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Japan's Constitutional Conundrums

A topical review of Japanese Constitutional Revision

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List of Abbreviations

ACL – Anti Conspiracy Law

LDP – Liberal Democratic Party

NHK – Japan Broadcasting Corporation (*Nippon Hōsō Kyōkai*)

NSL – National Security Law

SDF – Self Defence Force

SSA – State Secrecy Act

UN – United Nations

In May 2019, a mass protest was staged in Tokyo against the reinterpretation of Article 9 of the Japanese constitution, which prohibits Japan from having war potential and denies the right to belligerency. According to the organisers, over 65,000 people attended this protest, first at the Ariake disaster prevention park where politicians as well as activists held speeches, and then during a protest march around the area.² Interestingly, no major news outlet paid any attention to this gathering. One of the activists at the rally linked this lack of coverage specifically to their worries about other constitutional rights: is there still freedom of the press?³

Prime Minister Abe Shinzo⁴, who came into power in 2012 and has successfully kept a majority since, is well known for his stance on the revision or reinterpretation of the constitution, in particular Article 9. For his party, the Liberal Democratic Party (LDP), Article 9 has always been a thorn in its side ever since the constitution was promulgated in 1946. It reads,

“[...] 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.”⁵

Because amending the constitution is a task that is incredibly tough to execute (more on this below), the government of Prime Minister Abe Shinzo has first opted for a different approach, namely, to reinterpret: to stretch the meaning of the article as much as legally possible to allow for actions the government deems necessary.

² Anonymous. “Heiwa Kenpō-Rei Wa Mo Mamoru Shikō 72-Nen Shūkai Ni 6 Man 5000 Ri 平和憲法 令和も守る 施行72年集会に6万5000人 [The Peace Constitution Is Also Protected in Reiwa: 65000 People Attended the Rally on 72nd Year of the Constitution].” *Tokyo Shinbun* 東京新聞, May 4, 2019. <https://www.tokyo-np.co.jp/article/politics/list/201905/CK2019050402000130.html>.

³ Sasaki Kimiya 佐々木公哉. “Dōshite Ōte Masumedia Wa, Kenpō Shūkai No 6 Man 5 Sen-Ri No Minshū o Hōdō Shinai No Ka? どうして大手マスメディアは、憲法集会の6万5千人の民衆を報道しないのか? [Why Don't the Major Mass Media Report the 65,000 People at the Constitutional Rally?].” *Yahoo! Blog Japan*, June 6, 2019. <https://web.archive.org/web/20190622182034/https://blogs.yahoo.co.jp/sasaootako/65274646.html>. Note: Yahoo! Blog Japan has been completely disbanded. To access an archived version of the blog, please see: <https://web.archive.org/web/20190622182034/https://blogs.yahoo.co.jp/sasaootako/65274646.html>

⁴ In this paper, the Japanese way of writing names – first surname then first name – will be adhered to.

⁵ “Nihonkokukempo 日本国憲法 [The Constitution Of Japan].” *Shugiin* 衆議院 [The House of Representatives]. http://www.shugiin.go.jp/internet/itdb_annai.nsf/html/statics/shiryo/dl-constitution.htm#9sho.

The protest described above shows how the debate about constitutional reform is shaped in Japan. On the one hand, the government, led by Prime Minister Abe Shinzo, is adamant to change or reinterpret certain parts of the Japanese constitution, and is trying to achieve this change forcefully. On the other hand, there are citizens, human rights groups and opposition politicians who oppose these changes, but hardly get any attention at all from the media. Over the last years, since Prime minister Abe has been in charge, the government has been pushing the reinterpretation and attempted revision of the constitution further and further, often bypassing public and political debate.⁶

This paper will attempt to create a state of the field on Japanese constitutional reform and the issues that have arisen from the different amendments that the government is trying to make. In order to explain this, it is first necessary to look at how this constitution was created and under what circumstances. After this historical overview, the paper will showcase the different articles of the Japanese constitution that the LDP would like to reform if it gets the chance. Many people will have heard of Article 9, but there are other, smaller articles on the line too, which are important but do not receive much attention because of the spotlight on belligerency and war potential. This paper will include the most prominent articles that will potentially have the largest impact on Japanese society. In order to achieve this, this paper will use a proposal for a new constitution created by the LDP in 2012 to show the type of amendments that the Abe government would like to see implemented.⁷ While the LDP has since relinquished the idea to submit this proposal as an option for constitutional revision, it still remains the official document from which the LDP draws its ideas for revision.⁸

As a final note, it is important to state that this paper does not intend to answer the question whether or not constitutional reform in general is necessary. Opinions are divided on whether, for instance, Japan deserves a military like any other ‘normal’ country. This paper aims to underline the methods that are used by the government to implement changes regardless of constitutionality, and the effect this can have on Japanese society.

