarization and curtailment of civil rights. Demonstrations, petitions, and advocacy campaigns are commonly used tools to oppose the proposed revisions¹⁹².

This backdrop of political and civic activism demonstrates that the debate over constitutional revision goes beyond the walls of the Diet, reflecting a deeply divided society over what direction to take for the country's future. The complexity of the issue means that any attempt at reform will face not only legislative mechanisms but also vigorous opposition and intense public discussion, making the path to a new constitution anything but straightforward¹⁹³.

¹⁸⁸ Ryu Y [2018] (n.4).

¹⁸⁹ Liff AP [2015] (n.52).

¹⁹⁰ Ibid [189]

¹⁹¹ Rintaro Kuramochi, "Constitutional Revision" Inside and Outside the National Diet' in Helen Hardacre and others (eds), *Japanese Constitutional Revisionism and Civic Activism* (Lexington Books 2021).

¹⁹² Ibid [191].

¹⁹³ Ibid [191].

4.3.2. Revisionism Outside the Diet

The most central part of the constitutional discussion of the first decade of the 2000s was the term “constitutionalism,” which has become particularly contested over the years. Constitutionalism is defined as “the idea that governments can and should be legally limited in their powers and that their authority or legitimacy depends on their observance of these limitations.”¹⁹⁴ Modern constitutionalism has recently included governance based on protecting human rights and separation of powers, which are fundamental in modern democracies¹⁹⁵.

During the post-war era, the term constitutionalism was rarely used in Japan, centering the entire constitutional debate on disputes about rearmament and other purely economic issues. Only with the ‘civic activism of the 2010s did discussions begin to focus more on the fundamental concept of constitutionalism¹⁹⁶.

During the protests against the 2015 security bills, “constitutionalism” became a rallying cry for those opposed to the Abe administration’s proposed revisions. They used the term to criticize the government and accuse it of ignoring the universal values enshrined and protected in the 1947 Constitution: popular sovereignty, basic human rights, and pacifism¹⁹⁷.

Yasuo Hasebe, a constitutional scholar who played a crucial role in the protests against security bills, described two concepts central to the debate on constitutionalism. The first concept defines constitutionalism in its simplest form, namely the idea that government power can and should be limited. On the other hand, the second concept, “positive constitutionalism,” is met on the principle that government should not interfere with the private lives and thoughts of the people and that the Constitution should establish rules that promote general welfare¹⁹⁸. Therefore, the government should exercise great caution in any attempts to alter or modify in any way the constitution, ensuring that such modifications do not threaten the general welfare, undermine individual rights or interfere with the private lives of the citizens, prioritizing the public good over political interest.

¹⁹⁴ Wil Waluchow and Kyritsis Dimitrios, ‘Constitutionalism’ (*Stanford Encyclopedia of Philosophy*) <<https://plato.stanford.edu/entries/constitutionalism/>> accessed 22 July 2024.

¹⁹⁵ Makiko Ueda, ‘New Civic Activism and Constitutional Discussion: Streets, Shrines and Cyberspace’ in Helen Hardacre and others (eds), *Japanese Constitutional Revisionism and Civic Activism* (Lexington Books 2021).

¹⁹⁶ Ibid [195].

¹⁹⁷ Ibid [195].

¹⁹⁸ Ibid [195].

Hasebe, following this line of thinking, strongly criticized the 2012 constitutional draft proposed by the ruling party, accusing the government of self-aggrandizing excessive control over people's lives, including family matters¹⁹⁹. On the contrary, the party declared that the goal was not to meddle in the lives of the people but to re-institute traditional families and communities that had been destroyed by 'modern individualism, characterized by excessive individualism'²⁰⁰.

In fact, the Abe administration carried forward a completely different idea of constitutionalism and vision for the Constitution. During a 2014 Diet session, Prime Minister Abe declared that the Constitution was to give guidelines for an ideal future for Japan rather than strive to limit the powers of government²⁰¹. In fact, Abe believed that such limitations were less necessary in the modern era, as power had already shifted from the monarchy to the people and political systems had evolved into democracies²⁰².

These statements only increased the anti-revisionist spirit, drawing heavy criticism against Abe and accusing him of neglecting the importance of constitutionalism and the need to limit governmental powers. Indeed, in a democracy, these limits are not intended to restrict freedom but to prevent the emergence of dictators with unchecked political authority, similar to absolute monarchies or systems present before and during World War II²⁰³.

These distinctions of conflicting definitions and concepts were the basis for the creation of the two-fold movements inside and outside the Diet regarding constitutional revision. On the one hand, within the Diet, there were proponents of revisionism, mainly represented by the Liberal Democratic Party, who sought to expand governmental powers and restore a sense of traditionalism and national unity. On the other hand, opponents of revisionism, comprising a diverse coalition of opposition parties, academics, and civic activists, defended the basic principles of classical constitutionalism, stressing the importance of limiting government power and protecting human rights²⁰⁴.

¹⁹⁹ Ueda M [2021] (n.195).

²⁰⁰ Ibid [199].

Notes from 198-200, once again, are based on Ueda M [2021] (n.189), as the original sources are in Japanese and not directly accessible for citation.

²⁰¹ Ueda M [2021] (n.195).

²⁰² Ibid [201].

²⁰³ Ibid [201].

²⁰⁴ Kuramochi R [2021] (n.191)

This new type of activism has succeeded in mobilizing a wide range of participants, but the particularly dispersed nature of communication means that these participants often participate with very disparate ideologies and ideas. The definition and use of the term “constitutionalism” very concretely expresses this duality, as well as Japan’s modern Constitutional discussion²⁰⁵. For both sides, anti-revisionists and pro-revisionists alike, constitutionalism is an undeniable assumption, but their interpretations could not differ more sharply than this. The range of meanings given to the idea of constitutionalism by civic activists significantly illustrates the pluralistic character of modern Japanese democracy²⁰⁶.

4.3.2.1 Countermovements: The Quest to Defend the Constitution

The overly fast growth of the revisionist movement particularly alarmed social media and activated a prompt response from liberal and progressive countermovements, particularly slowing the momentum of the groups and the general discourse on revision. The most representative episode of these movements was the 2015 protest in front of the Diet building against the introduction of security bills²⁰⁷. This movement was very reminiscent of the Anpō protests of 1960, emulating the demonstration against the passage of controversial laws without any kind of debate or public consultation²⁰⁸.

