A Constitutional Case for Amending Article 9

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The revision of the Constitution of Japan is once again part of the public discourse. Article 9, the war-renouncing provision of the constitution, is seen by many as hindering Japan’s efforts to contribute more meaningfully to international peace and security initiatives, and undermining Japan’s ability to develop a more realistic national security posture in light of growing regional threats. On the other hand, it is seen by many others as the foundation of Japan’s post-war identity as a uniquely peaceful and pacifist nation. The conflict over whether to amend it is not of course new—it has been the subject of political dispute almost from its inception. The previous chapters in this volume explain that political history, and why it has once again emerged as a political issue. Given that there is a real possibility that efforts to amend Article 9 could be seriously undertaken in the near future, and that the procedure is now in place for a national referendum necessary to adopt any revision, this chapter provides a very brief outline of a constitutional case for amending the provision.

What I mean by the term “constitutional case” is an argument that is both grounded in constitutional law principles, and aims to remain loyal to the purpose and spirit with which Article 9 was ratified. It suggests that there are legal reasons why Article 9 ought to be amended, and there are ways in which Article 9 could be amended that would nonetheless remain true to the pacifist and internationalist objectives that animated those who ratified the constitution in 1946. It is an argument that is informed by principles of international and constitutional law that are understood to play a vital role in enhancing the peaceful tendencies of democracies. Such arguments stand in contrast with those proposals to amend Article 9 that are apparently based on purely political and policy considerations, and are designed to essentially undermine the provision’s effectiveness as a meaningful legal constraint on Japan’s foreign policy. This constitutional case includes a specific amendment proposal as the basis for meaningful discussion about alternatives. It is an amendment proposal that is meant to serve as a starting point for discussion of a more realistic and meaningful alternative than the current position taken by pro-Article 9 advocates, which is simply to reject any and all talk of revision. In laying out this proposal, I will touch on some of the dangers inherent in the proposals of the Liberal Democratic Party (the LDP), but will also emphasize that simply maintaining the status quo is no longer in the best interest of the constitutional order or the normative power of Article 9 itself.

The Meaning and Operation of Article 9

Before embarking on a discussion of why and how Article 9 ought to be amended, it is necessary to have a baseline understanding of what it means. This is, of course, the subject of considerable debate in the political, policy and academic spheres. Nonetheless, leaving aside the particulars of that debate, it is helpful to sketch out the broad concepts, as well as explain the formal and well-established government position. Article 9 provides that:

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Art. 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.

In essence, the provision has three distinct elements: First, it prohibits war and the use of force for settling international disputes; second, it prohibits the maintenance of armed forces or “other war potential”; and third, it provides that the rights of belligerency will not be recognized. It is the first and second elements that have proved the most controversial, while the third is typically ignored and often misunderstood. The first paragraph, what I will refer to as Article 9(1), explicitly incorporates principles from the international law system that governs the use of force by nation states against one another, the *jus ad bellum* regime. An interpretation of this provision that was informed by both the meaning of those international law principles, and the drafting and ratification history, would likely conclude that the provision prohibited all use of force, including that employed in self-defense.

The second paragraph, what I will refer to as Article 9(2), is unique and rather odd. The first clause is largely without precedent in any other constitution. The plain meaning of the text, along with a study of the history of the drafting and ratification of the provision, would suggest that the first clause in Article 9(2) prohibits the maintenance of any military forces whatsoever. The third element, being the second clause in Article 9(2), is often misunderstood and typically ignored in most Article 9 debate, but it constitutes the incorporation of principles of international humanitarian law (or *jus in bello*) to deny individual members of the armed forces of Japan, as a matter of domestic law, the privileges and immunities that they would otherwise enjoy as belligerents in an armed conflict. It would not, of course, have any impact on the rights and obligations of Japanese

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1 For my more detailed analysis of the meaning of Article 9, from an international law perspective, see Craig Martin, “Binding the Dogs of War: Japan and the Constitutionalizing of *Jus ad Bellum*” 30 University of Pennsylvania Journal of International Law 267-357 (2008), 309-317.


4 As will be discussed below, there are actually two theories as to the meaning of this clause. For an account of both theories, see Hatake, *Kenpō 9 jō*, note 2, 87–88; Tamura Shigenobu et al., *Nihon no bōei hôsei* (Tokyo: Naigai Shuppan 2008), 15; Ashibe Nobuyoshi, *Kenpōgaku*, Vol. 1 (Tokyo: Yuhikaku, 1992), 283-84; On the
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armed forces under international law, and it is a curious provision with no parallel in any other constitution. The foregoing understanding of Article 9, as will be discussed in a moment, is of course quite different from the official interpretation of the provision.