⁶ Craig Martin and Bryce Wakefield. “Reexamining Myths about Japan’s Collective Self-Defense” *The Asia-Pacific Journal: Japan Focus*. 2012. <https://apjif.org/-Bryce-Wakefield/4803/article.html>

⁷ *Jūminshutō* 自由民主党 [LDP], “*Nihonkokukēn pō Kaisei Sōan* 国憲法改正草案 [Draft Amendment of the Japanese Constitution,” *Jūminshutō* 自由民主党, April 27, 2012.

⁸ Tomohiro Osaki. “LDP Sets aside 2012 Draft Constitution Ahead of Diet Debate on Revision.” *The Japan Times*, October 18, 2016. <https://www.japantimes.co.jp/news/2016/10/18/national/politics-diplomacy/ldp-sets-aside-2012-draft-constitution-ahead-diet-debate-revision/#.XhxeKFVKjIU>.

The History of the Japanese Constitution – American Influence

The current Japanese constitution was drafted in 1946, after Japan was defeated in WWII and was occupied by the United States. There is much discussion about how this constitution came into existence; how much of it was Japanese input, and how much of it was forced upon Japan by the United States. As will be demonstrated later, this contestation is also one of the focal points for conservatives for wanting to change the constitution.

During the occupation of Japan, general Douglas MacArthur, who oversaw the Japanese occupation, asked the Japanese government to draft a new constitution, different from the Meiji constitution that was in effect during the Japanese colonial period and WWII.⁹ Both the Japanese government and general MacArthur's office created several drafts, based on the previous constitution, but with significant changes. All of this was done both in secret, without public knowledge, and in a very short amount of time. In only a couple of months, both the Japanese and American sides had drafted multiple versions of a new constitution. While both versions were discussed, since time was short, the Japanese government only received an English-language copy of the American draft. This was hastily translated, so how much the Japanese government could understand and remodel in such a short period of time will remain unclear.¹⁰ In the end, general MacArthur gave the Japanese government 48 hours to decide whether or not to use the draft. To create a more pressing environment for the Japanese government, MacArthur also stated that the only way to save the Japanese emperor, who was accused of war crimes in view of his rule during WWII and Japan's occupation of other Asian countries, was for the Japanese government to accept to work with the American draft.¹¹

In order to understand the weight of MacArthur's statement, one must understand how important the emperor was for the Japanese people and the societal system at that time. In the previous Meiji Constitution, the emperor was a divine entity who was not only a symbolic leader, but the actual head of state. Many of the victimized countries' officials were calling for the emperor to be tried during the Tokyo Tribunals as well, because he had been the one to sign the orders during the war. In the American draft, the power of

⁹ Takashi Inoue, "The Constitution of Japan and Constitutional Reform", *Asia-Pacific Review*, 23:2, 2016, 3-4.

¹⁰ Shoichi Koseki and Ray A. Moore. *The birth of Japan's postwar constitution*. Boulder: Westview Press. 1998. 105-107

¹¹ Ibid.

the emperor would be reduced to only being a symbolic leader, and thus he would escape the responsibility and the prosecution.¹² Because the emperor was seen by many as the symbol of Japan, the Japanese government was anxious to keep the emperor out of the almost literal firing line. It was a matter of pride for the emperor to survive the tribunals.

