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INTERPRETATION OF THE PACIFIST ARTICLE OF THE CONSTITUTION BY THE BUREAU OF CABINET LEGISLATION: A NEW SOURCE OF CONSTITUTIONAL LAW?

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Abstract: This article analyzes recent change of Japanese governmental interpretation of Article 9 of the Constitution of Japan concerning the right of collective self-defense. This governmental interpretation of Article 9 has been elaborated by the Bureau of Cabinet Legislation. This article criticizes a recent critique of this situation by main stream Japanese constitutional scholars as "crisis of constitutionalism".

I. INTRODUCTION

Since the Liberal Democratic Party's (LDP's) landslide victory in the general election in December 2012 and Prime Minister Shinzo Abe's return to office, Abe, the leader of the LDP, has been under critical fire from the media and many constitutional scholars on grounds of violations of the principle of constitutionalism. These critics proclaim that we are under a crisis of constitutionalism.[1] Indeed, Abe, who had served previously as Prime Minster from 2006 to 2007, was well known as a fervent advocate of constitutional reformation. Once he became Prime Minister for the second time in December 2012, he soon proposed a revision of the constitutional amendment procedure stipulated by Article 96 of the Japanese Constitution.[2] He argued that the current requirements for a constitutional amendment—the approval of two thirds of the members in both houses of the Diet plus a majority of votes cast in a mandatory national referendum—were too strict to allow the Japanese constitution to conform to changes in circumstances. He proposed to relax the requirement of Article 96 such that a constitutional amendment would require approval by a simple majority vote of members of each House, instead of two thirds of members, while retaining the mandatory

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1 *See generally* Yasuo Hasebe, *The End of Constitutional Pacifism?*, 26.1 WASH. INT'L L.J. 125 (2016).

2 NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 96, para. 1–2 (Japan) ("Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds or more of all the members of each House and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon, at a special referendum or at such election as the Diet shall specify. Amendments when so ratified shall immediately be promulgated by the Emperor in the name of the people, as an integral part of this Constitution.").

national referendum. This proposal succeeded to impress his very positive attitude for his supporters. However, Abe's proposal failed to advance because the opposition parties and public opinion criticized it harshly arguing that it would mean a substantial negation of the written and rigid constitution of Japan. Thus he was forced to withdraw the proposal.[3]

After the general election in 2012, Abe also led LDP in overwhelming victories in two successive national elections, the House of Councillors in July 2013 and the general election of the House of Representatives in December 2014. Now, the ruling coalition of the LDP and *Komeito* (a Buddhist center-right party) have 326 seats out of 475 (68.6%) in the House of Representatives and the Abe Cabinet continues to be relatively popular as compared with most predecessors (for example 46.0% positive opinions by an NHK poll in December 2015).[4]

Despite the LDP's large legislative majority and general popularity, Abe realized that it was politically impossible to pass an amendment pursuant to Article 96 that would change the text of Article 9, the pacifist article of the Japanese Constitution. Even if he could pass the amendment through both houses of Parliament, it was not possible to predict the outcome of the mandatory national referendum that would follow.

To achieve changes to the constitution, Abe modified his strategy. Aware of it being politically impossible to pass an amendment pursuant to Article 96 that would change the text of Article 9, he instead attempted to alter the long-standing governmental interpretation of Article 9.

According to the governmental interpretation prepared by the Cabinet Legislation Bureau (CLB) and presented for the first time in 1972 to the House of Councillors' Audit Committee as an answer to a question posed by a Councillors, Article 9 of the Constitution prohibits Japan from exercising the right of collective self-defense recognized by Article 51 of the UN Charter, although Japan may individually exercise

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[3] However, many constitutional scholars have argued that theoretically such a reform does not violate a substantial limit upon constitutional amendment. *See, e.g.*, NOBUYOSHI ASHIBE (supplanted by Kazuyuki Takahashi), KENPO [Constitutional Law] (Iwanami Shoten ed., 6th ed. 2015) (arguing that theoretically such a reform does not violate a substantial limit upon constitutional amendment). *See generally* SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS, 260–61 (2011).

[4] *Seiji Yishiki Getsurei Chousa* [*Monthly research on political consciousness*], NHK ONLINE, https://www.nhk.or.jp/bunken/yoron/political/2015.html (last visited Nov. 5, 2016) (showing the results of a monthly research of political opinion by Japan's national broadcaster).

the right of self-defense.[5] On July 1st 2014, the Abe Cabinet announced that it had decided to change this long-standing constitutional interpretation in order to allow Japan constitutionally to exercise the right of collective self-defense under certain conditions.[6] This decision caused a very heated dispute, in both political and academic circles. Abe, this time as "the reformer of constitutional interpretation," became the target of criticism as a promoter of "destruction of constitutionalism."[7]

I would like to take the opportunity to examine Japanese constitutional theory in light of this political-constitutional controversy. In Section II, I will present briefly the political background of Abe Cabinet's decision. In Section III, I will focus on the legal background and analyze the debate on the constitutionality of the self-defense army and role of the Cabinet Legislation Bureau. In Section IV, I will present a recent change of Japanese governmental interpretation of Article 9 of the Constitution concerning the right of collective self-defense. To reflect theoretically this change of interpretation, I will examine whether the interpretation of Article 9 of the Japanese Constitution by the CLB is a new source of constitutional law, and, if so, what place would be occupied by this new source of law in the hierarchy of norms in Japan? In the Conclusion, I will mention how we should reconstruct the normativity of Article 9.

II. POLITICAL BACKGROUND[8]

A. Evolution of the Political Situation on Constitutional Revision

The acceptance of the Potsdam Declaration of August 14th, 1945 demanding unconditional surrender forced the Japanese Empire to make liberal and democratic reforms. While the occupying US forces carried out these reforms in various fields, one natural and inevitable consequence of the imposed reforms was establishment of a new democratic and liberal constitution. The Japanese government desired

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[5] Ichiro Yoshikuni, Director General, Cabinet Legislation Bureau, Answer before the Cabinet Committee of the House of Councillors (May 12, 1972). All answers of governmental officials in this article are author's translation from Japanese into English.

[6] *Kakugi Kettei: Kunino sonritsu wo matto shi, Kokumin wo mamoru tameno kiremenonai anzenhosho hosei no seibi ni tsuite*, [Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People] PRIME MINISTER AND HIS CABINET (July 1, 2014), http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf.

[7] Renhō Murata, President of the Democratic Party, Question posed to House of Councillors (Feb. 24, 2014).

[8] *See* CURTIS J. MILHAUPT, J. MAR RAMSEYER & MARK D. WEST, THE JAPANESE LEGAL SYSTEM: CASES, CODES, AND COMMENTARY 214–28 (2d ed. 2012).

only a "slight touch," or in other words, only minor changes to the Imperial Charter of 1889.[9] Therefore, it accepted only very reluctantly, under pressure from the occupation forces, the proposal to establish a completely new constitution.[10] In the end, however, the government and the members of the Diet adopted by an overwhelming majority an only slightly retouched version of the draft presented by General MacArthur.

Following Japan's recovery of its independence in 1952 with the ratification of the Treaty of San Francisco, a conservative camp quickly formed that held a long-cherished wish to establish a new constitution which would reinforce the status of the Emperor, modify the pacifist clause to admit rearmament, and give extensive power to the State so as to limit citizens' exercise of liberties and rights.[11] This group's main complaint concerned Article 9, the pacifist clause that prevented a remilitarization of Japan. They preferred a new reactionary and authoritarian autonomous constitution, much more suited to the structure of traditional Japanese society. The conservative camp will be unified in 1955 as the Liberal Democratic Party (LDP).