While we cannot review here the drafting and ratification history, it is important to note a number of important features of the process. The Japanese government itself took the position during the revision and ratification process that Article 9 precluded all use of force and maintenance of any armed forces. The government was, of course, under some pressure from the staff of General MacArthur, which had drafted the provision, but the Diet members who considered it for purposes of ratification, and who were then unaware of the U.S. role in its creation, also embraced this position. This was not animated solely by a desire to ensure against the militaristic errors that had led to national disaster. In both houses of the Diet and in the Privy Council, members of the government and rank and file Diet members made impassioned speeches about how Japan would, through its adoption of this constitution, come to represent the vanguard of nations in establishing a new and more peaceful international order. It was in this process that Article 9 began to be embraced not only by segments of the political elite (though there were strong opposing forces among these as well, to be sure), but also by the people of Japan. It was the beginning of a process by which Article 9 would become a powerful constitutive norm, providing the legal foundation for a new national identity centered on pacifist ideals.

This is important in thinking about how to retain the essential purpose and spirit of the provision. Notwithstanding the early understanding and apparent intent, from 1954 the government of Japan has interpreted the first paragraph of Article 9 as permitting the use of force for the individual self-defense of Japan. Quite aside from the history, this is very difficult to square with the plain meaning of the text. As already noted in previous chapters of this volume, this interpretation was based upon an opinion provided by the Cabinet Legislation Bureau (the CLB), which not only interpreted the first paragraph as permitting rights of belligerency in international law generally, see e.g., Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict (Cambridge University Press, 2004), 27-33; for my more detailed analysis of this clause, see Martin, “Binding Dogs of War,” note 1, 314-17; See also, Craig Martin, “Denying the Right of Belligerency: The Significance of the Forgotten and Misunderstood Clause of Japan’s Article 9,” (forthcoming, 2013).

For a very detailed account of the process in English, see Ray A. Moore and Donald L. Robinson, Partners for Democracy: Crafting the New Japanese State Under MacArthur (Oxford University Press, 2002); see also Koseki Shōichi, The Birth of Japan’s Postwar Constitution, (Boulder, CO: Westview, 1997).

Even Prime Minister Yoshida took this position in answering questions during the committee deliberations. See Moore, Partners for Democracy, note 5, 212; Osamu Nishi, The Constitution and the National Defense Law System in Japan (Tokyo: Seibundō, 1987), 5, 100-102; but see Yasuzawa Kiichirō, Kenpō daikyōjō no kaishaku (Tokyo: Seibundō, 1981), from 156 and from 186.

Moore, Partners for Democracy, note, 170, 212-216.

the use of force for individual self-defense, but also interpreted the second paragraph as therefore only prohibiting a maintenance of armed forces that exceeded the minimum necessary for such individual self-defense. At the same time, while interpreting the provision as permitting individual self-defense, the CLB also entrenched the understanding that Article 9 prohibited the use of force for collective self-defense under Article 51 of the UN Charter, and for collective security operations authorized by the United Nations Security Council under Article 42 of the Charter.

The Supreme Court of Japan, which has largely abdicated its authority and responsibility with respect to the interpretation and enforcement of Article 9, nonetheless in 1960, in the only case in which it has addressed the meaning of Article 9, endorsed the view that Article 9(1) did not prohibit the use of force for individual self-defense. While the clarity of the government’s position, and thus the precise scope of Article 9(1), has been undermined by such policy statements as the U.S.-Japan 1997 Guidelines, and some of Japan’s military deployments since 9/11, as a formal matter this legal interpretation—limiting the permissible use of force to only individual self-defense, and armed forces to the minimum necessary for that purpose—has been consistently maintained by the government.

It is important to understand the extent to which Article 9(1), and the government’s interpretation of it, goes further than the *jus ad bellum* regime in international law, in the sense that it imposes greater constraints on the use of force than does the UN Charter. There was considerable concern among Japanese politicians during the ratification process as to whether Article 9 would make it impossible for Japan to comply with what were then understood as legal obligations under the UN Charter to contribute forces and participate in collective security operations. But given the manner in which the collective security system has developed, Article 9 does not put Japan at odds with international law. It deprives

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13 In particular, the establishment of a U.N. standing force, to which all members would be required to
Japan of rights it would otherwise have under international law, namely the right to use force in collective self-defense or in collective security operations—but there is no legal duty on Japan to engage in such operations. And one is always at liberty to waive one’s own rights. It may be, as Ozawa Ichirō and others have argued, that Article 9(1) constrains Japan in ways that prevent it from contributing to international peace and cooperation to the extent that many would like, or to the degree expected by its allies, but it does not cause Japan to violate the principles of international law. Moreover, the provisions of Article 9(2) do not have, as a matter of law, any relevance to the jus ad bellum regime whatsoever, even though they were no doubt conceived to limit Japan’s ability to use force, and thus to prevent Japan from violating the principles of that regime.

An important question remains, however, regarding how effective Article 9 has been as a meaningful constraint on national policy. Much of the controversy surrounding Article 9 has been related to the existence and increasing size of the Self-Defense Force (SDF). Japan’s defense budget ranks fifth or sixth in the world, it has one of the most sophisticated naval forces in Asia, it is cooperating with the United States in ballistic missile defense systems, and is developing increasing force projection capabilities.  