In the end, after a deadline extension of another 48 hours, the Japanese Prime Minister at that time, Yoshida Shigeru, decided to work with the American draft. This does not mean, however, that the American draft was just translated and used as it was. It was reworked by a team of politicians, and on 6th of March 1946, mere months after the start of the process, a draft, including the nowadays highly contested Article 9, was presented to the public.¹³ This did not mean, however, that the public had a referendum to vote on the new constitution. It was merely a notice to inform everyone of the new reality. The current constitution was formally enacted on the 3rd of May 1947.¹⁴

Since 1947, the Japanese constitution has remained this hybrid of American and Japanese work, and no article has ever been altered. Under Article 96 of the current constitution, any alteration or amendment of the constitution is extremely difficult to realize. The article reads,

*“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. [...]”*¹⁵

This means that not only has any amendment to be voted on by both the Lower House and the Upper House and has to receive a 2/3rd majority, it then has to be put to the public through a referendum, that has to achieve a simple (over 50%) majority. Only then can the constitution be altered. While the main point of a constitution is to have set rules and regulations that are less transient than regular laws, it does mean that it is difficult for the constitution to move with the times.¹⁶ What we see now is that, even though some parties would be in favour of altering the constitution to make it more malleable, very few will vote in favour of altering Article 96 precisely of what it would mean in this context.

¹² Herbert Bix, *Hirohito and the making of Modern Japan*. New York: Harper Collins 2000. 582-584

¹³ Soichi Koseki and Ray A. Moore. *The birth of Japan's postwar constitution*. 130

¹⁴ Ibid.

¹⁵ “*Nihonkokukuenpō* 日本国憲法 [The Constitution Of Japan].”

¹⁶ In comparison, the American, German etc. constitutions have been altered multiple times.

As we will see below, Abe Shinzo has as yet not been able to clear all the hurdles posed by Article 96. Nevertheless, he has been trying to circumvent this article in what can thus be regarded as unconstitutional actions, even proposing a revised constitution that does away with Article 96 altogether.¹⁷ It looks at this point as if Article 96 is the only thing that stands in the way of a full constitutional revision, and Abe's opposition would like to keep it that way, not only with regard to Article 9, but also to counter the revision of other articles.

Contested Articles of the Constitution

Article 9 – Renouncing the right to war potential and belligerency

As mentioned in the introduction, one of Abe Shinzo's focal points during his campaign and in his administration, has been amending Article 9. He is not the first prime minister to attempt revision, as one of the major factions within the LDP that has often delivered the Prime Minister has always heavily focused on self-reliance, international cooperation, and perhaps most importantly, taking pride in Japan and Japanese history. To the LDP, the 'American' Japanese constitution reeks too much of wartime guilt and oppression.¹⁸ While Japan does have a Self Defence Force (SDF) consisting of air, land and sea forces, and is allowed to practice self-defence should it ever be under siege, these forces are not allowed to be called "military", and are not allowed to operate outside the country (unless for specific reasons; see below).¹⁹ This restriction, while initially set up by the United States and generally well received by the Japanese public, in later years turned out to be a bone of contention. While the Japanese public, sick of war and death, welcomed the new 'peace clause' in the constitution²⁰, the United States fairly quickly realized the drawbacks of Japan not being able to participate in international conflicts, starting with when the US entered the Korean War in 1950.²¹ The U.S., while occupying Japan, had negotiated the

¹⁷ Keigo Komamura, Constitution and Narrative in the Age of Crisis in Japanese Politics, *Washington International Law Journal* 26:1. 2017. 87

¹⁸ Haruko Satoh. "Legitimacy Deficit in Japan: The Road to True Popular Sovereignty" *Politics and Policy* 38:3. 2010. 577,580

¹⁹ For a detailed explanation on how the Japanese government came to this interpretation see: Craig Martin, "The Legitimacy of Informal Constitutional Amendment and the "Reinterpretation" of Japan's War Powers" *Fordham International Law Journal* 40:2, 2017

²⁰ Akihiro Ogawa, "Peace, A Contested Identity: Japan's Constitutional Revision and Grassroots Peace Movement" *Peace & Change* 36:3. 2011. 376-377

²¹ Takako Honda (director). *Kakusareta "Sensō Kyōryoku" Chōsensensō to Nihonjin* 隠された“戦争協力”朝鮮戦争と日本人 [Hidden "War Cooperation" The Korean War and the Japanese]. *NHK On Demand*, 2019. <https://www.nhk-ondemand.jp/goods/G2019101428SA000/>.

right to have American bases on Japanese soil, and was now pressuring Japan to aid its ally, America, in the Korean War, which of course by this time was impossible for Japan to comply with.²²

With this, the conflict that is implied by Article 9 was exacerbated. If Japan wanted to keep its allies, and later, its promises to international operations with the United Nations (UN), at some point it was obliged to offer more than just monetary support.²³ Simultaneously, there was a branch of LDP conservatives fed up with the American military presence on Japanese soil, and wishing for more independence.²⁴ With the American military still defending Japanese interests in the region, however, the Japanese government at the moment still cannot afford to push the US away completely.²⁵ Thus, over the years various Japanese governments have, for multiple reasons, tried to alter Article 9.

