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ARTICLE 9 IN THE POST-SUNAKAWA WORLD: CONTINUITY AND DETERRENCE WITHIN A TRANSFORMING GLOBAL CONTEXT

John O. Haley*

Abstract: The 1959 Supreme Court Grand Bench (*en banc*) decision in *Sakata v. Japan*¹ (the *Sunakawa* case) was the first Supreme Court decision on Article 9 and the constitutionality of Japan's defense policies. In the precedent-setting decision, all fifteen justices endorsed the view that under Article 9 Japan retained a fundamental right of self-defense and could enter into treaties for mutual security. In the absence of an apparent or "clear" violation, the courts, *Sunakawa* held, must defer to the judgment of the political branches on the issue of constitutionality. The Court thereby established the outer parameters for judicial review and the scope of legislative and executive discretion. For half a century the decision has remained the controlling interpretation of Article 9. Reserving the right to adjudicate future cases only in the event of an apparent violation, the Court enabled successive Governments to make defense policy decisions based on political and public consensus and policy concerns circumscribed by only a possibility of judicial review. The result has been remarkable. Since 1959 Japan has pursued a consistent set of policies that have both expanded Japanese defensive military capacity and enabled effective deterrence within a transforming global context.

The varied interpretations of Article 9 that have been expressed over the years, I would emphasize, have been political not legal—or at least not as constitutional *law*. Yet a political consensus has endured that enables Japan to possess, as detailed below, the most technologically advanced defensive military in East Asia. No amendment of the Constitution has been necessary for the consistent development of defensive forces and a security alliance with the United States that arguably has for three generations ensured peace in East Asia through deterrence. As recently expressed by Satsuki Eda, the chair of the opposition Democratic Party's research commission on the constitution, under Article 9 Japan has both the legal right of individual self-defense, as well as the right of collective self-defense.² Nonetheless, the political constraints have been significant as Japanese Governments with few exceptions have declined since 1960 to enter into any other collective security arrangements much less to exercise a right of individual or collective self-defense.

I. THE DEBATE—PAST AND PRESENT

Few if any legal and political issues in Japan over the past seven decades have engendered as much continuous public controversy and debate

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¹ Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, no. 27660683, 13 Keishū 3225 (Japan) (translated with commentary in JOHN M. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60 298 (1964)) [hereinafter "the *Sunakawa* case"].

² The right of collective self-defense is defined in the Ministry of Defense as "the right to use force to stop an armed attack on a foreign country with which the state has close relations, even if the state itself is not under direct attack." MINISTRY OF DEFENSE OF JAPAN, WHITE PAPER ON DEFENSE OF JAPAN 2012, 110 (2012), http://www.mod.go.jp/e/publ/w_paper/pdf/2012/18_Part2_Chapter1_Sec2.pdf. The White Papers state the official defense policies of the Government.

as Article 9 and the existence and role of the Self-Defense Forces.³ In 1950 the first armed services—the National Police Reserve (renamed the National Safety Forces in 1952) and the Coastal Safety Force—under a National Security Board were established. In 1954 they were reorganized and expanded as the Japan Ground Self-Defense Force (Army), the Japan Maritime Self-Defense Force (Navy) and the Japan Air Self-Defense Force (Air Force) under a newly reorganized Defense Agency, which was reorganized as the Ministry of Defense in 2007. From 1950 to the present, the existence of a military establishment and its role have generated repeated partisan controversy, public protests, and litigation. The protests against the 1960 U.S.-Japan Security Treaty united a diverse group of over a hundred civic and political organizations that from 1959 into 1960 engaged in a massive campaign that resulted in the cancellation of U.S. President Dwight Eisenhower’s 1960 visit to Japan, albeit not the ultimate ratification of the treaty. The campaign also sparked additional protests that led to the resignation of Prime Minister Nobusuke Kishi and ushered in an over half-century-long era of continuity of constitutional law and policy, ending, many believe, perhaps not so ironically, with the premiership of Kishi’s grandson, Shinzō Abe.

Abe took the first steps toward revision of the Government’s defense policy during his first term in office (2006-2008). He began with an effort to develop a consensus for reform first within the Liberal Democratic Party (“LDP”) and then the broader community by establishing an Advisory Panel on Reconstruction of the Legal Basis for Security.