The official interpretation of Article 9(2) relies upon the first sentence of the paragraph, which refers to fulfilling the purposes of Article 9(1), to mean that the clause only prohibits armed forces that could be used for the type of force that is renounced in Article 9(1)—that is, any use of force above and beyond individual self-defense. It is thus understood to prohibit the kind of military capability that could enable not only acts of aggression, but also participation in collective self-defense or collective security operations.

Whether or not one can really make meaningful distinctions between military capability that is strictly for individual self-defense and that which exceeds such requirements is the basis for much criticism. As a constitutional constraint Article 9(2) is highly ambiguous

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14 For analysis of Japan’s military capability and national defense policy, see Christopher W. Hughes, Japan’s Re-emergence as a ‘Normal’ Military Power, (Oxford University Press, 2006); Christopher W. Hughes, Japan’s Security Agenda: Military, Economic & Environmental Dimensions, (Boulder, CO: Lynne Rienner Publishers, 2005).


16 This is the famous “Ashida amendment” – for my analysis of this as it bears on the official interpretation of Article 9, and some of the myths surrounding its origins, see Martin, “Binding Dogs of War,” note 1, 303-06; see also Moore and Robinson, Partners for Democracy, note 5, 248-50, and 275; Shōichi, Birth of Japan’s Constitution, note 5, 195-202.

and not really capable of enforcement. But even on the basis of this interpretation, there is a wide and growing chasm between that which is permitted by the constitution, and the reality on the ground. It may be, as some have argued, that Japanese military capability would have been much greater had Article 9(2) not provided some foundation for political and popular opposition to the SDF and defense spending, but it is difficult to deny that Article 9(2) has become utterly undermined. This is a compelling reason for amendment. It is entirely unrealistic for proponents of Article 9 to think that the clock can be turned back with some radical disbandment of the SDF, and a constitutional provision that is in a constant state of violation erodes the credibility and normative power of the entire constitutional framework.

In contrast, the government interpretation of Article 9(1) provides much clearer and more enforceable limits, and the provision has operated to effectively constrain government policy over the years. In the early 1950s Yoshida Shigeru’s government used the Article 9 constraints as a useful shield against American pressure to contribute more to the alliance and to participate in international peace and security operations. While cynical at the outset, this use of Article 9 nonetheless strengthened the normative power of Article 9(1), and helped reinforce the growing social, political and legal norms that were anchored in the Article 9(1) renunciation of the use of force. Over time, Article 9 thus came to comprise a real constraint on policy. This was most clearly illustrated during the Gulf War. The government felt a powerful need to participate militarily in the coalition operations to drive Iraqi forces out of Kuwait, but the CLB advised that the government’s proposed actions would constitute a use of force and thus violate Article 9. When the government proposed legislation for the contribution of non-combat related logistical support, it was defeated in the Diet on grounds that it too would violate Article 9. Notwithstanding the enormous pressure from Washington and the deeply felt sense that inaction was causing a major diplomatic crisis for Japan, Article 9(1) mobilized sufficient institutional compliance to prevent government action that would have violated the provision.

The Gulf War generated pressure to relax the constraints imposed by Article 9, and that pressure has only strengthened in the post-9/11 environment, for reasons that are explained in the chapters in this volume by Chris Hughes and Thomas Berger. And while Article 9 has continued to constrain policy even as Japan sought to contribute to the so-called “global war on terror,” the reality is that over the long term the calls for amendment are likely to

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18 Article 9 was the well-spring for such other limiting policies as that which limited defense spending to 1% of GNP, the three non-nuclear principles, and the prohibition on the export of arms. See Kenneth Pyle, Japan Rising: The Resurgence of Japanese Power and Purpose (New York: Public Affairs, 2007), 273-76.

19 For a detailed argument to support this assertion, see Martin, “Binding Dogs of War,” note 1, 329-56.

20 For more on the crisis, the government’s attempt to respond to it, see Pyle, Japan Rising, note 18, 290-293; Kazuhiko Togo, Japan’s Foreign Policy 1945-2003 (Leiden: Brill, 2005), 305-307; Katzenstein, Cultural Norms and National Security, note 8, 125-127.

become irresistible. The growing sense of insecurity in the face of strategic developments in the region, not least of which being the development of Chinese military capability and uncertainty regarding North Korea, together with Japan’s ongoing aspiration to obtain a seat on the UN Security Council, and pressure from the United States to contribute more to the alliance, all militate in that direction.

As the earlier chapters in this volume have outlined, a number of constitutional amendment proposals have been published. The most comprehensive and serious of these was that of the LDP, published in 2005. The LDP published a revised version of this proposal in April, 2012, just as this volume was going to press. It included revisions to its 2005 document, and this proposal contains significant changes to the language of Article 9. While there is not room here to engage in a detailed analysis of the text, under the LDP proposal Article 9(1) would be revised to clarify that Japan retains a right of self-defense (without specifying whether individual, collective, or both), and the language prohibiting the use of force would be significantly relaxed. Article 9(2) would be entirely replaced, and it would begin by making explicit the authority to maintain a “national defense military” (kokubōgun – the NDM), for the purpose of, among other things, defending the peace and independence of the country, and to engage in “international cooperation operations” (kokusai kyōchō kastudō) to guarantee the peace and security of the international society. Moreover, an entirely new Article 9(3) provides that the state, in cooperation with the people, shall protect the land, territorial waters, and air space of the country, together with all resources therein.