Fast forward a few decades, and one of the most controversial decisions regarding this subject was made in December 2003 by then LDP Prime Minister Koizumi Junichiro. During his administration, the 9/11 attacks took place and the subsequent war with Iraq was started. While up until that point the Japanese government had supported the US military by sending financial aid and materials, and even non-combat personnel, President Bush made it clear that this time he expected more from his allies.²⁶ In response, Koizumi went ahead and declared that members of the SDF could now be sent abroad, albeit only as medics or to help around camps, by legislating the 'Humanitarian Relief and Iraqi Reconstruction Special Measures Law'. Not only was this immensely controversial, it also highlighted the impossibility of actual aid: while the SDF members were there, they were not allowed to carry weapons or to practice self-defence; this would have to be done by other international troops.²⁷ Aside of whether or not this was the right decision to

²² It is important to note however, that in 2019, 70 interviews with Japanese soldiers who had indeed fought in the Korean War but were sworn to secrecy, were uncovered by Tessa Morris-Suzuki. Even if the constitution forbade Japanese troops from entering international conflict, the U.S. pressured Japan into participating because Japan was still under U.S. control. For more information on this discovery see: <https://www.nhk-ondemand.jp/goods/G2019101428SA000/>

²³ Akihiro Ogawa, "Peace, A Contested Identity: Japan's Constitutional Revision and Grassroots Peace Movement" 379

²⁴ Keigo Komamura, *Constitution and Narrative in the Age of Crisis in Japanese Politics*. 78

²⁵ Shinzo Abe, and Donald Trump. "Remarks by President Trump and Prime Minister Abe of Japan in Joint Press Conference." *The White House. The United States Government*, May 27, 2019. <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-prime-minister-abe-japan-joint-press-conference-3/>.

²⁶ Yukiko Miyagi. "Foreign Policy Making Under Koizumi: Norms and Japan's Role in the 2003 Iraq War" *Foreign Policy Analysis*, Volume 5, Issue 4, October 2009, 350,352

²⁷ *Ibid.*, 355.

make, the opposition pointed out that what Koizumi had done, and how he had done it, was in direct contradiction with the constitution.²⁸ Interestingly, though, Koizumi's approval ratings did not plummet after this decision. He stayed on for three more years and remains one of the longest governing Prime Ministers of Japan. The lack of a well-organised opposition and grassroots movements that could not get a hold of the situation in such a way that anything in parliament changed, was a major factor in Koizumi staying on, even when polls indicated that the public was unhappy with the way things were handled.²⁹

Abe Shinzo has followed in Koizumi's footsteps regarding the alteration of Article 9, declaring that he intended to do away with the post-war regime.³⁰ While trying to amend Article 9, Abe realized that this would not be easy to do, and so he simultaneously set out to enlarge the scope of what the SDF could do without altering Article 9, by implementing the National Security Law (NSL). The NSL allowed using the SDF for UN rescue and escort missions.³¹ Even though the NSL might have permitted these actions, it was in direct contradiction to the constitution. A Constitution Study Committee consisting of law professionals found that an overwhelming majority of professors (176) deemed the law unconstitutional, and signed a bill against it.³² Only 10 scholars in favour of the NSL were found, three of whom belong to the ultra-nationalist group *Nippon Kaigi*.³³ This is relevant for two reasons. First, *Nippon Kaigi* is known for its nationalist ideology, including wanting to decrease U.S. influence in Japan, and to return to the pre-war proud Japan, with a strong military as well.³⁴ Thus, it is not unthinkable that card-carrying scholars of such a group might be biased. Second, Prime Minister Abe Shinzo is also part of *Nippon Kaigi*.³⁵ For the scholars in favour of NSL, this is a clear conflict of interest. The reasons that the pro-NSL scholars gave for supporting the NSL were mostly political ones.³⁶ It is important to note here, that Abe Shinzo is a member, and even serves as

²⁸ Ibid., 356.