It is essential to note the genealogical continuity with the new civic movements, such as the anti-nuclear demonstrations and the counter-demonstrations against the far-right spreading hate speech against ethnic Koreans in Japan, was very present not only in the streets but also and especially on social media²⁰⁹. In particular, young people who joined the group Students Emergency Action for Liberal Democracy (SEALDs) contributed significantly to the movement’s visibility in the public sphere²¹⁰. Despite not being a well-organized group, SEALDs was one of the most influential movements in terms of activism, as opposed to security bills. In fact, the organization had no official membership like traditional civic movements and lacked a single, consistent ideology²¹¹.

²⁰⁵ Ueda M [2021] (n.195).

²⁰⁶ Ibid [205].

²⁰⁷ Matsudaira T [2023] (n.50).

²⁰⁸ The Anpo protests of 1960 were a series of mass demonstrations in Japan against the revision of the U.S.-Japan Security Treaty (Anpo), which was seen as a symbol of American military influence in Japan. The protests, involving students, workers, and citizens, peaked in June 1960 and resulted in the resignation of Prime Minister Nobusuke Kishi. The movement highlighted widespread opposition to the perceived erosion of Japanese sovereignty and the country’s alignment with U.S. Cold War policies. Despite the intensity of the protests, the treaty was eventually ratified.

²⁰⁹ Matsudaira T [2023] (n.50).

²¹⁰ Ibid [209].

²¹¹ Ueda M [2021] (n.195).

Yet because most members belonged to the generation of activists embedded in digital technology, SEALDs proved very capable of organizing and mobilizing protests and demonstrations. Their flexibility and ease of access ensured that they created solidarity between new and old styles of social activism²¹². The student protests also attracted many professors to the movement, as well as politicians, celebrities, and other smaller social groups such as labor unions or feminist groups, encouraging public intellectuals to re-enter the scene of ‘civic activism’²¹³.

SEALDs, from its inception, stood out with its unique approach of addressing single issues, a strategy it adopted with the expectation that it would dissolve once the issue was resolved²¹⁴. SEALDs’ predecessor group inspired this approach, the Students Against Secret Protection Law (SASPL), which was formed to protest the Act on the Protection of Specially Designed Secrets of 2014 and dissolved the moment the bill went into effect²¹⁵. Similarly, SEALDs dissolved the moment the security bill was passed in 2016, but it left a significant legacy.

Unlike many movements that often resulted in civil disobedience and violent confrontations, the 2015 movement operated in a peaceful and controlled environment. The police maintained order by restricting freedom of assembly and associational expression²¹⁶. Through rap, chants, signs, and other visual arts, the 2015 movement raised thought-provoking questions about the sovereignty of the Japanese people who firmly established the pacifist Constitution in 1946²¹⁷.

Although the movement failed to achieve the abolition of security legislation, it succeeded in forcing the opposition parties to form a strategic alliance against Constitutional change. Moreover, most of the public reacted negatively to any attempt to amend the Constitution under the Abe administration²¹⁸. As criticized by political scientist Takashi Mikuriya, Japanese voters did not accept Abe’s proposed amendment because they began to

²¹² Ueda M [2021] (n.195).

²¹³ Ibid [212].

²¹⁴ Ibid [212].

²¹⁵ The 2014 protests against Japan’s Act on the Protection of Specially Designated Secrets centered on concerns over government transparency and civil liberties. Critics argued that the law granted the government excessive power to classify information as secret, potentially stifling press freedom and public access to information. They feared it could be used to cover up government misconduct and limit whistleblowers. The law’s broad and vague criteria for what constituted a “specially designated secret” further fueled apprehensions about its potential misuse. Despite significant public opposition and demonstrations, the law was enacted, reflecting ongoing tensions between national security measures and democratic freedoms.

²¹⁶ Matsudaira T [2023] (n.45).

²¹⁷ Ibid [216].

²¹⁸ Ibid [216].

perceive it as a deception, using a future-oriented appearance to hide a return to prewar values²¹⁹.

Despite the defeat, the SEALDs' style of activism spread throughout Japan, indirectly contributing to the formation of numerous new groups, although they were formally separated from the SEALDs and had different ideologies. Adopting SEALDs' style, other local groups were spontaneously launched by college students, such as SEALDs KANSAI, SEALDs TOHOKU, SEALDs RYUKYU, and SEALDs TOKAI. The impact went beyond college students, encouraging mothers, teenagers, and others; groups such as Mothers Against Wars, TSOWL (for teenagers), MIDDLEs (people between 40 and 60), and OLDs (people over 65) were founded²²⁰. The MIDDLEs and OLDs groups met in Sugamo, Tokyo, known as a mecca for older people. Although SEALDs had no official leaders to oversee and organize the expanded movement, its model was influential even among more traditional activist groups²²¹.

Although these groups failed to achieve their goals, it was significant to see how college students and academic intellectuals were able to work together in civic activism. Their traditionally distant relationship was somehow healed through these collaborations, where everyone worked as equals²²². SEALDs legacy remains alive in contemporary movements as they inspired new generations of activists to organize and make their voices heard. Their innovative and inclusive approach left a lasting mark, demonstrating the importance of youth participation and creativity in political actions.

4.3.2.2. On the Flip Side: Radical Conservative Movements

Contemporary movements pushing for the amendment or complete replacement of the Constitution are led by political and especially religious forces originating from the prewar era that have now resurfaced to restore what they claim to be Japan's real shape. Supporters of such a conception believe that the Constitution is somehow dated and impedes Japan's ability to contribute to the maintenance of order globally²²³. In their view, the revision is necessary to

²¹⁹ The original article can be found at [安倍氏から菅首相に続く「説明しない政治」 御厨貴氏：朝日新聞デジタル \(asahi.com\)](https://www.asahi.com/japanese/articles/ASE1010001.html) in Japanese as cited in Matsudaira T [2023] (n.45).

²²⁰ Ueda M [2021] (n.195).

²²¹ Ibid [220].

²²² Ueda M [2021] (n.195).

²²³ Ibid [222].

legitimize the introduction of military forces that align with other nations to become more independent and active in international affairs²²⁴.