While the LDP proposal for Article 9(2) does introduce new provisions to establish greater civilian control, placing the NDM under the control of the prime minister, with several of its specified activities being subject to the approval of the Diet, the overall effect of the revisions would be to significantly undermine the constraints that Article 9 currently exercises on the use of force. Not only does the revision to Article 9(1) itself weaken the explicit constraint imposed, but the proposed changes to Article 9(2), and the new Article 9(3) would necessarily require a change to the current understanding of Article 9(1).

24 Ibid. Paraphrased from the full clause “kokusai shakai no heiwa to anzen wo kakuhosuru tameni kokusai teki ni kyōchōshite okonowareru katsudō.”
25 Ibid. Also entirely new to the 2012 draft, as compared to the 2005 LDP proposal, is the introduction of a provision in Article 9(2) establishing the authority for a military court to try members of the military and other public officials for offences committed in the performance of their duties, and for crimes relating to the disclosure of military secrets.
26 Reinterpretation of Article 9 was, of course, one of the prongs of prime minister Abe Shinzo’s attacks on Article 9, and was the recommendation of the so-called Yanai Report. “Anzen hoshō no hōtōki kiso no saikōchiku ni kansuru kondankai” hōkokusho, Prime Minister’s Office website, June 24, 2008.
Moreover, the introduction of the new authority to engage in “international cooperation operations,” a term that has no defined meaning in international law, would provide the ambiguity sufficient to encompass collective self-defense, collective security operations, and indeed even aggressive military operations in violation of international law, so long as they were conducted in cooperation with other states.

The main point is that this and other proposed amendments to Article 9 would utterly hollow out the provision’s constraints on the government’s ability to use armed force, and would be a marked departure from the pacifist principle that is thought to one of the three pillars of the Japanese constitutional order. Yet these are concrete proposals, and it is increasingly likely that they will be the subject of substantive debate as the prospect of amendment becomes more real. Supporters of Article 9 cannot continue to simply stonewall the debate, and refuse to discuss the details of these amendment proposals. They cannot continue to leave the field to the revisionists, and refuse to submit some alternative proposals that are true to the underlying principles. They must address the fundamental question: how can Article 9 be amended in a manner that addresses not only the very real security and diplomatic concerns, but also the constitutional law imperatives for amendment, while nonetheless remaining true to the spirit of the provision?

A Progressive Alternative

Clarity on the Permissible Use of Force

Article 9(1) is the most important and effective provision of Article 9. It is at the core of the idea of Japan being a pacifist country, and it has operated to effectively constrain government policy. With the exception of Japan’s marginal involvement in post-occupation Iraq, it has not used military force in *jus ad bellum* terms since the end of World War II, and that is due at least in part to both the direct operation and broader influence of Article 9(1). That is impressive. Nonetheless, as has been explained, Article 9(1) is not without legal ambiguity. There is tension between the government interpretation and the facial meaning of the language, and the ambiguity inherent in the provision could be the source of considerable mischief depending on how Article 9(2) is amended. The LDP’s amendment proposal is clearly intended to broaden the scope of permissible use of force, while leaving Article 9(1) largely intact, which would merely provoke greater political and legal conflict down the road. In the event that Article 9 is to be amended, Article 9(1) should be revised to provide in explicit terms precisely that which is prohibited, and that which is permitted.

This would require, of course, some important decisions about the scope of the prohibition that is to be created. Rather than burying or avoiding the issue, a clear amendment proposal will need to explicitly articulate that the use of force for the purpose of the individual self-defense of Japan, pursuant to Article 51 of the UN Charter, is


permitted. In addition, it will also have to make clear whether force is permitted for either, or both of, collective self-defense, and collective security operations authorized by the UN Security Council. Part of the debate in Japan has been over precisely this question, with people like Ozawa Ichirō of the DPJ, for instance, arguing that collective self-defense should be prohibited, but UN authorized collective security operations permitted.\(^{28}\) On the other hand, collective self-defense is at the core of the U.S.-Japan security arrangement, and there is pressure on Japan from Washington to broaden its ability to more fully contribute to the defense of U.S. interests outside of Japan.\(^{29}\) Indeed, the efficacy of the ballistic missile defense system being jointly developed relies upon such commitments.

Given that collective self-defense can be exercised unilaterally, requiring no authorization by the UN, many Japanese are justifiably concerned that permitting it could lead to Japanese involvement in military adventures that were in violation of international law. A constitutional prohibition on the use of force for collective self-defense, while permitting participation in UN collective security operations, would have the benefit of subjecting Japanese use of force (for anything beyond individual self-defense) to external checks, and would ensure it complied with international law.\(^{30}\) Of course it would still deny to Japan a right that exists in international law, but, as is currently the case, the denial of the right would not prevent Japan from fulfilling its legal obligations.\(^{31}\) Such a provision would still bring Article 9(1) into greater conformity with the *jus ad bellum* regime, and allow Japan to better fulfill its perceived international responsibilities. Such a provision would, for instance, have permitted participation in the first Gulf War, and in the UN mandated operations in Afghanistan, but would have prohibited participation in the invasion of Iraq.