²⁹ Ibid., 563.

³⁰ Haruko Satoh. "Legitimacy Deficit in Japan: The Road to True Popular Sovereignty", 581.

³¹ Lawrence Repeta, "Backstory to Abe's Snap Election – the Secrets of Moritomo, Kake and the "Missing" Japan SDF Activity Logs" *The Asia-Pacific Journal: Japan Focus* 15:20, 2017. 8

³² Lawrence Repeta, "Japan's Proposed National Security Legislation — Will This Be the End of Article 9?" *The Asia-Pacific Journal: Japan Focus* 13:25, 2015.

³³ Ibid., 5.

³⁴ "*Nippon Kaigi to Ha* 日本会議とは [What Is Nipponkaigi?]." *Nippon Kaigi* 日本会議. Accessed October 15, 2019. <http://www.nipponkaigi.org/about>.

³⁵ Ibid.

³⁶ Lawrence Repeta, "Japan's Proposed National Security Legislation — Will This Be the End of Article 9?", 5.

political advisor to the parliamentary committee of *Nippon Kaigi*.³⁷ It is important here to make the distinction between the political reasons given by pro-NSL scholars, and the legal reasons given by others.

Politically, there might be much to be said for the NSL and for an SDF that is more capable and has more freedoms. But the Constitution Study Committee is purely legal. If the Japanese government is not going to uphold the highest of laws, the constitution, then what does that mean for the rule of law in general? Especially when it comes to such a contested and divisive security issue, the fact that the government would decide to simply bypass the existing constitution upsets the status quo of what the Japanese governing system is supposed to be. More than that, it has allowed for a grey area in which human lives can be endangered without proper legal protection.

The endangering of human lives is exactly what happened after the SDF ground troops were deployed on a UN mission to South Sudan. The SDF was still not allowed to be close to combat areas, as it was not allowed to defend itself. In 2018, a journalist found out that the SDF had actually been in close proximity to combat and should have been withdrawn of the area. Instead of actually withdrawing the SDF to get them out of danger, the government ordered the SDF to remain in South Sudan, and daily activity logs of the SDF were discarded by government officials, making it difficult for journalists and researchers to track down what was actually happening.³⁸ These kinds of incidents show that the current government is committed to steamroll its own vision through parliament, even though it is unlawful, and perhaps even worse, it endangers its citizens. The example given above was only uncovered by journalists who hounded officials for months in order to get the relevant information necessary and is a perfect segue into another constitutional article that the Abe government would like to see amended.

Article 19 – Freedom of thought and conscience and Article 21 – Right to the freedom of the press and freedom of speech

Article 19 and Article 21 will be discussed together, as the freedom of thought and conscience are a prerequisite for freedom of speech and, as an extension thereof, freedom of the press.

³⁷ “*Nippon Kaigi to Ha* 日本会議とは [What Is Nipponkaigi?].”

³⁸ Lawrence Repeta, “Backstory to Abe’s Snap Election – the Secrets of Moritomo, Kake and the “Missing” Japan SDF Activity Logs” 9-10.

As stated in the introduction, protesters against Article 9 also mentioned the fear that the press might not be impartial anymore; an infringement of freedom of the press. While freedom of the press has been a bone of contention for a long time, the Abe government added fuel to the fire by suggesting alterations to Article 19 (Freedom of thought and conscience) and Article 21 (Right to freedom of the press) in its own draft of the revised constitution. The original article reads,

*“Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. No censorship shall be maintained [...]”*³⁹

In the LDP’s proposal for the constitution, freedom of the press would be limited by adding to both Article 19 and 21.

Article 19 would get an addendum stating, *“No person shall improperly acquire, possess or use information concerning individuals.”*⁴⁰

Article 21 would get an addendum as well, *“Notwithstanding [the original text of Article 21], engaging in activities with the purpose of damaging the public interest or public order, or associating with others for such purposes, shall not be recognized.”*⁴¹

These modifications show a distinctly different approach to individual freedom and freedom of the press by adding expressions that can be used to limit these freedoms, or expressions that are vague enough to be interpreted in a way that would potentially be more beneficial to the Japanese government. Expressions such as ‘improperly acquire’ and ‘the purpose of damaging [...] public order’, are vague and likely to be misconstrued. This, for instance, specifically would mean that ‘improperly acquired’ material would be ineligible for publishing. In this way, the press would be prohibited from publishing whistle-blower material.