The panel’s principal focus was the decades-long ban on collective self-defense. Highlighted were four scenarios: (1) defense of U.S. naval vessels on the high seas; (2) interception of ballistic missiles that might be heading toward the United States; (3) use of weapons in international peacekeeping operations; and (4) logistic support for the operations of other countries in international peacekeeping operations by the United Nations.⁴ In June 2008, the panel issued its report, which argued for a revised interpretation of the Constitution to allow Japan to exercise the right of collective self-defense and participate in peace keeping operations categorized as collective security measures under UN auspices (third and

³ For a descriptive summary of the Japanese “civil society” responses, see Millie Creighton, *Civil Society Volunteers Supporting Japan’s Constitution, Article 9 and Associated Peace, Diversity, and Post-3.11 Environmental Issues*, 26 VOLUNTAS 121 (2015).

⁴ For the 2008 report, see Report of the Advisory Panel on Reconstruction of the Legal Basis for Security (2008), <http://www.kantei.go.jp/jp/singi/anzenhosyou/report.pdf>.

fourth cases) and recommended that it introduce new legislation to permit action in all four cases.⁵ Abe had already resigned as prime minister ostensibly for health reasons in September 2007. No further action was taken on the recommendations until Abe returned as prime minister almost exactly five years later. Within weeks he had reconvened the Advisory Panel. Its final report, released in May 2014, provided the basis for the Abe Government to adopt new guidelines, issued on July 1, 2014, for Japan's defense policy and the Government's interpretation of Article 9.⁶ To some, the new guidelines "gutted" Article 9. In August, tens of thousands joined protests in Tokyo and Japan's other major cities. A year later in July 2016, the LDP, with one seat held by its coalition partner, the Komeito, won the needed two-thirds majority that would allow a national referendum on revision of Article 9. Yet, only days before the election, LDP Vice President Masahiko Komura had stated "there is zero possibility" that Prime Minister Shinzō Abe would try to revise Article 9.⁷ To date no proposal for a referendum has been made.

Interpretations left to elected governments are by definition subject to change. What is remarkable about Article 9 is its enduring political viability, and the continuity of Japanese defense policy within a transforming global context. Yet, despite the hyperbolic assessments, basic questions remain: how significant a departure from the past do the Abe Government's policies portend, or whether consensus and continuity will continue to prevail within a transforming world. Perhaps the most significant questions of all are how China will respond and whether the deterrence effect of Japan's current constraints hold.⁸

⁵ *Id.*

⁶ See Report of the Advisory Panel on Reconstruction of the Legal Basis for Security (2014), http://www.kantei.go.jp/jp/singi/anzenhosyou2/dai7/houkoku_en.pdf.

⁷ Reiji Yoshida, *LDP vice president says 'zero possibility' Abe will revise Article 9 after Upper House poll win*, THE JAPAN TIMES (July 6, 2016), <http://www.japantimes.co.jp/news/2016/07/06/national/politics-diplomacy/ldp-vice-president-says-zero-possibility-abe-will-revise-article-9-upper-house-poll-win/#.V5z4Y4-cFIY>.

⁸ Some might include the question of U.S. policy, but at least to date, support for the Abe Government proposals has been emphatic. See, e.g., Office of the Press Secretary, *U.S.-Japan Joint Statement: The United States and Japan: Shaping the Future of the Asia-Pacific and Beyond* (Apr. 25, 2014), <https://www.whitehouse.gov/the-press-office/2014/04/25/us-japan-joint-statement-united-states-and-japan-shaping-future-asia-pac>.

II. THE HISTORY OF ARTICLE 9 AND ITS INTERPRETATION

The story of Article 9 commenced with inclusion of a “renunciation of war” clause in the “model” constitution drafted in 1946 by a secret Steering Committee comprising select group of U.S. lawyers serving in the Allied Occupation pursuant to a command by General Douglas MacArthur as Supreme Commander of the Allied Forces.⁹ As related by Charles L. Kades, Deputy Chief of Government Section, the committee’s chair and author of the initial version of what became Article 9:

MacArthur had directed [Courtney] Whitney [Chief of Government Section] to have the Government Section draft a model for a constitution to be handed to [Prime Minister Shigeru] Yoshida and [State Minister Jōji] Matsumoto for their consideration at the meeting which the Japanese had postponed to the following week . . . Whitney handed me a legal-size sheet of green-lined yellow paper on which were handwritten, in pencil, notes that Whitney said were to be used as the basis for a model constitution.¹⁰

The handwritten notes (written either by MacArthur or Whitney) included the following provision:

War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even preserving its own security. It relies upon the higher ideals which are now stirring the world for its defence and its protection.