I am not here making a case for any particular position, such as revising the constitution to permit only UN authorized collective security operations, or only collective self-defense, or indeed to permit both. But I am arguing that Article 9(1) ought to be amended to make very clear what is to be permitted and what not, in terms that have specific meaning under international law. Seeking to amend Article 9 without making these hard choices, and trying to fudge the issue with such ambiguous terms as “international cooperation operations,”—which has absolutely no legal meaning—is precisely the wrong way to proceed. If the decision is made that Article 9 should permit both collective self-defense and collective security operations, then one option with respect to the actual language would be to simply incorporate generally by reference that which is permitted by the UN


\(^{31}\) Though, this proposition becomes somewhat more debatable as Japan increasingly agrees to vaguely worded commitments regarding mutual defense, as in the 1997 Guidelines; see footnote 12.
Charter and customary international law, so that the constitutional provision would adjust with international law over time.\textsuperscript{32} (Sample language, with different possible options for a proposed Article 9(1), is provided in Appendix 1).

**Armed Forces, but with Clear Civilian Control**

Turning to Article 9(2), I would endorse the LDP proposal’s move to delete the prohibition on the maintenance of armed forces or “other war potential,” as well as the denial of rights of belligerency, and also agree with its proposal to acknowledge the legitimacy of the SDF. Moreover, credit is due for the attempt to add some degree of civilian control. Nonetheless, there need to be stronger and more elaborate constraints adopted in conjunction with these moves to legitimate the existence of a military. This abandoning of the renunciation of armed forces will, of course, be enormously controversial for many supporters of Article 9, while the new constraints will be objectionable to the right. But as already argued, the left must come to recognize that the existence of the SDF is a reality that cannot be realistically reversed. It is futile to argue for the disarmament of Japan in the current environment. Moreover, the future that was envisioned when the constitution was ratified, in which UN forces would enforce a collective security system to maintain international peace and security, making the maintenance of national armed forces increasingly unnecessary, has not materialized.\textsuperscript{33} And as already argued, the ever growing gap between the reality of Japan’s military capability and the prohibition in Article 9(2) is increasingly unhealthy for the constitutional order as a whole. Even accepting the government interpretation, Article 9(2) is increasingly problematic. If Article 9(1) is amended to make clear that Japan can use force in individual self-defense, as well as for collective security operations, it will be impossible to meaningfully distinguish between a military capability that is the minimum necessary for such purposes, and that which exceeds the limit. Opaque and unenforceable provisions corrode a constitution. It is, therefore, advisable to eliminate the general prohibition on the maintenance of armed forces, and to put in place important constraints that the constitution currently lacks.

The overriding purpose behind the first clause of Article 9(2) was to prevent the possibility of a Japanese military again leading the country into a disastrous war.\textsuperscript{34} It was a response to the militarism of the 1930s, and the ruin that a defeated nation suffered as a result. That militarism had been made possible precisely because of fundamental flaws in

\textsuperscript{32} A number of countries have adopted this approach to the incorporation of human rights principles from international law into their constitutions; see Thomas Buergenthal, “Modern Constitutions and Human Rights Treaties,” 36 Columbia Journal of Transnational Law 211 (1997).

\textsuperscript{33} See footnote 13.

\textsuperscript{34} I am here referring to the purpose as contemplated by the ratifiers. The American drafters, of course, had a similar though slightly different purpose of preventing Japan from ever again posing a military threat to the United States and its allies.
the Meiji Constitution of 1898. Among other things, the Meiji Constitution was highly ambiguous on the nature of the executive, it failed to identify the locus of supreme command over the military, and it did not establish civilian control over the military. While the 1947 Constitution of Japan corrected the problems regarding the location and scope of executive power, it was largely silent on the issues of civilian control and supreme command, precisely because it did not contemplate that Japan would have any military at all, or that it would be able to use force. There is only one relevant provision (Article 66(2)), added late in the ratification process, which requires that the prime minister and other cabinet ministers be civilians. Beyond that, there are no provisions regarding supreme command or civilian control. Moreover, there is nothing that provides for legislative oversight. It will be recalled that in the last five years there have been significant incidents in which the Diet was misled by the SDF regarding operations in support of coalition actions in Iraq and Afghanistan, and the Diet inquiry into those incidents was handcuffed by its limited power to compel the disclosure of information from the Ministry of Defense and the SDF.

Similarly, because Article 9(1) originally contemplated that Japan was to be prohibited from using any force at all, there are no constitutional provisions regarding how decisions are to be made regarding the use of force. Assuming that the decision is to be made by the executive, is it a decision of the prime minister alone, or the cabinet as a whole? Is it a purely executive decision, or must it be also approved by the legislature? Is there some threshold level above which a decision to deploy military forces requires legislative approval? A convention has developed in Japan pursuant to which the Diet is required to pass a law for each deployment of the SDF, but there is no provision of the constitution that requires this process. Not long before it was replaced in the last election, the LDP government was working on legislation that would provide the government with permanent authority to deploy the SDF so long as prescribed conditions were satisfied, thereby eliminating this very convention.