Despite the LDP remaining in power almost continuously from 1955 until now, the Japanese Constitution has yet to be modified. This is due to efforts by progressives to prevent constitutional revision and block the realization of the wishes of ultra conservative elements within the LDP. Japanese left-wing parties, including the Japanese Socialist Party (JSP) and the Japanese Communist Party (JCP) considered the liberal and democratic constitution to be a symbol and an indispensable instrument of the radical democratization of Japanese post-war society. The pacifist Article was also the central Article of this Constitution. The Japanese left-wing parties, more or less favorable toward communist countries, wanted an unarmed and neutral Archipelago so that Japan would not do military collaboration with the U.S. as a member of the Western countries under the Cold War. Therefore, supporters of constitutional reform were paradoxically considered conservatives in the political sense (*Hoshu*), while pro-constitution activists were considered progressives (*Kakushin*) in the same sense. After a failed attempt by the Conservative government to achieve an authoritarian constitutional

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[9] *See* RYUSUKE ISHII, A HISTORY OF POLITICAL INSTITUTIONS IN JAPAN 112 (1989); EDWIN O. REISCHAUER, JAPAN: THE STORY OF A NATION 116 (4th ed. 2004); KAZUHIRO TAKII, THE MEIJI CONSTITUTION (David Noble ed. & trans., 2007).

[10] *See generally* SHOICHI KOSEKI, THE BIRTH OF JAPANS POSTWAR CONSTITUTION (Ray A. Moore ed. 1998); THEODORE MCNELLY, THE ORIGINS OF JAPAN'S DEMOCRATIC CONSTITUTION (2000); A. MOORE & DONALD L. ROBINSON, PARTNER FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR (2002).

[11] *See generally* SHIGENORI MATSUI, *supra* note 3, at 262.

reform in 1956, reform movements gradually subsided, and the text of the Constitution was never revised.

However, the atmosphere toward constitutional revision in Japan has grown more favorable since the 1990s in the global changes of politics and economy.[12] This is mainly a result of upheaval in Japan's international environment. The Cold War ended definitively, while new regional and ethnic conflicts have exploded around the world. As part of this "New World Order," Japan has been forced to assume its international responsibilities under external pressures. The decisive event was the First Gulf War, where the United States pressured Japan to contribute beyond the dimension of "checkbook diplomacy."[13] Conservative reformers (*Hoshu*), LDP members, also have managed to influence opinion by putting forward proposed constitutional reforms concerning environmental protection, transparency of information and decentralization. Furthermore, in 2012, the LDP published a very conservative draft for a comprehensive amendment of the present Constitution.[14] We can consider this draft as a result of a kind of socio-psychological reaction to development of globalization of Japanese society in order to emphasize a Japanese identity against such a world-wide trend.

In July 2016, the election of the House of Councillors was held. The LDP/Komeito coalition scored a sweeping victory in spite of a well-organized election campaign by opposition parties, including the Japan Communist Party. As a result, the coalition parties and revisionist opposition parties have gained a two-thirds supermajority in the Upper House. This enables the parties to initiate a referendum on changes to the Constitution because they already have a two-thirds supermajority in the House of Representatives. However, according to a recent public opinion poll by the *Nikkei* newspaper, even after the victory of the Abe Administration in the election of the Upper House, opinion supporting activities of the Abe Administration to realize a constitutional amendment decreased from 38% in January to 46% in July and opposite opinion

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[12] *See generally* J. PATRICK BOYD & RICHARD J. SAMUELS, NINE LIVES?: THE POLITICS OF CONSTITUTIONAL REFORM IN JAPAN 27 (2005).

[13] "Checkbook diplomacy" means a diplomatic policy that uses economic aid between countries to gain diplomatic favor.

[14] Jiyumintô, Shinkenpô sôan [New Draft Constitution], Oct. 28, 2005, at www.jimin.jp/jimin/shin_kenpou/shiryou/pdf/051028_a.pdf [hereinafter LDP Draft].

increased respectively from 34% to 49%.[15] Thus, the prospect for a constitutional amendment in the near future is quite uncertain.

B. Constitutional Pacifism and Contradictory Military Reality[16]

The Constitution proclaims a remarkable pacifism. First, the Japanese people renounce all kinds of war, including defensive war; second, it is interpreted as completely disarming the country; and finally, "the right to live in peace" is proclaimed in the Preamble and Article 9 of the Constitution. Chapter II of the Constitution provides as follows:

> **CHAPTER II RENUNCIATION OF WAR**
>
> Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
> 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.[17]

This text is not merely the result of a victory of an idealistic pacifism. Indeed, a complex political situation immediately following the end of World War II led Japan to proclaim such pacifism. The aim of the Allied Powers of total disarmament policy of Japan was to condemn it as pre-war colonialist and imperialistic invader. The Japanese government agreed to disarmament because preservation of the imperial regime and the national polity was the most important support for traditional social and moral order in Japanese society.[18] The government therefore wished to save the imperial regime at any cost; total disarmament was the price. The Japanese had also lived through "Hiroshima and Nagasaki" and experienced the first hand misery and

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[15] *Abe Seiken Deno Kenpou Kaisei "Hantai" 49% Yoronchousa* [*49% "Disagrees" to the Constitutional Reform under Abe Administration: Public Opinion Poll*], NIHON KEIZAI SHIMBUN (July 25, 2016), http://www.nikkei.com/article/DGXLZO05207340V20C16A7PE8000/.

[16] *See generally* JAMES E. AUER, 'ARTICLE NINE: RENUNCIATION OF WAR' IN JAPANESE CONSTITUTIONAL LAW 69 (Percy R. Luney, Jr., & Kazuyuki Takahashi eds., 1993); TOSHIHIRO YAMAUCHI, 'CONSTITUTIONAL PACFISM: PRINCIPLE, REALITY, AND PERSPECTIVE' IN FIVE DECADES OF CONSTITUTIONALISM IN JAPANESE SOCIETY 27 (Yoichi Higuchi ed., 2001); BOYD & SAMUELS, *supra* note 12; MCNELLY, *supra* note 10 at 105; GLENN D. HOCK & GAVAN MCCORMACK, JAPAN'S CONTESTED CONSTITUTION: DOCUMENTS AND ANALYSIS 13 (2001).

[17] KENPŌ, art. 9, para. 2 (Japan).

[18] *See* SHOICHI KOSEKI, *supra* note 10, at 102.

inhumanity of war. The phrase "the war, that's enough!" represented the general feeling at the time.

However, from the very early stage of the Cold War, Americans began to regret bitterly the introduction of Article 9 in the Constitution. Only a few years after the defeat of Japan, tensions between the US and the USSR became more prominent. The emergence of the Chinese Communist government in 1949 finally convinced the United States that Japan's assistance was necessary to counter communist influence in Asia. The Cold War strongly shook Japan's new constitutional era. Consequently, U.S. diplomatic policy changed course.[19] In 1950, General MacArthur ordered the Tokyo government to create a paramilitary force to take over the role of American troops in Japan. When the troops shift from Japan to the Korean Peninsula, Japan would become defenseless. In fact, the Cold War led the Japanese and the U.S. to question the disarmament provision in the Japanese Constitution very seriously.