It has been evident for years that the LDP would like to restrict freedom of the press. In 2002 the LDP unveiled a plan for the creation of a Human Rights Commission under the Ministry of Justice.⁴² It was made clear that the primary aim would be to monitor the actions of the media, and even prohibit ‘excessive reporting’ on certain

³⁹ *“Nihonkokukentō 日本国憲法 [The Constitution Of Japan].”*

⁴⁰ *Jūminshutō 自由民主党 [LDP], “Nihonkokukentō Kaisei Sōan 国憲法改正草案 [Draft Amendment of the Japanese Constitution],”*

⁴¹ *Ibid.*

⁴² Lawrence Repeta. “Japan’s Democracy at Risk – The LDP’s Ten Most Dangerous Proposals for Constitutional Change.” *The Asia-Pacific Journal: Japan Focus* 11:28. 2013.

issues.⁴³ While this Commission was never implemented, this shows the hard-line stance of the LDP against the free press. The main media outlet, Japan Broadcasting Corporation (NHK), is state-owned and has often been accused of being biased towards the Abe administration. In the past, there have been multiple instances of the NHK censoring certain issues or broadcasting pro-Abe content that lacked critical opinion.⁴⁴ Currently, one of Abe's close allies is head of the NHK, putting its impartiality up for debate.⁴⁵ Even one of the larger English language news outlets, the Japan Times, controversially decided in November 2018 to change terminology from "forced labourers" to "wartime labourers" when reporting on issues related to WWII and Japan's colonial period.⁴⁶ Not only this, Japan Times decided to actively change the definition of the word "comfort women", stating, *"“comfort women” have been referred to as “women who were forced to provide sex for Japanese troops before and during World War II.” [...] from today, we will refer to “comfort women” as “women who worked in wartime brothels, including those who did so against their will, to provide sex to Japanese soldiers.”*⁴⁷

With WWII and the Japanese colonial period still being highly contentious issues both in Japan and its neighbouring countries, the announcement shocked both readers and staff of the Japan Times.⁴⁸ The editor's note turned out to be so controversial, that a couple of days later the executive director of Japan Times, Mizuno Hiroyasu, felt forced to write an op-ed in which he denied any allegations of bowing to political pressure or partiality. Regardless of the public outrage, however, the policy still remains into force.⁴⁹ Regardless of whether Mizuno was telling the truth, it is clear that the Japanese government is trying to get a foothold in its national media outlets, actively trying to undermine the freedom of the press.

Similar to the implementation of the National Security Law to circumvent Article 9, the Abe government implemented the State Secrecy Act (SSA) in 2013. The SSA was

⁴³ Ibid.

⁴⁴ Aurelia George Mulgan, "Media Muzzling under the Abe administration", In: Jeff Kingston, *Press freedom in contemporary Japan*, New York: Routledge, 2017. 19-21

⁴⁵ Ibid.

⁴⁶ Kyodo. "South Korea's Top Court Orders Mitsubishi Heavy to Pay Compensation for Wartime Labor." *The Japan Times*, November 28, 2018. <https://www.japantimes.co.jp/news/2018/11/29/national/crime-legal/south-koreas-top-court-orders-mitsubishi-heavy-pay-compensation-wartime-labor/#.XiHALv5KjIU>.

⁴⁷ Ibid.

⁴⁸ Michael Penn. "Yoshito Hori and the Rightwing Turn of the Japan Times." *SNA Japan*, December 24, 2018. <http://shingetsunewsagency.com/2018/12/17/yoshito-hori-and-the-rightwing-turn-of-the-japan-times/>.

⁴⁹ Hiroyasu Mizuno, "Message from the Executive Editor." *The Japan Times*, December 6, 2018. https://www.japantimes.co.jp/2018/12/06/announcements/message-executive-editor/#.XiG_O_5KjIU.

specifically designed, it seems, to implement the abovementioned change to Article 19. Journalists or researches would be deemed punishable for uncovering designated state secrets, even if they came across them by accident, and even if they decided not to publish the information they had retrieved.⁵⁰ While at present the constitution still protects journalists, the new law gives the government a means to prosecute. In the case of the SDF in South Sudan described above, where a journalist discovered that the SDF had been placed in an illegal position, the Japanese government had the possibility to pursue the journalist through the SSA.