There is a growing trend among constitutional democracies towards the establishment

36 Article 66(2) provides that “the Prime Minister and other Ministers of State must be civilians.” It was added at the insistence of the Far Eastern Commission during the ratification process, after the Ashida amendment was added to Article 9. There was uncertainty at the time as to how “civilian” should be translated, and the word bunmin was used, though with little clarity on what its exact scope and meaning would be (would it cover retired officers, for instance, or only serving members of the military?). Moore and Robinson, Partners for Democracy, note 5, 306.
of constitutional or statutory provisions that require governments to obtain legislative approval for decisions to use armed force. As was observed by Immanuel Kant and James Madison over two hundred years ago, such separation of powers with respect to the decision to go to war is an important factor in not only satisfying the requirements of representative democracy, but also in reducing the risk of democracies embarking on military misadventures. When the representatives of those citizens who will be dying and paying for the war participate in the decision-making process, there is less chance that wars will be fought for the benefit of narrow interests. Modern political theory has reinforced our understanding of the various ways in which such legislative involvement and oversight can enhance the decision-making process and reduce the risk of states engaging in ill-advised or illegitimate wars.

If we accept that Article 9 is to be amended in a manner that contemplates the possibility of some use of force, and formalizes the existence of an armed forces, but also insist that Article 9 nonetheless reflect its pacifist origins, and continues to serve as an avante garde model for other nations, I would suggest that any amendment must include some entirely new provisions that address the foregoing problems. First, an entirely new Article 9(2) ought to include provisions that would provide for civilian control and strict neutrality of the military (in place of the current Article 66(2)). Building on the LDP proposal, this could be achieved by establishing that the prime minister is commander in chief, prohibiting the appointment of serving officers of the armed forces as ministers in the cabinet, and limiting other ways in which the military might become involved in politics and policy. As part of both civilian control and legislative oversight, the new Article 9(2) ought to include provisions that would require the establishment of institutions that would monitor military deployments, along the lines of the Armed Services Committee in the U.S.

39 Wolfgang Wagner, Parliamentary Control of Military Missions: Accounting for Pluralism (Geneva Center for the Democratic Control of Armed Forces, 2006).
Congress, and the oversight mandated in the German Basic Law.  

Second, a new sub-paragraph, Article 9(3), should include provisions that establish the formal separation of powers with respect to decisions to participate in armed conflict or other military operations. As reflected in the draft language in Appendix 1, this would include a requirement that the government obtain approval in both houses of the Diet for decisions to use force or deploy the armed forces for international operations. It would require a super-majority in such votes with respect to decisions to use force in *jus ad bellum* terms, but a simple majority for other operations. The deployment of military forces for UN peacekeeping missions, for instance, will typically not contemplate the use of force, and so ought to be subject to lower thresholds than the dispatch of troops for collective security operations under Chapter 7 authority to use force. The provision should include a mechanism for requiring further approval of the Diet in the event that a peacekeeping mission morphs into a full-blown Chapter 7 “peace enforcement” operation, as has happened with operations such as that in Somalia.

This provision would merely build upon and constitutionalize a convention that already operates in Japan, so in many respects it should not be seen as a radical suggestion. Yet the constitutionalizing of this convention is important, as it protects the current convention from capricious change. Even more significant, such a provision entrenches principles that are increasingly understood to be central to explanations for the democratic peace, and which enhance democratic accountability and deliberation in respect of the most important decision a government can make—that is, the decision to engage in armed conflict.  

It would, moreover, do much to reassure Japan’s neighbors in the region, who will be highly sensitive to the ramifications of these amendments. Many will of course resist this innovation on the grounds that it makes decision-making cumbersome and time-consuming, and may lead to the Diet actually preventing a contemplated use of force or military deployment, as it did during the Gulf War crisis. But that is of course precisely the point. Engaging in armed conflict should not be easy, and ought to be possible only when the reasons are compelling enough to mobilize the opinions and support of a significant percentage of the polity. Decisions to engage in armed conflict ought to be taken only after serious debate, with the assumptions and reasons of government exposed to interrogation and analysis, and challenged from various perspectives.  