By November 1948, the US and Japanese governments had already developed a potential solution to address the constitutional problem relating to Article 9. According to the new idea, the text of Article 9 prohibited "the use of force as means of settling international disputes", but did not prohibit the use of force as a means to defend the national territory, a right recognized by all nations under the UN Charter.[20] The United States therefore proposed the creation of a paramilitary force. Thus, Japan was encouraged to build the embryo of an army. The American aim was twofold: reduce the cost of defense of the Archipelago, and allow it to accomplish a remilitarization through new alliances despite active protest movements.

In 1951, a "National Police Reserve (*Keisatsu Yobitai*)" of 75,000 men was created. That same year, Japan signed the San Francisco Peace Treaty, allowing it to rejoin the international community. Japan also signed the Japan-U.S. Security Treaty, which legitimized the continued presence of the US Army garrison in Japanese territory after the end of the post-War occupation. The paramilitary force changed its name twice: first, it became the "National Security Force (*Hoantai*)" in 1952, and then the "Self-Defense Forces" (*Jieitai* or "SDF") in 1954. Since that time, the Japanese army has gradually strengthened its military

[19] *See generally* MARIUS B. JANSEN, THE MAKING OF MODERN JAPAN 969 (2000); REISCHAUER, *supra* note 9, at 199.

[20] *See* MCNELLY, *supra* note 10, at 134–35.

relationship with US forces. Today, the National Defense budget (for FY2015) is $40.9 billion in US dollars, an amount similar to that of France ($50.9 billion) or Germany ($39.4 billion).[21]

III. LEGAL BACKGROUND

A. The Debate on the Constitutionality of the Self-Defense Army

Due to Article 9 of the Constitution, the constitutionality of the SDF has been an important ongoing legal issue in Japan since World War II. The issue of national defense and the creation of an army in relation to constitutionalism is particularly interesting in this country compared to other countries. In Japan, discussion about the army is directly related to constitutional matters. While the SDF has developed considerably throughout the postwar period, the legal debate about its constitutionality has never really ceased.

Successive governments have argued that even under Article 9 of the Constitution, Japan is not prohibited from possessing a "minimum defensive force necessary for its self-defense".[22] According to this constitutional interpretation, if Japan were to have a military force beyond that minimum level, however, the situation would become unconstitutional because it would amount to "war potential" prohibited by Article 9 of the Constitution. Therefore, the successive governments have taken the view that the military power of the SDF does not reach the level of such "war potential". In Parliament, the ruling party, LDP, has supported the government's interpretation in the domain of national defense despite strong protest from the Japanese left wing. For many years, however, the left-wing parties succeeded in slowing a gradual expansion of the SDF politically through parliamentary debates. But in 1994, the Japanese Socialist Party made a change in its policy toward Article 9 to join a ruling coalition. As a consequence, all Japanese political parties have come to recognize the constitutionality of the SDF except for the Japanese Communist Party and other small left parties.

With regard to Japanese case law, the Supreme Court avoided an opportunity to examine the constitutionality of the Japan-U.S. Security Treaty in 1959 in the *Sunagawa* case, adopting the same idea as the "political question doctrine" in American constitutional theory or "*act de*

[21] Sam Perlo-Freeman et al., *Trends in World Military Expenditure, 2015*, SIPRI FACT SHEET (April 2016), http://books.sipri.org/files/FS/SIPRIFS1604.pdf.

[22] Hideo Sanda, Director General, Cabinet Legislation Bureau, Answer before the Budget Committee of the House of Councillors (Apr. 3, 1978).

gouvernement" in French legal theory, where Administrative Courts avoid examining legality of a certain kind of presidential acts and diplomatic acts of government whose nature is political to a high degree.[23] In the US, political question doctrine might be invoked, for example if a judicial intervention causes a disrespect for other branches of government.[24] In 1952, a JSP leader had brought a constitutional litigation concerning the Constitution directly before the high court, in the absence of any case or controversy. The Japanese Supreme Court declined to examine the constitutionality of the "National Police Reserve," on the grounds that the judges' power to exercise judicial review over the constitutionality of a state act is based on the American model that had been established through case law in the United States where existence of a case or a controversy is a necessary condition for judicial examination of constitutionality.[25] In fact, the Japanese Supreme Court has yet to definitively rule on the SDF's constitutionality under a certain influence of the political question doctrine. Although one judgment out of the Sapporo District Court in 1973, the *Naganuma* case,[26] declared the SDF unconstitutional, the Supreme Court invalidated the decision in September of 1982,[27] concluding that the plaintiffs no longer had standing to sue.

Public opinion concerning the presence of the SDF is contradictory. On one hand, a majority considers that the existence of the SDF is necessary for national defense and to provide aid to victims of disasters.[28] But this same majority has long been against the deletion of paragraph 2 of Article 9 of the Constitution.[29] As for legal doctrine, the majority of constitutional scholars take the view that the SDF is

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[23] Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 13 *Keishu* 3225; *See* MILHAUPT ET AL., *supra* note 8, at 230.

[24] *E.g*., Baker v. Carr, 369 U.S. 186 (1962); Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Nixon v. United States, 506 U.S. 224 (1993). According to the US political question doctrine, the Supreme Court does not examine cases which deal directly with issues that Constitution makes responsible exclusively the other branches of government.

[25] Saikō Saibansho [Sup. Ct.] Oct. 8, 1952, 6 MINSHU 783.

[26] Sapporo District Court, Sept. 7, 1973, HANREI JIHO, no 712, 249; *See* MILHAUPT ET AL., *supra* note 8, at 239.

[27] Saikō Saibansho [Sup. Ct.] Sept. 9, 1982, 36 MINSHU 1679.

[28] A public opinion survey on SDF and issues of national defense taken by the Cabinet in January 2015 indicate that 29.9% represent an opinion for reinforcing SDF and 59.2% an opinion for maintaining current level of faculties, see "Jieitai/Boueimondai Ni Kansuru Yoronchousa" No Gaiyou [Summary on "Public Opinion Poll on Self-Defense Forces/Defense Problem"], http://survey.gov-online.go.jp/h26/h26-bouei/gairyaku.pdf (Japan).

[29] *See Yoron Chousa: Kenpou 9 Jou, Kaisei Hantai 52% "Kenpou Kaisei" Ha Kikkou* [*Public Opinion Poll: Article 9 of the Constitution, 52% disagrees "Constitutional Reform" competition remains*], MAINICHI SHINBUN (May 3, 2016) http://mainichi.jp/articles/20160503/k00/00e/010/121000c (Japan) (A public opinion poll taken by a Newspaper *Mainichi Shinbun* shows 52% of people are against any amendment of Article 9).

unconstitutional, respecting the letter of the Constitution, a position that is explained further in Section IV C.

Despite the gradual development of the SDF, Article 9 has exerted a considerable, concrete impact on Japanese military policy since World War II. Indeed, the existence of the pacifist Article and movements to safeguard the Constitution prevented a total and radical remilitarization of postwar Japan. If the article had been removed, the four pacifist policies adopted by successive conservative governments would never have existed. These policies are:

> (1) "Three principles on weapons exports" (1967),[30] under which Japan declared it would not export weapons to communist governments, to countries designated by the United Nations, and to countries in international conflict or at risk of being so
> (2) "Three non-nuclear principles" (1967),[31] under which Japan adopts the following three prohibitions: No possession, no production and no permitted introduction onto Japanese territory of nuclear weapons
> (3) Limitation of military budgets to 1% of GNP (1976–1986)[32]
> (4) No re-introduction of a conscription system (1980)[33]

Article 9 prevented the Japanese defense industry from growing as much as in Western countries, or as it had in Japan before the World War II. The three non-nuclear principles were motivated by the "nuclear allergy" among contemporary Japanese people. As a matter of fact, it is widely believed that the third non-nuclear principle has been violated by the US military. According to an official explanation from the Japanese government, when the U.S. wants to introduce nuclear weapons into Japanese territory, it must notify the Japanese government for consultation. Because the United States has never provided such notice, so goes the theory, we must conclude that nuclear weapons have not been introduced into Japanese territory. However, the U.S. military keeps its disposition, movement, and removal of nuclear weapons totally secret.[34]

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[30] Prime Minister Takeo Miki, Answer before the Budget Committee of the House of Representatives (Feb. 27, 1976).