In May 2017, the Japanese government fast-tracked a law through the Upper House that would criminalize plotting and preparing to commit 277 acts, such as preparing a gas attack or hijacking a plane, but also seemingly innocuous activities such as mushroom picking, importing certain cultural goods, and gambling regularly: the Anti Conspiracy Law (ACL).⁵¹ Suspicion of plotting or preparing any of these activities would grant governmental organizations the right to monitor the suspected person or entity as a threat to “state security”. The problem that many human rights watchers had with this law was that it was way too broad for its punishment. Why would hijacking an airplane be on the same level, or even within the same law, as regular gambling? In addition to this, the wording of the law was vague as to what would constitute ‘plotting’, and how this would be investigated.⁵² One legal scholar even went so far as calling it akin to a pre-WWII Japanese thought crime law.⁵³

While the law has not been used in such a way yet, it does give off the vibe of potentially restricting thought. The combination of the ACL, the SSA and the ‘regular’ attempts of the Abe administration to get news agencies to cooperate with its points of

⁵⁰ Lawrence Repeta, “Raising the Wall of Secrecy in Japan – The State Secrecy Law of 2013” *Meiji Law Journal* 21 (2013): 13-34.

⁵¹ Shugiin 衆議院, “Soshiki-tekina hanzai no shobatsu oyobi hanzai shūeki no kisei-tō ni kansuru hōritsu-tō no ichibu o kaisei suru hōritsu-an” 組織的な犯罪の処罰及び犯罪収益の規制等に関する法律等の一部を改正する法律案 [Bill to amend a part of the Act on Regulation of punishment and crime profits of organized crime], *Shugiin* 衆議院. 20 January 2017.

http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19305064.htm

⁵² Midori Ogasawara, “Surveillance at the Roots of Everyday Interactions: Japan’s Conspiracy Bill and its Totalitarian Effects.” *Surveillance and Society* 15. 2017. 477-485.; Kanichi Kitagawa 鑑一北川, “*Kyōbōzai no mondaiten o kangaeru*” 共謀罪の問題点を考える [Thinking about the issues with the Anti-Conspiracy Law], *Shakaishugi* 社会主義 658, 2017, 78-85.

⁵³ Hirofumi Uchida 博文内田, *Chian ijihō to kyōbōzai* 治安維持法と共謀罪 [The Peace Preservation Law and the Anti-Conspiracy Law]. Tokyo.: Iwanami Shoten. 2017.

view is disconcerting to say the least, and shows how committed the Japanese government is to altering Japanese human rights to suit its view, in the hope that the interpretation of human rights might resemble its own draft of the constitution.

Article 12 – Freedoms and rights of people shall not be abused

Looking back at the discussions on the other constitutional articles, much of what is stated there also belongs in this section. Article 12, the guarantee that all the freedoms and rights of people will not be abused, is one that directly relates to all changes that have been propagated by the Japanese government. While the current constitution is still valid, both the Japanese government and Japanese citizens will have to uphold it in order for Article 12 to remain in effect. What we can see is that the government is trying to find ways to circumvent different articles in different ways. If the Japanese government is hellbent on altering the constitution, in the future adhering to Article 12 will not so much be a question of adherence, but rather of interpretation. What will the new definition of ‘rights and freedoms’ be?

The 2012 constitutional draft created by the LDP, sheds light on its interpretation of human rights, and on what kind of human rights the LDP promises to uphold. In that sense, it would not so much be a revision of Article 12, but rather a change of the definition of ‘people’s freedoms and right. The LDP draft came with a booklet explaining the changes it had made to the constitution in its draft. It came up with explanations such as, *"Human rights should be rooted in the state's history, culture and tradition"*⁵⁴, and, *"Several of the current constitutional provisions are based on the Western European theory of natural human rights; such provisions therefore are required to be changed."*⁵⁵

These sentences imply that the LDP would like to see human rights that are rooted in Japanese history, rather than the ones that were thought up together with the US. The debate about a Western European notion of human rights for non-Western European countries has been going on for years and is difficult to resolve. It seems, however, that by putting the emphasis on ‘roots in Japanese history’, the LDP shows again its preference to return to a sort of pre-war, proud Japan such as *Nippon Kaigi* would prefer.