There will of course be possible scenarios, such as when the state itself is under direct attack, in which the luxury of time for such debate and analysis is impossible. But mechanisms can be developed to deal with such circumstances, permitting decisions be made by the executive to use force in an emergency, subject to *ex post facto* approval by the legislature within a defined time frame, as the U.S. *War Powers Act* and the

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42 German Basic Law, Article 45b.
43 See authorities in footnotes 40 and 41, and my analysis of these issues in Martin, “Taking War Seriously,” footnote 40.
44 Ibid.
constitutions of several other countries provide for.45

Reinforcing the Power of Judicial Review
The final element of the amendment required to fully establish civilian control over the military and separation of powers with respect to the decision to engage in armed conflict would be a provision providing for more specific judicial review of decisions or actions that might be in violation of Article 9. The Constitution of Japan already provides for considerable powers of judicial review,46 but the Supreme Court has largely abdicated its responsibility and authority with respect to the interpretation and enforcement of Article 9.47 The lower courts have generally followed the Supreme Court’s lead by insulating Article 9 from judicial review through the application of excessively narrow standing requirements, such that virtually no one other than a member of the SDF ordered into combat could establish the narrow legal interest deemed necessary to ground a claim that government action is in violation of Article 9.48

This of course means that Article 9, one of the three pillars of the Japanese constitutional system, is immunized from judicial scrutiny and is largely unenforceable, and that the third branch of government in the Japanese democratic system has opted out of any involvement in the process of ensuring that decisions to use force comply with the constitutional limits. To the extent that one takes seriously the idea that Article 9 is a fundamental component of the constitutional system, and takes seriously the notion that constitutional limits ought to be binding and enforceable, then this situation ought to be considered unacceptable. If we understand one of the roles of constitutions as being to operate as pre-commitment devices, serving to bind future governments to principles and values viewed at the outset as crucial for the polity, then one role of the courts is to ensure that those commitments are enforced.49

Aside from broader constitutional theory, the role of the judiciary is key to ideas that form part of liberal theories regarding the democratic peace. While the separation of powers as between the executive and legislature is central to republican ideas of democratic accountability, and for creating the circumstances in which the benefits of representative and deliberative democracy will operate to reduce the risk of rash decisions to engage in armed conflict, it is not sufficient. It is recognized that there will be times when legislatures

45 War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)); for examples of such mechanisms or other exceptions in the constitutions of other countries, which would include Denmark and Sweden, see Wanger, Parliamentary Control.
46 Articles 76, 81, and 98, Constitution of Japan, 1947.
48 The Supreme Court established this narrow standing requirement in the Naganuma case, 36 Minpō Hanreishū 1679 (Sup. Ct., Sept. 9, 1982).
too can be carried away in irrational fervor for war. Political theory suggests that this risk is highest for democracies when dealing with illiberal states. There is, therefore, a real need for a further check in the democratic system, a further separation of powers with respect to the decision to use force. The third branch of government, independent and the least susceptible to the political pressure of the day, in the course of constitutional litigation plays a crucial role of monitoring government conduct, disseminating information about such conduct and coordinating public opinion regarding decisions, and finally in actually enforcing the constitutional provisions governing the decisions to use force. Over time the very possibility of such judicial review exercises a powerful influence on government conduct, and serves to internalize constitutional norms. It is yet another but crucial mechanism for moderating the tendency of democracies to engage in illegitimate or unlawful armed conflicts.

As previously mentioned, there are a number of other countries that have constitutional provisions requiring legislative involvement in decisions to use force or deploy armed forces, and several that also have constitutional limits on the circumstances under which the state may engage in armed conflict. Courts have thus been called upon to consider these issues in other countries. While many argue that the domestic courts of many countries do not and ought not to interfere in government decision-making on national security issues, there is increasing evidence of a trend towards courts rejecting the notion that questions relating to national security are somehow non-justiciable or beyond the jurisdiction of the judiciary. In particular, many courts have not been reluctant to engage in a review of specific questions regarding the extent to which government decisions relating to national security were made in a manner that complied with clear and unambiguous constitutional conditions, or were made by the branch of government that had the requisite constitutional authority to do so. The Constitutional Court of Germany illustrated this most famously with its 1994 decision relating to Germany’s involvement in Bosnia, holding that the Bundestag must approve each and every decision to deploy the armed forces of Germany.

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51 Much more could be said about this last assertion – but to the extent the Constitution incorporates principles of international law, adherence to the constitutional limits will help ensure that the state does not use force in violation of international law principles. See “Martin, Taking War Seriously,” note 40; on the need for such checks to resist the tendency of democracies to engage in irrational wars with illiberal states, see Michael Doyle, Ways of War and Peace: Realism, Liberalism, and Socialism (New York: Norton, 1997), 251-301.
52 See Wagner, Parliamentary Control.
54 For the analysis supporting this proposition, see Martin, “Taking War Seriously,” 693-704.
for international military operations.\(^{55}\)

I would therefore propose a new clause for Article 9, Article 9(4), which would provide for explicit powers of judicial review with respect to government compliance with the rest of the provision. This sub-section would also establish broad standing for citizens seeking to commence applications to enforce the provisions of Article 9. Such standing would not require existence of a personal narrow legal interest, as currently serves to insulate Article 9 from virtually all judicial review. Rather, employing a standard similar to that established by the Supreme Court of Canada, the Supreme Court of Japan should merely require that there be a serious issue to be determined, that the applicant has a genuine interest in the issue, even if only as a representative of the broader public, and that there would be no more reasonable or effective manner for the issue to be brought before the court.\(^{56}\) Such a provision would bring Article 9 back into the realm of enforceable constitutional provisions. In so doing, it would also provide some reassurance that the amendment of Article 9 to permit some use of force would not be the beginning of a slippery slope towards unrestricted participation in military operations of all kinds.