[31] Prime Minister Eisaku Sato, Policy speech before the House of Representatives (Jan. 30, 1968).

[32] Cabinet Decision by the Miki Cabinet, Nov. 5, 1976.

[33] Cabinet Legislation Bureau, Written Answer to House of Councillors (Aug. 15, 1980).

[34] Yasufumi Okadome, *Hikaku 3 gensoku to kaku mituyaku kyougi* [*Three Non-nuclear Principles and Consultations on the Secret Nuclear Deal*] *Rippo to chosa* no. 309 2010 at 101; Hans Kristensen, *Japan Under the US Nuclear Umbrella*, NAUTILUS INSTITUTE (June 2016), http://www.nautilus.org/wp-content/uploads/2015/06/Japan-Under-the-US-Nuclear-Umbrella.pdf.

Thus, Tokyo has no way to confirm or deny the existence or introduction of nuclear weapons onto its territory.

B. The Cabinet Legislation Bureau and Its Role

The Cabinet Legislation Bureau (CLB) was formed in 1885, four years before the establishment of the Meiji Imperial Constitution. Modeled on the French *Conseil d'État*, the CLB was created as a part of the modernization of governmental and administrative organizations that included the creation of the Cabinet of Ministers as its most important component. Four years later, administrative justice functions were vested in an Administrative Court. Thus, the CLB became a pure organ of legal counsel and of examination of government bills, orders, and treaties. After being moved under the Ministry of Justice for the period from 1945 to 1952, this organ attached to the Cabinet again. The CLB today primarily fulfills two very important functions for the rule of law: it advises Cabinet members on drafting legislation to be proposed to the Diet (opinion-giving work), and it acts as legal counsel for the Cabinet by examining bills, orders and treaties (examination work). It also presents opinions on legal matters to the Prime Minister and other Cabinet Ministers. It is a state organ that is authoritative in the Japanese bureaucracy. It is noteworthy that in part as a result of the rigorous examination of bills by the CLB, the number of laws declared unconstitutional by the Supreme Court is extremely small–currently only ten.[35]

The CLB's Director General shall, as a legal adviser to the Cabinet, assume the role of replying on behalf of the Cabinet to the legal questions raised by Diet members. The CLB's mission is to unify legal interpretations concerning governmental and administrative activities to ensure the appropriate and consistent implementation of laws and ordinances.[36] This mission is not only to unify interpretations among ministries, but also those of successive governments, so as not to cause any instability or any legal disorder and thereby to maintain the coherence of government activities despite changes of government. The CLB's function applies similarly to constitutional questions. Without unification of constitutional interpretation within the government, bills cannot be drafted. *A posteriori* control of the constitutionality of all acts of state can be exercised by judicial review, but governmental

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[35] Shigeru Yamaguchi, Former Chief Justice of the Supreme Court, Remarks to the Constitution Research Council of the House of Representatives (May 15, 2003).

[36] See official website of the CLB at *About the Cabinet Legislation Bureau*, CABINET LEGISLATION BUREAU, http://www.clb.go.jp/english/about.html (last visited Nov. 6, 2016).

constitutional interpretations must be checked *a priori* and unified by the CLB.

C. Interpretation of Article 9 by the Government and the CLB

To remilitarize Japan in sharp contradiction with the pacifist Article of the Constitution, the government and CLB have presented many strained and acrobatic constitutional interpretations as we see below. They have interpreted the organization of the military and other activities as remaining within the confines of the Constitution. For example, on December 22, 1954, the Director of the Defense Agency stated that Article 9 does not prevent Japan from defending itself, although Japan has renounced war through this Article of the Constitution.[37] The government introduced three conditions to exercising the right of self-defense under the Constitution: (1) if there is an attack both pressing and illegal in Japan, (2) there is no other appropriate means of defense, and (3) military force that Japan would exercise should be confined to the necessary minimum. The government repeatedly confirmed such conditions in the Diet.[38]

The CLB has clarified the legal meanings of the constitutional provisions concerning military activities. In 1965, the Director General of the CLB provided a definition of the term "civilians" as used in paragraph 2 of Article 66.[39] He explained, "The Prime Minister and other Ministers of State must be civilians. By this government's constitutional interpretation change in 1954, the CLB has prohibited an active member of the SDF from becoming a minister."[40] In 1978, the Director General presented the constitutional interpretation stating that the possession of nuclear weapons is possible even under the current Constitution,[41] and in 1980, he noted that the introduction of a conscription system is prohibited constitutionally.[42] A hypothetical legal question has arisen in which Japan would send SDF troops to

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[37] Seiichi Omura, Director of Defense Agency, Answer before the Budget Committee of the House of Representatives (Dec. 22, 1954).

[38] Masami Takatsuji, Director General, Cabinet Legislation Bureau, Answer before the Budget Committee of the House of Councillors (Mar. 31, 1969); Masami Takatsuji, Director General, Cabinet Legislation Bureau, Answer before the Cabinet Committee of the House of Councillors (May 12, 1972); Prime Minister Kakuei Tanaka, Answer before the House of Councillors (Sept. 23, 1973).

[39] KENPŌ, art. 66, para. 2 (Japan) ("The Cabinet shall consist of the Prime Minister, who shall be its head, and other Ministers of State, as provided for by law.").

[40] Masami Takatsuji, Director General, Cabinet Legislation Bureau, Answer before the Budget Committee of the House of Representatives (May 31, 1965).

[41] Hideo Mano, Director General, Cabinet Legislation Bureau, Answer before the Budget Committee of the House of Councillors (Apr. 3, 1978).

[42] Reijiro Tsunoda, Director General, Cabinet Legislation Bureau, Answer before the Budget Committee of the House of Representatives, Feb. 16, 1981.

participate in a UN army. No such army has been established, but it could be created under Article 47 and 48 of the UN Charter in the future. In 1980, however, the government rejected this possibility officially, arguing that if such a UN army should exercise military force to carry out its mission, then the participation of troops from the SDF would not be permitted under the current Constitution.[43]

Since the First Gulf War in 1991, under U.S. diplomatic pressure, the LDP government has wanted Japan to contribute more to the international community not only financially, but also in providing soldiers, doctors, and humanitarian aid, etc. In 1992, the Diet passed a controversial Act allowing cooperation to maintain peacekeeping operations of the UN. Following the September 11, 2001 terrorist attacks in New York, on October 29, 2001, a new Act was passed to strengthen Japan's cooperation as part of the international community. The Act concerned the Special Measures related to the September 11, 2001 terrorist attacks in the United States. This Act allowed Japan to send SDF troops to engage in activities to support foreign military and humanitarian activities not only within Japan but also on the high seas and in foreign territory (with the consent of that country). To justify sending troops to Iraq in 2003, the government and CLB invented a very artificial distinction between "combat area" and "non-combat area" in a country at war. According to the government's interpretation, the Constitution prohibits sending troops only into a "combat region" (which would then require prior approval of the Diet).[44] In addition, the Government stated that land transportation of weapons is prohibited even in a "non-combat area." Many constitutional scholars criticized harshly the distinction between a "combat area" and a "non-combat area" elaborated by the CLB on the ground that such a distinction is only a pure abstract or notional concept, namely sophism. To justify this distinction, however, the Prime Minister at the time, Junichiro Koizumi, appealed to the spirit of international understanding, citing the following sentence of the Preamble of the Constitution: "We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth."[45]

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[43] Cabinet Legislation Bureau, Written Answer to House of Councillors (Oct. 28, 1980).