The most influential faction within the radical conservative groups was Nippon Kaigi, a group formed in 1997. It, too, lacked an overarching ideology and centralized leadership. It comprised several ideological factors and numerous affiliated organizations, which contributed to the difficulty of defining a clear and precise goal for the group, which many scholars labeled as particularly enigmatic²²⁵. Its roots can be identified in two primary ideologies, “*Minzoku-ha*,” ethno-movement, and “*Minshu Shakaitō*”, the Democratic Socialist Party, a right-wing socialist party²²⁶.

The phrase *Minzoku-ha* was coined in the 1950s to remove the image of an extreme right-wing from the movement, as the image of “*uyoku*” was excessively reminiscent of the ‘ultra-nationalist activism associated with the Yakuza’²²⁷. University students Yūzō Kabashima, the future secretary-general of Nippon Kaigi, and Andō Iwao, the future leader of the religious group Seichō no Ie, succeeded in achieving leadership of the university’s student associations, taking it out of the hands of leftist student groups and forming what would later become Nippon Kaigi²²⁸.

Although the organization is based on a membership system, its leadership is not vertically structured. Although there is a general secretary, it is not very clear who represents the group. Several groups cooperate with Nippon Kaigi, especially those of a religious nature; first and foremost is Jinja Honchō, the largest association of Shintō shrines, but there are several groups of Shinto, Buddhist, and other new religion-based nature²²⁹. What unites the members and Adjacent groups is not an actual ideology but a front based on opposition to the progressives. Many members identify themselves as “patriots” and reject being labeled conservative or nationalist. Nippon Kaigi has continued to expand around the country, forming local groups in parts of Brazil as well. Women members have also formed a feminist group, and lawmakers who are part of the organization have organized multiparty groups within the parliament, with members also from the LDP, despite not being hierarchically organized²³⁰.

²²⁴ Ueda M [2021] (n.195).

²²⁵ Ibid [224].

²²⁶ Ibid [224].

²²⁷ Akira Fujii (2017), as cited in Ueda M [2021] (n.195).

²²⁸ Ueda M [2021] (n.195).

²²⁹ Akira Fujii (2017), as cited in Ueda M [2021] (n.195).

²³⁰ Ueda M [2021] (n.195).

Within Nippon Kaigi's circle of influence, the discourse is similar to the "overcoming modernity" movement of the 1940s, which challenged Western modernity. However, they recognize that Constitutional proposals will not be accepted in contemporary Japan if they deny the universal values that the Japanese have enjoyed since the end of World War II²³¹. They, therefore, intend to revitalize "traditional values" that they believe have been destroyed by the imposition of a postwar Constitution written by foreigners during the occupation.

In May 2016, Nippon Kaigi spokesman Osamu Nishi, a professor at Komazawa University, described the "Constitutionalism" referred to by the anti-Abe administration movement as a "populist Constitutionalism" that views the government as hostile²³². Nishi said that exercising the right to collective defense helps ensure the security of Japan and its people, which should be a fundamental principle of "Constitutionalism."

Like SEALDs, Nippon Kaigi has elements of the new civic activism: a decentralized network focused on a single, critical issue. They also have centers in public spaces where pedestrians can encounter Nippon Kaigi activism. Since 2000, local shrines have become hubs of Nippon Kaigi's civic activism for the general public, such as collecting signatures for petitions calling for Constitutional revision. Local Nation Defense Shrines (*Gokoku Jinja*), dedicated to the war dead, organize events commemorating national heroes and cleaning shrines²³³. Associated with the regional branches of Nippon Kaigi, the local shrines also offer seminar programs on modern history, encouraging local and national patriotism. Nippon Kaigi's growth has occurred through radical grassroots conservative activism supported by local shrines and religious associations²³⁴.

Despite the profound influence of groups within parliament, the opposition to the conservatives has managed to acquire a new face in recent years, using new, more modern methods to increase appeal both within and outside of government. For example, the opposition has adopted digital communication and social media techniques to mobilize supporters and raise awareness of Constitutional and political issues²³⁵.

²³¹ Ueda M [2021] (n.195).

²³² The original article can be found at [産経ニュース \(sankei.com\)](http://sankei.com) in Japanese, cited in Ueda M [2021] (n.194).

²³³ Ueda M [2021] (n.1945)

²³⁴ Ibid [233].

²³⁵ Ibid [233].

They are also collaborating with civic movements and academics to develop more effective strategies in countering conservative proposals, making political debate more inclusive and participatory. This renewed opposition poses a significant challenge to traditional conservatism, promoting a progressive vision of Japan's future as opposed to nostalgia for an idealized past²³⁶.

4.3.3. *Reiwa Shinseigumi: the New Face of the Opposition*

Despite the persistent pressure from the influential political and social alliance led by Shinzō Abe, his party, and their supporters, the government has yet to initiate the process for reform, let alone the actual amendment of the document. Credit for this political standstill must be attributed to the opposition²³⁷. Those advocating vigorously for constitutional revision, the conservatives, have always faced staunch opposition from progressives, who share a common goal of safeguarding the 1947 Constitution²³⁸. As mentioned, during the 2016 elections, the conceptual debate on constitutionalism was the central matter of party campaigns, although it then became less relevant in the following election, the 2019 House of Councillors elections²³⁹. Although the pro-revisionist constitutionalist parties failed to reach the required two-thirds in those elections, in that same year, the previously dominant liberal approach was replaced by a new group: the Reiwa Shinseigumi²⁴⁰.

Sometimes regarded as a “populist liberal” party, this new party arose as an uprising of people who felt marginalized by both the capitalist economic system and the Japanese democratic system²⁴¹. The party's charismatic leader, Tarō Yamamoto, strategically spread its vision and message both on the streets and through social media. For example, in 2021, his YouTube channel had nearly 70,000 subscribers. Yamamoto argues that politics in the digital age should constantly be attractive to viewers, competing with the myriad of engaging online content²⁴². He also uses direct and unambiguous language to reach the most marginalized and

²³⁶ Ueda M [2021] (n.195).

²³⁷ Yoichi Higuchi, ‘The Paradox of Constitutional Revisionism in Postwar Japan’ in Yoichi Higuchi (ed), *Five Decades of Constitutionalism in Japanese Society* (University of Tokyo Press 2001).

²³⁸ Ibid [237].

²³⁹ Kuramochi R [2021] (n.191).