The LDP draft amendments and other proposals being developed by those who are essentially hostile to the underlying premise of Article 9, would operate to undermine the constraints that Article 9 has exercised over Japan’s use of force over the last sixty five years. They are potentially dangerous.\(^{57}\) Yet those who support Article 9 and the idea of a pacifist Japan can no longer afford to simply reject all talk of amendment. The winds of change are moving against them, and they must develop realistic and feasible alternatives to the proposals being developed by those on the right. When the debate is finally joined in earnest, and questions of amendment are being developed to lay before the people of Japan, the champions of Article 9 will have to have some meaningful response. There are sound reasons to think that Article 9 ought to be amended, for the good of the constitutional order as a whole, and in the interests of preserving reasonable constraints on Japan’s ability to use armed force. I have tried here to provide the outline of some of those arguments, and to provide some revised language that may serve as the starting point for a discussion on what form alternative proposals might take—proposals that would remain true to the spirit and purpose of Article 9.


\(^{57}\) For my analysis of these amendment proposals, see Craig Martin, “LDP’s Dangerous Proposals for Amending Antiwar Article”, The Japan Times, June 6, 2012.
APPENDIX 1 – PROPOSED AMENDMENTS TO ARTICLE 9

Article 9(1) – (Option One) - Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce the threat or use of force as means of settling international disputes, except for the purpose of individual self-defense of the nation in the event of armed attack, or for the purpose of maintaining international peace and security as authorized by the United Nations Security Council.

Article 9(1) – (Option Two) - Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce the threat or use of force as means of settling international disputes, except in accordance with that which is permissible under the United Nations Charter and customary international law.

Article 9(2)(a) – The government may establish land, sea, and air armed forces for the primary purpose of defending the territorial and political integrity of Japan. In addition to self-defense, the armed forces of Japan may only be employed for such purposes as are permitted by the exceptions provided for in the preceding paragraph, and otherwise in accordance with the provisions of the Constitution and other laws of Japan.

Article 9(2)(b) – The Prime Minister, acting through the Minister of Defense, shall be the commander in chief of the armed forces of Japan. No serving member of the armed forces may be appointed as a minister in cabinet, and no serving officer with the rank of Colonel or higher may serve in any ministry of government other than the Ministry of Defense.

Article 9(2)(c) – No serving member of the armed forces may run for public office, be a member of any political party, actively participate in any political campaign, or otherwise engage in public debate or other activity designed to influence the formulation of public policy.

Article 9(2)(d) – A Committee for the Armed Forces shall be established by law in the House of Representatives and the House of Counselors in the Diet, for the purpose of requesting and receiving reports from the Ministry of Defense and other branches of government, on the deployment and operations of the Armed Forces, otherwise monitoring such operations of the Armed Forces, and generally providing legislative and civilian oversight over the Armed Forces. The Committee for the Armed Forces shall have subpoena power over documents and may compel testimony before it, and shall issue reports of its findings.

Article 9(3)(a) – Any decision by the government to use force consistent with and as permitted by paragraph one of this Article, shall be approved in a formal vote by each of the House of Representative and the House of Counselors, by a minimum of two thirds of votes cast by the members of each House.

Article 9(3)(b) – In the event that the nation is under attack or the government has determined that there is a state of emergency threatening the territorial and political integrity of the state, making prior approval from the Diet impractical, the government may use force in accordance with paragraph one of this Article without such prior approval. In such event, the government shall immediately provide notice of its decision to each House of the Diet, and it shall obtain approval from each House in accordance with the terms of sub-paragraph (a) of this paragraph within twenty days thereof, failing which the government shall immediately cease such hostilities.
Article 9(3)(c) – Any decision by the government to deploy members of the Armed Forces for participation in peacekeeping operations, to provide logistical support for international collective security operations, or other such activity that does not include the use of force contemplated in paragraph one of this Article, shall be approved by a formal vote of each of the House of Representatives and the House of Counselors, by a simple majority of the votes cast by the members of each House.

Article 9(3)(d) – In the event that the character of any operations in which members of the Armed Forces are participating in accordance with sub-paragraph (c) of this paragraph, should develop such that they will likely require a use of force contemplated in paragraph one of this Article, the government shall obtain further approval for the continuation of such operations according to the terms of sub-paragraph (a) of this paragraph, failing which the government shall immediately discontinue such operations.

Article 9(4)(a) – Any person in Japan may apply to a court of competent jurisdiction to obtain a declaration, injunctive relief, damages, or any other remedy for alleged violation of this Article that the court considers appropriate and just in the circumstances.

Article 9(4)(b) – Any person who has made application under sup-paragraph (a) of this paragraph shall be granted standing by the court so long as the issue raised is a serious issue to be tried, the person has a genuine interest in the issue, even if only as a representative of the general public, and there would be no other reasonable or effective means for the issue to be brought before the court.

Article 9(4)(c) – The Supreme Court has the final authority with respect to the interpretation and meaning of this Article.