[44] Osamu Akiyama, Director General, Cabinet Legislation Bureau, Answer before the Budget Committee of the House of Representatives (Feb. 13, 2004); Cabinet Legislation Bureau, Written Answer to House of Councillors (Aug. 10, 2004).

[45] KENPŌ, pmbl.; Prime Minister Junichiro Koizumi, Remarks at a press conference (Sept. 19, 2001).

Thus, as we have seen above, we can say that successive governments tried to justify constitutionality of more and more expanding military activities of SDF to responding to international pressures.

IV. CONSTITUTIONALISM IN CRISIS AND THE ISSUE OF THE RIGHT OF COLLECTIVE SELF-DEFENSE

A. "Impermissible" Interpretation Established by the CLB

In 2013, the Abe Cabinet determined it would be politically difficult to attempt a constitutional amendment of Article 9 through an amendment of procedure of constitutional amendment stipulated by Article 96, and therefore decided to modify the interpretation disallowing the right of collective self-defense developed by the CLB since 1981.

On May 29, 1981, in response to a question asked by a member of the LDP in the House of Representatives, the LDP government clearly formulated its negative constitutional interpretation on the issue of a right of collective self-defense as follows:

> Under international law, it is understood that a sovereign state has the right of collective self-defense, that is to say, the right to prevent a military attack on a foreign country that maintains a close relationship with it, even though it is not directly attacked. Japan, as a sovereign state, has the natural right of collective self-defense defined as such. According to our interpretation of Article 9, the exercise of the right of self-defense permitted by it must be limited to the minimum necessary to defend our country. Therefore, an exercise of collective self-defense right is not permitted under the Constitution since it exceeds such a limit.[46]

On February 22, 1983, the Director General of the CLB Reijiro Tsunoda himself admitted to the Budget Committee of the House of Representatives that if Japan would like to exercise the right of collective self-defense under the current Constitution, it must necessarily resort to a constitutional amendment. Thus, the interpretation that the right of collective self-defense was not permissible under Article 9 was established, and dominated for more than 30 years until 2014.

However, since the 1990s the CLB has been criticized more and more violently by radical conservatives because they believe the interpretations of Article 9 presented by the CLB are restricting the

[46] Cabinet Legislation Bureau, Written Answer to House of Councillors (May 29, 1981).

development of activities of the SDF too severely. It is notable that the rise among conservatives of opinion favorable to the introduction of a Constitutional Court of the European type, able to judge constitutional limits of military activities, was parallel to this increasing criticism of the CLB. They were thinking it would be better to examine the constitutionality of legislations concerning military activities by a Constitutional Court where judges could be nominated on political reasons than to let the CLB examine it as of now, where its bureaucratic legal control of military activities could not be changed with ease by external political powers.

On August 8 2013, Abe appointed Ichiro Komatsu as the new Director General of the CLB. Komatsu,[47] who was a professional diplomat, an expert in international law, and the former Japanese Ambassador to France, was a perfect stranger to the CLB.[48] In fact, he was thrust into what had been an honorable bastion of government-patronized legists. Although Komatsu's appointment followed statutory procedure, it was not in accordance with the rotation practice dating back to 1946.[49] Traditionally, the Deputy Director General of the CLB automatically assumed the position of Director General upon the resignation of his predecessor. Komatsu was expected to have significant advisory power to the CLB. As we will see below, certainly the CLB will change the constitutional interpretation of the Article 9 on the right of collective self-defense after the nomination of Komatsu as the Director General of the CLB. It is noteworthy that the Japanese government has always followed the advisory opinions of the CLB. Thus, the Abe Cabinet thought, if this customary rule is always to be respected, the advisory opinion should be changed.

B. The Change of the Constitutional Interpretation of Article 9 and Reactions

After working with the CLB, whose Director General had until recently been an outsider diplomat, on July 1, 2014, the Cabinet meeting

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[47] He had published a textbook on international law before his nomination as the Director General of the CLB, see ICHIRO KOMATSU, JISSEN KOKUSAIHO, PRACTICAL INTERNATIONAL LAW (2011). After his death on June 23, 2014, his academic works on international law were collected and published, see ICHIRO KOMATSU, KOKUSAIHO JISSEN RONSHU, COLLECTED WORKS ON PRACTICAL INTERNATIONAL LAW (2015).

[48] He had to resign from the post because of illness on May 16, 2014.

[49] Naikaku hōseikyoku secchi hō [Enforcement Order of CLB Establishment Law], Law No. 252 of 1952, art. 2, para. 1.

announced a change in the governmental constitutional interpretation of Article 9:[50]

> Under such recognition and as a result of careful examination in light of the current security environment, the Government has reached a conclusion that not only when an armed attack against Japan occurs but also when an armed attack against a foreign country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people, use of force to the minimum extent necessary should be interpreted to be permitted under the Constitution as measures for self-defense in accordance with the basic logic of the Government's view to date.[51]

It is clear that this change of the government's interpretation of Article 9 widens the practical scope of the right of self-defense. The right to self-defense is widened under this interpretation because even if there is no direct military attack against Japan, Japan is constitutionally able to use the minimum necessary force when the strict conditions of the armed attack on the foreign country threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness, and when there is no other appropriate means available to repel the attack and ensure Japan's survival and protect its people are satisfied. Criticism that "this alteration of constitutional interpretation by the Abe Cabinet qualifies as a violation of constitutionalism" widely and rapidly spread in influential media, constitutional academia,[52] the Japan Federation of Bar Associations,[53] and the overwhelming majority of the pacific movements. This widespread criticism acted to oppose the interpretation by the CLB. It should be noted that former Director

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[50] At the time of the actual change in interpretation of Article 9, Komatsu was no longer the Director General of the CLB because of disease, and had been succeeded by Yusuke Yokobatake, former Deputy Director General of the CLB. If he had not accepted the new constitutional interpretation of Article 9, probably another outsider of the CLB would have been nominated as the Director General.

[51] *Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect its People* (July 1, 2014) 7–8, CABINET LEGISLATION BUREAU, http://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf.

[52] On June 11, Asahi Shinbun reported that only 1.6% of 122 Japanese constitutional scholars appreciated this bill as constitutional.

[53] Susumu Murakoshi, *Statement Opposing the Bills to Revise National Security Policy*, JAPAN FED'N OF BAR ASS'NS (May 14, 2015), http://www.nichibenren.or.jp/en/document/statements/year/2015/150514.html.