²⁴⁰ Shinsengumi: “New Selected Group” was a special police force formed in 1863 to protect shogun officials during a period of assassinations surrounding the openings of the country to diplomatic relations with western countries. Reiwa was the name for the reign of Emperor Naruhito, beginning in 2019 and continuing to the present. Rob Fahey, “The Reiwa Era: Explaining Japan's New Era Name – Tokyo Review” (*Tokyo Review*, 2019) <<https://www.tokyoreview.net/2019/04/the-reiwa-era-explaining-japans-new-era-name/>> accessed September 20, 2024.

²⁴¹ Ueda M [2021] (n.195).

²⁴² Ibid [241].

vulnerable sections of society without resorting to the academic discourse used by scholars and students.

Reiwa Shinsegumi has attracted people seeking social change, including those struggling with poverty or nonpermanent employment and who were previously devoted to radical conservatism²⁴³. To reach such individuals, the new party also uses the liberal alliance led by Shimin Rengō and the Constitutional Democratic Party of Japan (CDPJ), one of the main opposition parties in Japan, and focuses on issues such as protecting the country's pacifist Constitution, human rights, and progressive social and economic policies²⁴⁴.

Reiwa Shinsengumi opposes the LDP's 2012 Constitutional draft, arguing that it ignores individuals and gives too much power to the government. In the 2019 elections, Reiwa Shinsengumi supported a variety of minority social and activist candidates, focusing on issues such as sexuality, the environment, U.S. bases in Okinawa, and North Korean abductions²⁴⁵. They succeeded in sending two candidates with severe disabilities to the Diet, forcing the Diet building to adhere to the principle of universal design, a symbolic and visible change to the status quo²⁴⁶.

This new united front against Revisionist attempts is single-handedly advancing the hopes of the country's progressive and left-liberals by shifting the focus away from Constitutionalism per se and back toward issues of more practical importance to the people²⁴⁷. He stresses that although the case for a policy based on Constitutionalism is important, it is not the right time to focus on it. Instead, he believes it is necessary to discuss in more detail what policies are needed to make people's lives a little more comfortable²⁴⁸. This statement would have met with strong opposition, especially from liberals, in a state that proclaims itself a constitutional democracy. However, in Japan, people, particularly left-wing activists, agreed unanimously with this statement through "likes" and shares on Facebook²⁴⁹. These reactions highlight a contradiction within Japan's conception of constitutionalism. Moreover, Yamamoto's statement is crucial to understanding constitutional review and civic activism in Japan today.

²⁴³ Ueda M [2021] (n.195).

²⁴⁴ Ibid [243].

²⁴⁵ Ibid [243].

²⁴⁶ Ibid [243].

²⁴⁷ Tokyo Shimbun, 2019, as cited in Kuramochi R [2021] (n.191).

²⁴⁸ Kuramochi R [2021] (n.191).

²⁴⁹ Ibid [248].

The emergence of Reiwa Shinsengumi revealed the weaknesses of new forms of civic activism. Spontaneous, grassroots civic activism had exploded in open public spaces such as streets, local shrines, and the Internet. This new civic activism challenged the parliamentary system, but connecting local sentiments to the Diet still required mobilizing traditional organizations such as political parties and constituencies²⁵⁰. Although the new civic activism involved a wide range of participants, it did not replace traditional civil society organizations but strengthened them. This brings civic activism back to an inherent dilemma: the hierarchy and centralization of power undermine the movement's original spontaneity and autonomy²⁵¹.

In any case, an in-depth analysis of political movements within the constitutional review debate reveals that both the ruling and opposition parties are using the review as a tool for internal party politics or to influence their supporters. As a result, the constitutional review debate ultimately seems to lack depth. Even beyond Prime Minister Abe and the Liberal Democratic Party, no opposition party has ever proposed alternative constitutional amendments. Therefore, without clear Constitutional viewpoints from the opposition, it is difficult for voters to assess their fitness to govern²⁵².

At present, especially since the end of Prime Minister Abe's last term, most members of the diet and citizens are showing little interest in the Constitution, beginning to exhibit a form of Constitutional nihilism²⁵³. Indeed, many believe that Constitutional provisions do not significantly impact their daily lives or that discrepancies between the Constitution and reality are acceptable as long as the status quo remains unchanged²⁵⁴. This attitude and "nihilism" have thus preserved the unchanged Constitution.

However, the process of change cannot be regarded as finished; meanwhile, one must consider that it may take decades, twenty, thirty, or even fifty years. The steady growth of civic movements actually has the potential to bring about fundamental democratic changes in Japan²⁵⁵. Failure to cultivate such movements would mean succumbing to maintaining a fragile, unstable democracy. Although these counter-power movements are currently small, their numbers could grow.

²⁵⁰ Matsudaira T [2023] (n.52).

²⁵¹ Kumada N [2018] (n.181).

²⁵² Ibid [251].

²⁵³ Ibid [251].

²⁵⁴ Ibid [251].

²⁵⁵ Ueda M [2021] (n.191).

This form of civic activism challenges the current electoral system and representative democracy by offering hope²⁵⁶. In fact, it should be encouraged as a new emerging force by future indifferent Japanese citizens, distinct from traditional activism related purely to political parties²⁵⁷. The focus should be on shared similarities rather than differences²⁵⁸. Second, it is crucial to consider the death of Prime Minister Abe and the impact it will have on revisionist discourse, assessing whether his ultimate legacy will be revisionism.

4.3.4. Abe's Legacy: Revisionism as a Reality?

On July 8, 2022, former Prime Minister Shinzo Abe was tragically assassinated during a political rally in Nara, where he was campaigning for the LDP candidate seeking reelection²⁵⁹. Despite having retired two years earlier, Abe remained highly influential figure as Japan's longest-serving prime minister, especially in the constitutional review debate²⁶⁰.

Abe's impact is most evident in foreign policy and the contentious issue of Japan's pacifist stance. Prime Minister Fumio Kishida often consulted with Abe on international matters. Abe was a strong supporter of doubling Japan's defense budget to 2 percent of GDP²⁶¹. Freed from the constraints of office, he became a vocal critic of China and Russia and a supporter of Taiwan. In December, he said Japan would respond militarily if China took action against Taiwan, marking a significant change since 1945²⁶².

Abe transformed Japan's security framework more than any other postwar leader, establishing a national security council, adopting new defense guidelines with the United States, and passing major security laws in 2016²⁶³. These laws allowed Japan's prime ministers to circumvent the constitutional limits imposed on military forces as stipulated in Article 9 of the 1947 peace Constitution.