⁵⁴ Jūminshutō 自由民主党 [LDP]. “*Nihonkokukēnpō Kaisei Sōan Q & A 国憲法改正草案 Q & A [Draft Amendment of the Japanese Constitution Q & A]*,” *Jūminshutō 自由民主党*, April 27, 2012.

⁵⁵ Ibid.

This, however, of course is not realistic. Decades ago, Japan ratified UN international regulations on human rights, signing treaties and participating in the international community.⁵⁶ Even if the constitution would be altered, it would be difficult for Japan to thrive on the international stage if the government decided to pull out of international treaties, which are based on the Western European notions of human rights. And if the current Japanese government sees human rights as being provided by the benevolence of the state and not – as in the Western notion – as rights inherently granted to every human being, what does that mean for Japan as a democratic, ‘free’ country? While the current government might not go as far as denying its citizens certain human rights, it would set a dangerous precedent for the future, and would open doors for more authoritarian leaders.

Conclusion

This paper has attempted to show the difficulties surrounding Japanese constitutional revision. It is clear that the Abe government is hellbent on amending the current 1947 Constitution but lacks the means and the support to legally achieve so. In the 2019 snap elections the LDP just fell short of securing a landslide majority that would have let it win the Upper and Lower House referendum. However, Abe promised in January 2020 that constitutional revision was still something he wanted to achieve before the end of his final term in November 2021.⁵⁷

Hence, the current conundrum is as follows. Because the Japanese government at present does not have the support to legally change the constitution, it is creating alternatives to achieve the same results while it keeps attempting to alter the constitution. It does so by either reinterpreting the text (Article 9, Article 12) or implementing laws that directly contradict the constitution (Articles 9, 19 and 21). This causes protest from grassroots movements and citizens, but so far it seems as if there are no consequences for the Abe administration. In fact, Abe is the longest serving post-WWII prime minister, and while several scandals have hit his approval ratings, he is still at 42%.⁵⁸ Perhaps the

⁵⁶ For all UN regulations Japan has ratified, see:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=87&Lang=EN

⁵⁷ Sakura Murakami. “What Will Abe Do to Cement His Legacy?” *The Japan Times*, January 2, 2020. <https://www.japantimes.co.jp/news/2020/01/02/national/politics-diplomacy/shinzo-abe-legacy/#.Xj0irzJKJIU>.

⁵⁸ Kyodo. “Japanese Support Rate for Abe's Cabinet Tumbles to 42%, Dropping for Second Month in a Row.” *The Japan Times*, December 15, 2019.

current changes that the government aims to make that contradict the constitution do not have much impact on the daily lives of people, but it sets a precedent that other issues could be up for grabs as well. And it begs the question: what is the worth of a constitution if it can so easily be circumvented? Are one party's views of international security, being allies and pride more important than the rule of law, or the international human rights? How does this fit into a democracy?

As demonstrated in this paper, many scholars and policy makers have already voiced their opinions, warnings and analyses on this issue, and while the general consensus is condemnation of the Abe government's ways of forcing its rules through parliament, no one has managed to find a solution to hold Abe or his associates accountable for their unlawful behaviour. While the current constitution remains intact, opponents of the Abe administration will always have a strong protection against the Japanese government's antics – something to rely on in court – making this a legal vicious circle. For now, the situation will not escalate completely. This might change significantly if the Abe administration manages to make it easier to revise the constitution. Abe Shinzo himself may only have until November 2021 to push his agenda, but it is likely that he is already grooming a successor to take his place.⁵⁹

Constitutional revision in and of itself is not a bad thing. Times, cultures and countries change, and more often than not these changes require alterations of law or new laws all together. It has to be ensured, however, that constitutional revision is done in such a way that the rule of law is not eroded, otherwise the constitution becomes meaningless, and unable to defend the citizens of a country. Thus, it does not seem likely that this constitutional conundrum will be solved any time soon.

<https://www.japantimes.co.jp/news/2019/12/15/national/politics-diplomacy/japanese-support-rate-abes-cabinet-tumbles-42-dropping-second-month-row/>.

⁵⁹ Shogo Kodama. "Abe Reveals His 'Successor List' but Keeps up the Suspense." *Nikkei Asian Review*, December 27, 2019. <https://asia.nikkei.com/Politics/Abe-reveals-his-successor-list-but-keeps-up-the-suspense>.

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