Generals of the CLB[54] have publicly criticized this change, always coming from the perspective of constitutionalism, and former Chief Justice Yamaguchi of the Supreme Court[55] expressed the same opinion. Various political movements were also encouraged by this critical constitutional argument. This groundswell of criticism is why the Abe government had a difficult time persuading both Houses of the Diet to adopt a controversial security-related bill in 2015, which was based on the new constitutional interpretation regarding the right of collective self-defense.[56]

Admittedly, this criticism within the context of constitutionalism has been very influential politically. Despite one's political position towards the military-diplomatic policy of the Abe government, we ask if this change in the government's constitutional interpretation regarding the right of collective self-defense is a constitutional crisis. Therefore, we wonder if it is theoretically appropriate to argue that this change in the government leads to a crisis of constitutionalism. To examine this question, we must review the constitutional doctrinal history of the pacifist Article.

C. The Doctrinal History of Article 9

Since the establishment of the "National Police Reserve" in 1950, the vast majority of constitutional scholars have held the view that the policy of remilitarization continuously pursued by conservative politicians is unconstitutional. Why have they viewed remilitarization as unconstitutional? Japanese representative constitutional doctrine after the World War II was built under Hans Kelsen's theoretical influence on hierarchy of laws according to the following reasoning: legal

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[54] Masasuke Omori, Former Director General, Cabinet Legislation Bureau, Opinion presented at the Peace and Security Special Committee of the House of Councillors (Sep. 9, 2015) (Director General from January 1996 to August 1999); Masahiro Sakata, Former Director General, Cabinet Legislation Bureau, Opinion presented at the Peace and Security Special Committee of the House of Councillors (June 22, 2015) (Director General from August 2004 to September 2006); Reiichi Miyazaki, Former Director General, Cabinet Legislation Bureau, Opinion presented at the Peace and Security Special Committee of the House of Councillors (May15, 2014) (Director General from September 2006 to January 2010).

[55] Opinion presented by former Chief Justice Shigeru Yamaguchi in an interview with Asahi Shinbun, see *Ex-Supreme Court chief justice raps Abe's security reforms*, THE JAPAN TIMES (Sep. 4, 2015), http://www.japantimes.co.jp/news/2015/09/04/national/politics-diplomacy/ex-supreme-court-chief-justice-raps-abes-security-reforms/#.WC1ljuErKt8.

[56] Tomohiro Osaki, *Thousands protest Abe, security bills at Diet rally*, THE JAPAN TIMES (Aug. 30, 2015), http://www.japantimes.co.jp/news/2015/08/30/national/thousands-protest-abe-security-bills-diet-rally/#.V0edKJOLR-U (reporting that organizers stated 120.000 people gathered around the Diet Building on Aug. 30, 2015).

norms fix a frame.[57] This frame exists objectively and it is verifiable scientifically. Legal actors have several possible interpretations within this frame. As interpreters of the legal norm, the actors make voluntary choices between different possibilities and create the law. Thus, one can distinguish "authentic interpretation" from "false interpretation" scientifically and objectively. By adopting this conception of the act of interpretation, the majority of Japanese constitutional scholarship has drawn the inference that any interpretation that would justify constitutionality of SDF is outside of the frame fixed by Article 9. They took a very critical position with regard to the government's interpretation of Article 9 and concluded that it was a "false interpretation." Therefore, the CLB was criticized as an organ that used sophistry and contributed to the "false interpretation" of Article 9. The CLB was also the object of fierce criticism from citizens concerned with preserving Japanese pacifism. But despite such criticism, rearmament of Japan was completed and strengthened gradually through many duly established laws and decrees concerning the SDF and the Defense Agency.[58]

In opposition to rearmament, dissenting views were expressed strongly by constitutional scholarship and in the media. The media characterized the political and legal phenomenon around Article 9 as constitutional amendment by interpretation.[59] It means to effect *de facto* constitutional changes through an interpretation of the existing Constitution that contradicts the constitution's meaning. In other words, a policy objective is achieved through a change in constitutional interpretation without following the procedure prescribed for constitutional amendment, or without touching any constitutional text in question. Thus, it has become very common among those who are pro-constitution progressives to criticize successive governments' constitutional policies as a constitutional hollowing out through constitutional amendment by interpretation.

Parallel to the theory of "amendment by interpretation" is a doctrinal explanation inspired by the theory of constitutional mutation (*Verfassungswandlung*) presented by the great German public law theoretician, Georg Jellinek. His theory describes a "constitutional

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[57] *See generally* SHIRO KIYOMIYA, KOKKA SAYO NO RIRON [THEORY OF STATE FUNCTIONS] (1968).

[58] *About Ministry*, JAPAN MINISTRY OF DEFENSE, http://www.mod.go.jp/e/about/index.html (last visited Nov. 6, 2016). The Defense Agency has been the Ministry of Defense since January of 2007.

[59] *See generally* OSAMU WATANABE, NIHONKOKU KENPO 'KAISEI' SHI [HISTORY OF IDEOLOGY OF JAPANESE CONSTITUTIONAL REFORM] (1987).

modification that formally leaves the texts unchanged, but is produced by the facts, which must not be accompanied by the intention or consciousness of such a change."[60] Here, "the facts" would be the existence of the SDF and the Japanese Defense Agency produced by the numerous unconstitutional laws and ordinances that legally support their existence and operation. Therefore, the question is whether Japanese constitutional law has been changed by "constitutional amendment by interpretation."

Similarly, in the 1980s, constitutionalist, Kiminobu Hashimoto, presented theories inspired by the theory of constitutional mutation.[61] According to him, until the 1980s, Japanese constitutional doctrine had come to grips with the practical meaning of Article 9, namely the total negation of remilitarization. However, with the radical changes of the international environment and the international status of Japan, he affirmed it was necessary to change Japan's interpretation of Article 9. The Japanese people consequently condoned establishment of military forces for national defense, leading to a transformation in the meaning of Article 9. Therefore, the question is whether Japanese constitutional law has been changed by "constitutional amendment by interpretation."

However, a majority of constitutionalists in Japan have rejected the theory of "constitutional mutation" or that of "constitutional convention" *contra legem* ("against the law"), doubting its compatibility with the existence of a written and rigid constitution. In fact, they have never accepted that while the will of the nation is principally expressed in constitutional text, it can manifest also through custom or stabilized accomplished fact. Under this theory, we would have to negate that a constitutional custom can change the constitutional text. We have to qualify that the SDF was created undoubtedly by the anti-constitutionalist means, unlike the postwar German remilitarization process where the constitution was changed formally by using amendment procedure to justify a postwar remilitarization.

Another approach explaining the nature of the SDF appeared at that time, which defined the SDF as unconstitutional but legal (the "unconstitutional-legal-theory").[62] This theory states that while the SDF remains unconstitutional, we must face the reality that it existed and

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[60] *See* GEORG JELINEK, VERFASSUNGSÄNDERUNG UND VERFASSUNGSWANDLUNG: EINE STAATSRECHTLICH-POLITISCHE ABHANDLUNG, (O. Haring ed., 1906).

[61] *See* KIMINOBU HASHIMOTO, KOHO NO KAISHAKU [INTERPRETATION OF PUBLIC LAW] (1987).

[62] *See* NAOKI KOBAYASHI, KENPO DAI 9 JO [ARTICLE 9 OF THE CONSTITUTION] (1982).

functioned as a national army for more than twenty years with the legal base founded by numerous duly established laws and decrees. However, there was not any supporter of this theory.