²⁵⁶ Ueda M [2021] (n.191).

²⁵⁷ Silvia Suteu, 'Eternity Faces "The People"' in Silvia Suteu (ed), *Eternity Clauses in Democratic Constitutionalism* (Oxford University Press 2021).

²⁵⁸ Ibid [257].

²⁵⁹ Robert F Worth, 'The Bizarre Story Behind Shinzo Abe's Assassination' [2023] *The Atlantic* <www.theatlantic.com/magazine/archive/2023/10/shinzo-abe-assassination-japan-unification-church-moonies/675114/> accessed 23 July 2024.

²⁶⁰ Matsudaira T [2023] (n.50).

²⁶¹ Jeff Kingston, 'Shinzo Abe Is Gone, but His Controversial Vision for Japan Lives On' (*The Guardian*, 12 July 2022) <www.theguardian.com/commentisfree/2022/jul/12/shinzo-abe-controversial-vision-japan-constitution> accessed 24 July 2024.

²⁶² Kingston J [2022] (n.261).

²⁶³ Kumada N [2018] (n.181).

Domestically, Abe was known for “Abenomics,” a bold plan that included massive monetary easing, fiscal stimulus, and structural reforms to revitalize the Japanese economy²⁶⁴. However, by 2017, it had become more of a marketing strategy than a concrete plan for economic renewal. When he ran for the LDP leadership last fall, Kishida criticized Abenomics as a failure²⁶⁵.

Abe’s legacy is also clouded by accusations of cronyism and lack of transparency. Key documents were allegedly altered, hidden, or destroyed, obstructing accountability. His labor market reform efforts were significant but muddled by the use of questionable data, resulting in modest changes²⁶⁶. Moreover, Abe’s downplaying of Japanese atrocities during the war, especially regarding “comfort women” and forced labor, strained relations with countries affected by Japan’s past actions, complicating reconciliation and cooperation efforts²⁶⁷.

Abe was proud of having shifted Japan’s political center to the right, a shift that accelerated after his assassination. In part due to the shock of his death, the LDP secured a landslide victory in the upper house election on July 10. This victory gave Kishida the necessary votes to increase defense spending and potentially pursue Abe’s goal of revising Japan’s pacifist Constitution²⁶⁸. Following the LDP victory, Prime Minister Kishida acknowledged that the election results paved the way for discussing constitutional revision, as supported by Abe. However, the revision is not imminent. Although the election victory provided the necessary two-thirds majority in both chambers, this is not enough to guarantee the revision²⁶⁹.

Proponents of amending Japan’s Constitution must first agree on what changes to make. Under Abe’s leadership, the LDP proposed four possible amendments. The first and most important to Abe was to add a clause to Article 9 to explicitly recognize the Self-Defense Forces²⁷⁰. The second, favored by Komeito, was to increase government funding

²⁶⁴ Kingston J [2022] (n.261).

²⁶⁵ Ibid [264].

²⁶⁶ Ibid [264].

²⁶⁷ “Comfort women” refers to the forced sexual slavery of women by the Japanese military during World War II, primarily affecting women from Korea, China, and other occupied territories. Shinzo Abe’s administration faced criticism for its handling of the issue, as many perceived Japan’s official apologies and compensation efforts as insufficient. Abe’s attempts to revise wartime history and downplay Japan’s wartime atrocities further strained diplomatic relations and drew international criticism, complicating Japan’s efforts to reconcile with affected nations.

²⁶⁸ Kingston J [2022] (n.261).

²⁶⁹ Sheila A Smith, ‘Will Abe’s Legacy Be Constitutional Revision?’ (*Council on Foreign Relations*, 11 July 2022) <www.cfr.org/blog/will-abes-legacy-be-constitutional-revision> accessed 24 July 2024.

²⁷⁰ Ibid [269].

for education²⁷¹. The third, more controversial, proposed granting the prime minister emergency powers during national crises, an idea discussed since the 2011 East Japan earthquake²⁷². Finally, an amendment was proposed to ensure fair electoral representation by addressing Supreme Court decisions that rural districts have disproportionate influence in elections to the detriment of urban voters²⁷³.

Whether a right-wing alliance can be created to present a list of amendments remains to be seen, but Kishida's invocation of Abe's memory suggests that he wants Japanese lawmakers to consider again whether they are ready to propose a national referendum to the Japanese people²⁷⁴. Public opinion polls in Japan indicate an interest in debate on this issue, but skepticism persists about what would be the first amendment ever made to a document so central to Japan's postwar identity²⁷⁵. Assessing whether the public is ready will undoubtedly shape Kishida's calculations on how to proceed.

In any case, voters did not consider Constitutional revision a priority, so Kishida campaigned on more pressing issues, such as supporting households in dealing with inflation²⁷⁶. After his victory, Kishida stressed that his focus would be on Japan's economy first, even public polls suggest that most Japanese voters believe this should be the government's primary focus²⁷⁷.

The LDP will have time to build a bipartisan coalition for Constitutional review, as no elections are scheduled in Japan in the next three years, allowing Kishida to pursue his policy goals while his party explores with like-minded parties whether a consensus exists to move the process forward²⁷⁸. If Kishida intends to pursue the revision, he must keep his party's goals within what the Japanese see as an acceptable effort to improve, rather than undermine, Japanese democracy²⁷⁹. He may have a better chance of presiding over his party's long-standing goal of amending the postwar Constitution, but only if the Japanese people see a tangible benefit in the change²⁸⁰.

²⁷¹ Komeito is a centrist political party in Japan, originally founded by members of the Buddhist organization Soka Gakkai. It advocates for pacifism, social welfare, and human rights. Komeito has been a key coalition partner of the Liberal Democratic Party (LDP) since 1999, significantly influencing Japanese politics through its support for moderate policies and balancing the LDP's more conservative stance.

²⁷² Smith SA [2022] (n.269).

²⁷³ Ibid [272].

²⁷⁴ Ibid [272].

²⁷⁵ Ibid [272].

²⁷⁶ Ibid [272].

²⁷⁷ An NHK exit poll on election day showed that 45 percent of voters agreed with such statement, while only 5 percent were focused solely on Constitutional Revision.

²⁷⁸ Smith SA [2022] (n.269).

²⁷⁹ Ibid [278].

²⁸⁰ Kingston J [2022] (n.269).

However, on May 3, 2023, Japan celebrated the 76th Constitution Memorial Day to commemorate the promulgation of the country's postwar pacifist Constitution. Across the country, pro-constitutionalists and Constitutional revisionists held rallies and meetings to promote their positions on whether or not to revise the Constitution²⁸¹.

Opinion polls released on the anniversary indicate that the Japanese public is still deeply divided on the issue²⁸². Major Japanese newspapers and media companies, including Kyodo News, Mainichi Shimbun, Japanese News Network, and NHK, conducted separate polls, showing these opinions sharply divided²⁸³. In the polls, which focused mainly on the amendment of the pacifist clause in Article 9, 32 to 55 percent of respondents favored amending the article, while 30 to 45 percent were opposed²⁸⁴.

As is well known, the revision has always focused on Article 9. Abe tried to insert language to clarify the status of the Self-Defense Forces, and when he left office, he stated that his biggest regret was not being able to gain public support for the revision²⁸⁵. Abe has been his own worst enemy, for the more he has continued to curtail Constitutional pacifism, the greater the public resistance to his belligerent policy²⁸⁶. However, Kishida is a moderate and thus encounters much less resentment when he supports Abe's policy agenda, which is why it appears that polls are much less hostile to change²⁸⁷.

Thus, recent rallies have shown a division among the public. Citizens must balance growing regional security concerns with the notion of pacifism ingrained in the Japanese psyche since the end of World War II²⁸⁸. Kishida's message on Constitution Memorial Day indicates continuity in the LDP's position since the late Prime Minister Shinzo Abe²⁸⁹. At the same time, public opinions, combined with reaffirming the party's efforts to amend the Constitution, seem to indicate that the various debates will continue indefinitely.

²⁸¹ Scott Harrison, Momo Sakudo and Tae Yeon Eom, 'Insight: Northeast Asia. Debate Rages in Japan Over Whether to Revise World's Oldest Unamended Constitution', *Asia Pacific Foundation of Canada* (2023) <https://cast.asiapacific.ca/sites/default/files/publication-pdf/Insight_NEA_May09_V3.pdf> accessed 24 July 2024.

²⁸² Ibid [281].

²⁸³ The statistics presented are based on Harrison S, Sakudo M and Eom TY [2023] (n.276), as the original sources are in Japanese and not directly accessible for citation.

²⁸⁴ Harrison S, Sakudo M and Eom TY [2023] (n.281).

²⁸⁵ Kingston J [2022] (n.261).

²⁸⁶ Ibid [285].

²⁸⁷ Ibid [285].

²⁸⁸ Harrison S, Sakudo M and Eom TY [2023] (n.281).

²⁸⁹ Ibid [288].

Conclusion

Japanese society and culture, which tend to seek compromise and consensus relentlessly, paradoxically make it difficult to amend the postwar Constitution, even as they express confusion and resistance to its values. If we cannot recognize the Constitutional sentiment caused by this misalignment, we will not be able to capture the political dynamism that promotes or, conversely, deters Constitutional revision.

The intricate history of Japan's Constitution, often touted as the oldest unamended Constitution in the world, showcases a complex interplay between imposed narratives and the resilience of its provisions. The argument that the Constitution was forcibly imposed by American forces in 1947 is both oversimplified and problematic. This narrative overlooks the collaborative nature of its creation and the Japanese populace's embrace of its democratic principles. The Constitution's endurance is rooted in its ability to adapt and remain relevant to Japan's evolving political and social landscape.

The critical examination of Article 96 reveals how the Constitution's design inherently resists easy amendments, thereby preserving its core principles such as human rights, pacifism, and popular sovereignty. These principles have ensured stability and continuity in Japanese governance, even as debates over Constitutional revision persist. The discussions around unamendability and eternity clauses further emphasize the challenges inherent in altering a document that has become integral to Japan's national identity.

Shinzo Abe's tenure as Prime Minister brought the issue of Constitutional revision to the forefront, particularly concerning Article 9's pacifist stance. Abe's vision of a "normalized" Japan with a more significant role in international affairs contrasts sharply with the preservationists' view that the Constitution has been fundamental to Japan's postwar peace and prosperity. The intensity of this debate underscores the Constitution's role in shaping Japan's identity and its geopolitical stance.

The Constitutional review debate in Japan is heavily influenced by internal party politics, with both ruling and opposition parties using it to sway supporters rather than presenting substantive proposals. Since the end of Prime Minister Abe's term, interest in Constitutional matters has waned among Diet members and citizens, leading to a sense of Constitutional nihilism, where the Constitution is seen as irrelevant to daily life. This attitude has inadvertently preserved the unchanged Constitution.

However, the potential for change remains, driven by the growth of civic movements that could eventually lead to democratic reforms. Though currently small, these movements challenge the current electoral system and represent hope for a more engaged citizenry. Abe's assassination further complicates the revisionist discourse, but his influence persists, particularly in security policies.

Abe's legacy includes significant changes to Japan's security framework and his advocacy for Constitutional revision, specifically regarding Article 9. Despite his controversial domestic policies and allegations of cronyism, his push for a more assertive Japan remains influential. The recent upper house election victory for the LDP has given Prime Minister Kishida the votes needed to pursue Constitutional revision, though public skepticism and other pressing issues like inflation may delay immediate action.

Ultimately, while the LDP continues to advocate for Constitutional changes, particularly to Article 9, the deeply divided public opinion and other pressing national issues suggest that the debate over Constitutional revision in Japan will persist for the foreseeable future. Abe's assassination has added a layer of complexity to the Constitutional revision debate, casting uncertainty on the future trajectory of his revisionist agenda. Despite this, the Constitution's inherent resilience, supported by grassroots solid opposition and the scholarly community, suggests that any attempts at significant amendments will face formidable challenges.

In summary, the Japanese Constitution's longevity is a testament to its foundational principles and the intricate balance it maintains. While calls for revision reflect ongoing debates about national identity and Japan's role on the world stage, the Constitution's stability and adaptability continue to underpin Japan's democratic governance and societal values. The Constitution's enduring legacy, despite the pressures of revisionism, highlights its significance as a cornerstone of modern Japanese statehood.