Overall, the prevalent constitutional doctrine at that time and even until very recently, including scholars who rejected the "constitutional mutation" theory and proponents of the "unconstitutional-legal-theory," was critical of the government's interpretation of Article 9. The government seemed too tolerant in accepting a reality obviously inconsistent with the constitutional text. According to the dominant constitutional doctrine, "constitutional amendment by interpretation" and "constitutional mutation" were no more than a violation of constitutionalism. Constitutional doctrines that supported the government's interpretation on the pacifist Article asserting its compatibility with SDF were very rare.

D. Theoretical Reflection on Current Trends of Constitutional Doctrine

As noted, on July 1, 2014, the Abe Cabinet decided to change the government's interpretation of Article 9 so that Japan would be able to exercise the right of collective self-defense constitutionally. Is this a constitutional policy that can be carried out without any constitutional amendment? It seems that the current majority of Japanese constitutional scholars now affirm emphatically that this change cannot be implemented without recourse to the procedure for a constitutional amendment stipulated by Article 96 from the procedural point of view. According to this doctrine, the rule of law in Japan is guaranteed by the stability of the government's interpretation of the Constitution. That interpretation must be the consequence of the political balance of power, meaning the conflicts, tensions, and deliberations in the Diet since the establishment of SDF between successive governments and opposition parties. We should respect this interpretation as the result of legal and political balance.[63] In addition, the majority view argues that the interpretation presented by successive governments prior to Abe and previously by the CLB coincides well with the current opinion of Japanese citizens today. According to this thesis, a kind of mutual agreement between the major actors had been established based on a restrictive interpretation. Indeed, efforts by the SDF to offer aid to

[63] *E.g.*, Shigeru Minamino, *Kinjite deha nakute seikohowo, jo yori ri wo* [*Frontal Attack Rather than Forbidden Technique, Reason than Emotion*], *in* SHUDANTEKI JIEIKEN NO NANIGA MONADIKA 89, 89 (Yasuhiro Okudaira & Jiro Yamaguchi eds., 2014).

victims of natural disasters are highly appreciated by the people, like when the SDF responded to the great earthquake on March 11, 2011. The majority of the public, however, does not desire an expansion of the scope of military activities of the SDF.[64]

It is very interesting to note that so far we find no controversy between the two opposing theoretical positions on the change of interpretation of the Article 9. Belonging politically to the same camp, the two currents support different strategies to prevent a constitutionalization of an exercise of the right of collective self-defense: the opposition from the procedural point of view or the substantive point of view.

What is the theoretical premise of the doctrine on Article 9 of the current majority of Japanese constitutional scholars who remark a necessity to resort to constitutional amendment? Theoretically, following this doctrine, the CLB's interpretation is described as having a particular role in the hierarchy of laws in the state. This doctrine does not hold that the CLB's interpretation has become a legal standard at the constitutional level, but it would be above ordinary law, which the Legislature can legally abolish or modify at any time without a constitutional amendment. The CLB's interpretation therefore falls somewhere in between on the hierarchy. Because the interpretation has an effect similar to that of a constitutional amendment, but is not constitutional without an amendment, it is a "semi-constitutional" norm or "quasi-constitutional" norm *contra legem*. It is normatively stronger than the constitutional convention, since it is a purely political norm without any judicial sanction to an act of violation although it is a rule for application. According to my understanding such a way of thinking on the "semi-constitutional" norm is particular to Japanese constitutionalism. This is due to the fact that Japan has been able to rearm gradually but steadily without resorting to constitutional amendment. In this respect, Japan is a very unique country in the world. Further, Japan's ability to rearm without a constitutional amendment has produced another particularity in terms of the hierarchy of laws in the state to assert a "semi-constitutional" norm or "quasi-constitutional" norm *contra legem*.

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[64] *E.g.*, A recent public opinion poll by Asahi Shinbun on May 14–15 , 2015 indicates that 52% of people are against any expansion of the scope of oversee activities, while 33% of people stand for it, see *Asahi Shimbun Regular Public Opinion Poll*, Maureen and Mike Mansfield, http://mansfieldfdn.org/program/research-education-and-communication/asian-opinion-poll-database/asahi-shimbun-regular-public-opinion-poll-05192015/ Foundation.

In addition to the previous doctrine, there is another influential constitutional one. Unlike the previous one, this doctrine supports a radical pacifism without any army. According to this doctrine, the pacifism of the Japanese Constitution is based on the radical idea that the existence of an army, is, by definition, against the interest of the people. It is noteworthy that in Japan, despite the fundamental difference between the pre-War and post-War constitutions, the dominant constitutional doctrine always presupposes theoretical legal boundaries of constitutional amendment both before and after the World War II. All the more impressive is that beyond the methodological differences of each constitutionalist, there is a common dominant theme, derived from German public law theorist, Carl Schmitt that envisages the Constitution as the fundamental decision of political entity.[65] By linking this way of thinking and a kind of radical pacifism, this doctrine argues that the amendment of paragraph 2 of Article 9 is impossible normatively because it would exceed a limit on the ability to constitutionally amend the Constitution. According to this opinion, paragraph 2 of Article 9 is the core and the identity of the current Constitution. Therefore, it is theoretically impossible to resort to a constitutional amendment in order to overcome the constitutional interpretation by the CLB. The Japanese people must never alter Article 9 to permit rearmament. If the Japanese people abolished paragraph 2 of Article 9 through constitutional amendment, the result would be a violation of constitutionalism. Moreover, constitutional scholars who agree with this argument are convinced that to continue to affirm the unconstitutionality of the SDF is the best way, politically, to limit expansion of the SDF, because such an interpretation is capable of depriving the SDF of complete legitimacy. In contrast, the new current I presented above that requires a constitutional amendment in place of changing the government's interpretation of Article 9, and reduces the problem simply to a choice of procedure to be adopted. They affirm that if the government wants to change the interpretation of Article 9, it is necessary to use the constitutional amendment procedure of Article 96; otherwise the government has to give up on the change of its interpretation.

Furthermore, it is remarkable that the percentage of constitutional scholars who support the pre-July, 2014 governmental interpretation of Article 9 and admit the constitutionality of Japan's right of individual self-defense has been gradually increasing, and dramatically so with the

[65] CARL SCHMITT, CONSTITUTIONAL THEORY 150 (2008).

passage of time. We can qualify this doctrinal phenomenon as a variant of the theory of constitutional mutation (*Verfassungswandlung*).

It is noteworthy that the situation we have mentioned where very different interpretations of the Article are presented including the new governmental interpretation clarifies the current nature of the forum for discussion around the interpretation of Article 9. This constitutional forum is very different from an ordinary legal forum of the intellectual community composed of legal specialists. In the current constitutional forum, political considerations overwhelmingly precede legal logic.

We may question whether the procedure-oriented current is justifiable theoretically, even if the political intention that motivates it is understandable. It must be said that the "semi-constitutional" or "quasi-constitutional" norm is extremely difficult to sustain theoretically. One possibility is that the decision of the Abe Government has expanded the frame originally established by Article 9. Based on a kind of theory of "constitutional mutation," the fundamental change in 2014 in the legal environment surrounding postwar constitutional pacifism may change the meaning of Article 9 for many constitutional scholars to allow an exercise of the constitutional right of *individual* self-defense; that is to say, put it within the frame of Article 9. The evocation of this interpretation would be able to justify very effectively the use of force by the SDF. On the contrary, an exercise of the right of *collective* self-defense would still remain outside the frame set by Article 9. If this is the case, to admit the right of collective self-defense constitutionally, we would have to amend the pacifist Article.