Final Remarks

In conclusion, it is possible to say that Japan's post-conflict constitution represents an extraordinary example of both external influence and internal resilience in the landscape of international constitutionalism¹. Its longevity, unparalleled in the contemporary world, testifies not only to the complexity of the process that led to its drafting but also to the ability of the constitutional charter to maintain a delicate balance between stability and change². This balance results from several interconnected factors, including its origin, historical context, and the political and social dynamics that have influenced its evolution³.

Although the American occupation played a decisive role in shaping Japan's constitutional architecture, to reduce this process to a mere foreign imposition would be simplistic and misleading⁴. Such an interpretation ignores the complexity of the dynamics involved, which included not only external contributions but also the critical participation of Japanese political and social forces⁵. Moreover, the Constitution incorporates elements drawn from different constitutional traditions such as America, Britain, and Germany, reflecting a synthesis of diverse influences that still contribute to its uniqueness and responsiveness to Japan's needs from the postwar period to the present⁶.

This delicate balance between external influences and internal participation, combined with its ability to embody pivotal principles such as pacifism and popular sovereignty in a context previously alien to those principles, continues to make it a unique model of a "transplanted" constitution⁷. Although the document was established in a context of military occupation, it has managed to become deeply rooted in the social and political fabric of the peninsula⁸. Indeed, a central aspect of the document is the famous Article 9, which enshrines the explicit rejection of war as a means of resolving international disputes⁹.

¹ Shoichi Koseki, *The Birth of Japan's Postwar Constitution* (Ray A Moore tr, Taylor & Francis Group 2018).

² John W Dower, *Embracing Defeat: Japan in the Wake of World War II* (W.W. Norton & Co. 1999).

³ Lucian W Pye and Eiji Takemae, 'Inside GHQ: The Allied Occupation of Japan and Its Legacy' (2003) 82(1) *Foreign Affairs* 176.

⁴ Ray A Moore and Donald R Robinson, 'Introduction: "A New Order of Things"' in Ray A Moore and Donald L Robinson (eds), *Partners for Democracy: Crafting the New Japanese State Under MacArthur* (Oxford University Press 2002) 3.

⁵ Sylvia Brown Hamano, 'Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 415.

⁶ Dale M Hellegers, *We, the Japanese People: World War II and the Origins of the Japanese Constitution* (Stanford University Press 2002).

⁷ John M Maki and Lawrence Ward Beer, 'Constitutionalism in Asia. Asian Views of the American Influence.' (1980) 53(3) *Pacific Affairs* 522.

⁸ Moore RA and Robinson DR [2002] (n.4).

⁹ "(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."

The Constitution of Japan (日本国憲法 *Nihon-koku kenpō*) [1947] Chapter II.

This clause not only made Japan a particularly peaceful actor on the world stage but also generated, over the decades, heated debate both internationally and domestically¹⁰. The primary aim of this thesis was to evaluate the potential longevity of the United States-imposed constitution in Japan, while analyzing the legal and constitutional processes that led to its creation and establishment. This research was approached through a comprehensive analysis of the historical and contemporary dynamics that have influenced its evolution and present stability.

Despite mounting revisionist pressures, the document has indeed shown remarkable resilience¹¹. The persistent “culture of unamendability” and the symbolic value attached to the Constitution have significantly contributed to maintaining the *status quo*¹². Japanese society, particularly legal institutions, demonstrates a strong inclination to preserve the document intact, resorting to legal and political interpretations to adapt to new requirements without changing the text¹³. This proclivity for stability is particularly bolstered by the judiciary, which has historically refrained from challenging the executive branch on constitutional issues, thereby further limiting opportunities for revision¹⁴.

The emergence of numerous new revisionist movements, especially in response to growing international security challenges, shows that the debate around Japan’s constitution is far from over and its future remains uncertain¹⁵. Although Article 9 has become a powerful symbol of the break with the country’s militarist past, it is now more than ever the focus of discussions about the limits and potential of the constitution, giving rise to proposals for revision that reflect changing global geopolitical dynamics¹⁶. Such movements argue that pressures to amend the constitution are motivated by the need for a more assertive Japan on the international stage, able to respond more effectively to new global challenges¹⁷. The response to such pressures has not been to proceed with a formal revision but rather to try to adapt interpretations of the document to new realities without altering it¹⁸.

¹⁰ It is important to note that however, despite constitutional constraints, Japan has participated in several military operations, in cooperation with the United Nations and the United States. For example, the Japanese Self-Defense Forces took part in peacekeeping missions in Cambodia during the 1990s and in Iraq in 2004, providing logistic and humanitarian support, while formally adhering to constitutional limitations.

¹¹ Glenn D Hook, ‘Japan’s International Relations: Politics, Economics, and Security’ (2002) 75(3) Pacific Affairs 454.

¹² Shigenori Matsui, *The Constitution of Japan: A Contextual Analysis* (Hart Pub. 2011).

¹³ Tom Ginsburg, James Melton and Zachary Elkins, *The Endurance of National Constitutions* (Cambridge University Press 2009).

¹⁴ Brown Hamano S [1998] (n.5).

¹⁵ Richard J Samuels, ‘Securing Japan: Tokyo’s Grand Strategy and the Future of East Asia’ (2008) 45(07) Choice Reviews Online 45.

¹⁶ Ibid [14].

¹⁷ Tokujin Matsudaira, ‘Japan: A Case Against the Amendment Politics?’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Edward Elgar Publishing 2023) 176.

¹⁸ Ginsburg T, Melton J and Elkins Z [2009] (n.12).

Indeed, despite these pushes, the document has remained unchanged for more than seven decades, demonstrating its incredible resilience and deep-rootedness in national culture and identity. In this sense, the constitution is not just a set of legal norms, but a symbolic and identity pillar that has played, and still plays, a key role in shaping modern Japan, imparting stability to the system and reflecting the value pillars of peace, popular sovereignty and defense of human rights¹⁹. At the same time, the ongoing confrontation between political and social forces supporting or opposing its revision highlights how this debate is not just about legal issues, but deeply touches the country's sense of belonging and national identity²⁰.

In essence, the issue of constitutional reform, especially following the demise of a central figure like Shinzo Abe, will continue to indefinitely shape the Japanese political landscape, profoundly affecting the future of the document, the future of the country, and its national identity²¹. The debate over constitutional revision, while remaining a crucial and controversial issue, reflecting the external and internal tensions and dynamics affecting governance, does not pose a threat to the constitutional framework, at least in the near future²². It is worth taking into consideration, in any case, that Abe's legacy, with his drive for greater assertiveness on the part of Japan, will continue to influence this debate, although his death has added an additional layer of uncertainty and complexity²³.

This thesis, based on methodology derived from Comparative Constitutional Inquiry, has explored the multiple factors that have contributed to the remarkable longevity of Japan's constitution while examining the growing pressures for its reform in light of changing domestic and international circumstances. By analyzing the dynamics that have shaped the constitutional debate, it becomes clear how Japan's legal framework has managed to navigate the complexities of modern governance while maintaining its stability. The Japanese experience offers valuable insights into how a constitution can maintain relevance and legitimacy in a rapidly changing world by striking a delicate balance between preserving fundamental principles and adapting to new geopolitical and social challenges²⁴.

In order to reach these conclusions, the analytical path was developed according to the different requirements of the research, addressing the different fundamental aspects of the birth and persistence of the Japanese Constitution. The first chapter laid the initial theoretical groundwork

¹⁹ Dower JW [1999] (n.2).

²⁰ Takeshi Inoue, 'The Constitution of Japan and Constitutional Reform' (2016) 23(2) Asia-Pacific Review 1.

²¹ Jeff Kingston, 'Shinzo Abe Is Gone, but His Controversial Vision for Japan Lives On' (*The Guardian*, 12 July 2022) <www.theguardian.com/commentisfree/2022/jul/12/shinzo-abe-controversial-vision-japan-constitution> accessed 24 July 2024.

²² Samuels RJ [2008] (n.14).

²³ Sheila A Smith, 'Will Abe's Legacy Be Constitutional Revision?' (*Council on Foreign Relations*, 11 July 2022) <www.cfr.org/blog/will-abes-legacy-be-constitutional-revision> accessed 24 July 2024.

²⁴ Dower JW [1999] (n.2).

derived from comparative constitutionalism, analyzing the various issues inherent in the technical and theoretical definition of the Japanese constitution. These definitions set the stage for understanding the document's drafting process under external influences and its characteristics of resilience and adaptability. The second chapter laid the particular and unique historical and functional foundations of the document itself. Here, the context of American occupation and the role of key figures such as General MacArthur or Joji Matsumoto were instrumental in shaping the final version of the constitution, despite its reluctant acceptance by the Japanese powers. A key element of this chapter was to define the document's relevance from doctrinal and theoretical perspectives in light of the definitions outlined in the first chapter.

The 1947 constitution is undoubtedly a democratic constitution based on the separation of powers and popular sovereignty, in contrast to the previous imperial sovereignty. Characterized by rigidity, the main legacy of the occupation, it is difficult to amend. Although drafted during Allied occupation and often classified as an "imposed constitution," its legitimacy and complexity go beyond this simple definition, representing, for all intents and purposes, a *sui generis* constitutional case. In essence, the document is a complex text, difficult to classify uniquely, reflecting its unique history and the multiple interpretations attributed to it over the years.

Next, the third chapter analyzed the challenges faced by the constitution, with a focus on the debate over Article 9 and the role of the judiciary, which has maintained constitutional stability despite the pressures. Its propensity to refer to the executive and legislative branches revealed not only the strengths of the system but also the critical issues, highlighting the negative repercussions of this attitude on the protection of human rights. Finally, the fourth chapter focused on public perception and the current debate regarding constitutional review. Japan's consensus and stability-oriented culture has shown resistance toward any attempt to amend the document, even in the face of proposals to revise Article 9 promoted by the Abe government. Despite pressure to amend the constitutional text, particularly to adapt it to geopolitical and national security changes, the Constitution continues to maintain its fundamental role in Japanese political and social life, supported by a public perception that favors continuity.

Ultimately, the 1947 Constitution continues to confirm itself as a document that, while the result of a peculiar and very specific historical context, has been able to adapt and respond to the needs of a changing society, while maintaining its legitimacy and authority in Japan's identity. Moreover, Japan's new national identity, which replaced the old *kokutai* following the establishment of the new constitution and the country's commitment to peace and democracy, solidified the document's status as an irreplaceable foundation of Japan's social, political, and legal landscape.

Ultimately, the case of the Japanese constitution offers interesting insights for the broader academic debate on two central themes: Constitutional Endurance and Constitutional Imposition. Firstly, the ability of Japan's constitution to maintain its stability over time, despite internal and external pressures for revision, offers a key example of how a constitution can consolidate and gain legitimacy even when it has arisen from an undemocratic historical context, as the result of – direct or indirect – imposition. This suggests that constitutional endurance depends not only on the endogenous origin of the document but also on the ability of the political and social context to “make the constitutional document its own” and adapt it to its own needs.

However, it is important to make two specifications. First, as Silvia Suteu's writings also often suggest, endurance is not always synonymous with democracy and justice. It is uncertain how this culture of non-amendability and rigidity will continue to influence the democratic and legal landscape on the Japanese peninsula, given that, as discussed, the legal and political dynamics that led and lead to constitution endurance are not always in line with a strict definition of democracy. Time will be the judge. Second, it should be remembered that it would be imprudent to generalize such conclusions to other contexts, as the Japanese experience remains deeply tied to specific cultural, historical, and political dynamics unique not only in Asia but in the world as a whole.

In terms of constitutional imposition, Japan demonstrates that even an imposed constitution, although this condition is quite contested, can turn into a pillar of national sovereignty if it succeeds in reflecting, over time, the aspirations and values of the people. Again, the uniqueness of the Japanese context, with its culture of consensus, its particular pragmatic nature, and the specific configuration of legal and political power, precludes automatically extending certain reflections to other legal and constitutional realities. However, this case may invite reflection on the complexities of the legitimation process in a context of imposition and how the interrelation of internal and external factors may contribute to its resilience, or conversely, its vulnerability in the long run.

For this reason, the 1947 Constitution, while unique, can offer an excellent point of comparison in contexts with similar origins. Through comparative analysis, it emerges how different legal systems can have common origins or share fundamental principles but develop in different directions, adapting to the specific historical, social and cultural needs of their respective countries. This process of branching out highlights the uniqueness of a subject such as constitutional law, in which each system evolves according to its own dynamics, yet retains an intrinsic fascination that makes it an ongoing object of study and insight.

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