We must remark that this solution contains a fundamental structural transformation of the argument of interpretation. Relying on the "theory of constitutional mutation" necessarily leads to a dynamic vision of the act of interpretation. If one day in the future a government or the CLB were to declare a new constitutional interpretation of Article 9, which set out much more lenient conditions for the exercise of the right of collective self-defense than those in the 2014 decision of the Abe Government, what criteria should be adopted to evaluate this new interpretation? Politically, it is quite likely that the interpretation of the CLB may change again, under pressure from the ruling party. We must say that according to this doctrine, ultimately, a frame fixed by the constitutional text does not exist. The outer frame is flexible, supple and changeable over time. Probably the continuity and stability of an interpretation and the degree of consensus among citizens would make

such an interpretation a "semi-constitutional" or "quasi-constitutional" norm.

According to our understanding, it is pertinent to criticize the new interpretation of Article 9 as lacking in merit because of a lack of persuasiveness and a misunderstanding of the recent international security environment in place of resorting to the problem of constitutionalism as we saw above.

V. CONCLUSION

A French constitutional law scholar of the University of Paris I, Dominique Rousseau, referring to "hermeneutic thinking," describes interpretation as "a continuous act of relationship," overcoming the opposition between interpretation as an "act of knowledge" and an "act of will."[66] He explains that

> [T]he text exists before the interpretation and it remains after. The interpretation is intended to represent the meaning of the text, to deliver its secret, but the mystery may never be completely lifted as a text remains forever inexhaustible. Inexhaustible does not mean that the constructed meaning does not exhaust the text: there is only a moment in the history of text that continues to live and therefore to become the support for other interpretations later.[67]

The new trend in Japanese constitutional law since 2014 concerning the pacifist Article corresponds to the definition of the interpretation given by Dominique Rousseau. In fact, both of the new governmental interpretation of Article 9 and the new procedural approach interpretation are very far from the original meaning of Article 9.

Nevertheless, we should note an important difference. Even though constitutionalists of this new trend are very much aware that the act of interpretation is essentially a subjective act of will based on political preference, they tend to state that the interpretation of the CLB up until 2014 was the only authentic and scientifically convincing interpretation as we saw above in Section III Part D. Such a behavior corresponds exactly to the expectation of the mass media in its desire to know and report only one authentic constitutional interpretation on this

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[66] DOMINIQUE ROUSSEAU, DROIT DU CONTENTIEUX CONSTITUTIONNEL 145–46 (9th ed. 2010).
[67] *Id.*

issue. The mass media tends to believe or pretends to believe that there is only one authentic and scientifically convincing constitutional interpretation. The procedural approach to the issue of constitutionality of the right of collective self-defense meets such an expectation perfectly.

In fact, contemporary Japanese constitutional law scholars' attitude is mainly due to their socio-political role in the public space.[68] Indeed, in Japan as well as in many other countries, the activities of constitutional law professors are not limited to university campuses or to academic activities. Although constitutional law professors do research in their field, teach their students at the university and attend national and international academic conferences, alongside these scientific and educational activities, it is not unusual for them to give expression in public spaces as constitutional law specialists. Their opinions may possibly have a large influence on public opinion regarding various legal, political, and social topics. This tradition dates from the 19th century at the very birth of the Japanese constitutional law academia. Accordingly, in order not to risk weakening the sociopolitical practical effect of their doctrines, constitutionalists always present their interpretations as "the only authentic interpretation" in the public space, avoiding objective explanation of the nature of the act of interpretation. This is essentially a "political position" rather than a "pure legal position" or a "position as a historian or a sociologist."[69]

Article 9 is popularly known as "the pacifist Article," and a large part of Japanese opinion tends to consider military and defense policy that is in tension with Article 9 as purely bellicose. Although this mindset of the post-war Japanese people is very understandable, it makes it difficult to discuss dispassionately questions such as how Japan should contribute to or cooperate with the international community, including military activities. In this situation, I think we must reconsider the nature of the normativity of Article 9 and desirable issues for discussion about the future. It seems to me that it is extremely difficult to affirm a clear legal rule and criterion to distinguish a constitutional situation and an unconstitutional situation in the field of the interpretation of Article 9.

The interpretation of Article 9 has necessarily evolved over time since the establishment of the Constitution; its original meaning of

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[68] *See* Simon Serverin, *La Constitution japonaise est-elle fondée sur une légitimité charismatique?*, 5 REVUE DU DROIT PUBLIC 1311 (2014).

[69] Stéphane Rials, *Réflexions sur la notion de coutume constitutionnelle*, 189 LA REVUE ADMINISTRATIVE 273 (1979).

realizing a "perfectly demilitarized Japan" was negated quickly and totally, although it has nevertheless continued to exert significant regulative effects on the militaristic and diplomatic aspects of Japanese politics. Thus, as Ronald Dworkin observed in his critique of legal positivism, it is better to understand Article 9 as "law as principles" rather than as "law as rules."[70] In Japan, Yasuo Hasebe adopted this way of thinking for the Article 9 more than 10 years ago.[71] As for rules, they function in an all or nothing fashion. If Article 9 were a rule, an army would be unconstitutional. In terms of principles, norms tend to incline towards one direction, and continue to lead in that direction. According to this understanding, Article 9 would incline Japan normatively to remilitarize as little as possible. So, if the government would like to strengthen the military power of the SDF or enlarge the scope of activities of the SDF, it must present such compelling necessities as a constitutional obligation. I think under such a condition it is to be desired that Japan discuss reasonably the scope of activities of the SDF through distinguishing among the legal-constitutional dimension, national interest-oriented dimension, and international public interest-oriented dimension.

From the point of view of constitutional policy, it seems very wise to keep Article 9 in the constitution as "law as principles." Article 9 as a principle means that Japan could remilitarize, but would need to limit its remilitarization as much as possible. Is that very wise? Generally speaking, a military expansion is very difficult to control even in democratic countries. Furthermore, we have to remark that Japan is unique in at least two ways. First, it made important historic mistakes in not controlling its military authorities during World War II, resulting in the complete destruction of the pre-war democratic regime. Second, contemporary Japanese opinion is still deeply divided in respect to the recognition of historical events related to the invasions of countries in Asia during World War II. It is worrisome that extreme right-wing elements attempting to justify more or less Japan's pre-war Asia invasion have recently increased their influence. Thus, there may be a danger to provoke a feeling of tension or fear regarding Japan's military threat, especially to China and Russia, and its risk of destabilizing the East Asian political and military environment in case a dramatic or sudden Japanese military expansion occurs. Thus, Article 9 has assumed a militarily

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[70] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14 (1977).

[71] YASUO HASEBE, KENPO TO HEIWA WO TOINAOSU [REQUESTIONING CONSTITUTIONAL LAW AND PEACE] (2004).

stabilizing function for the East Asian region, and should continue to serve that purpose.

In relation to the so-called "Japanese constitutionalism in crisis," what is important is to respect the freedom of political expression guaranteed by the Constitution and a well-functioning democratic process in order to formulate Japanese military and defense policies based on a consensus of the people. If this process functions well, and a well-functioning democratic process could involve an interpretation of Article 9 allowing collective self-defense, a crisis of constitutionalism in Japan can be avoided. On the contrary, in the near future this process could exclude such interpretation by establishing a new government composed by current opposition parties (Democratic Party, JCP, Social Democratic Party etc.) against the current coalition LDP/Komeito, a crisis of constitutionalism can also be avoided to reestablish the previous constitutional interpretation on the right of collective self-defense.