⁹ For a first-hand account of the origin of Article 9 and the drafting of the Constitution, see Henry M. Jackson School of International Studies at the University of Washington, *Making the Japanese Constitution: Col. Kades interviewed by Prof. Haley*, YOUTUBE (May 23, 1989), www.youtube.com/watch?v=jnzOU4sf3Ms. For recent studies in English, see KENNETH L. PORT, *TRANSCENDING LAW: THE UNINTENDED LIFE OF ARTICLE 9 OF THE JAPANESE CONSTITUTION* (2010), as well as two excellent Library of Congress Law Reports: LIBR. OF CONGRESS, *JAPAN: INTERPRETATIONS OF ARTICLE 9 OF THE CONSTITUTION* (20015), <https://www.loc.gov/law/help/japan-constitution/interpretations-article9.php>; and LIBR. OF CONGRESS, *JAPAN: ARTICLE 9 OF THE CONSTITUTION* (2006), <http://www.loc.gov/law/help/japan-constitution/article9.php>. For two studies by one of the foremost U.S. experts on Article 9 and Japanese defense policy, see JAMES E. AUER, *THE POSTWAR REARMAMENT OF JAPANESE MARITIME FORCES, 1945-71* 122 (1973); James E. Auer, *Article Nine of Japan’s Constitution: From Renunciation of Armed Force “Forever” to the Third Largest Defense Budget in the World*, 53 L. AND CONTEMP. PROBS. 171 (1990) [hereinafter *Article Nine of Japan’s Constitution*]; and James E. Auer, *Article Nine: Renunciation of War*, in *JAPANESE CONSTITUTIONAL LAW* 79 (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) [hereinafter *Article Nine: Renunciation*].

¹⁰ Charles L. Kades, *The American Role in Revising Japan’s Imperial Constitution*, 104 POL. SCI. Q. 215, 223 (1989).

No Japanese Army, Navy, or Air Force will ever be authorized and no right of belligerency will ever be conferred upon any Japanese force.¹¹

Whether the idea for such a clause originated with MacArthur himself or, as MacArthur later asserted and many now believe, Prime Minister Kijūrō Shidehara, or even Kades, remains unknown.¹² Kades, however, considered that a renunciation of war in self-defense was unrealistic. In drafting the initial version of Article 9, he thus deleted the phrase “even preserving its own security.”¹³ He also considered undesirable any express reservation of a right to self-defense. For Kades, the article did not require any explicit mention of such right. As with the 1928 Kellogg-Briand Pact, the right to self-defense was implicit.¹⁴ Moreover, as Kades told the author during an interview in 1989, in the context of Japan’s use of “self-defense” as a justification for the attack on Pearl Harbor, any such provision would have been politically unacceptable.¹⁵

As ordered, the Supreme Commander of Allied Powers (SCAP) Steering Committee completed its model constitution within one week. On February 13, 1946, General Whitney handed it over to the Japanese government. The “renunciation of war” provision as drafted by Kades read as follows:

¹¹ *Id.*

¹² Despite attribution to MacArthur by both Foreign Minister (and later Prime Minister) Shigeru Yoshida as well as Shidehara himself (see SHIGERU YOSHIDA, *THE YOSHIDA MEMOIRS: THE STORY OF JAPAN IN CRISIS* 137 (Kenichi Yoshida trans., William Heinemann Ltd 1961) (1961) (cited in Auer, *Article Nine of Japan’s Constitution*, *supra* note 9, at 173)), the evidence in favor of Shidehara as the source is quite strong. See Kenzo Takayanagi, *Some Reminiscences of Japan’s Commission on the Constitution*, in *THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-1967* (Dan Fenno Henderson ed., 1968) 71, 79, 86. Dale Hellegers suggests that the idea may have come to MacArthur via a similar provision in the 1935 Philippine Constitution. 2 DALE M. HELLEGERS, *WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION* 576 (2001). Theodore McNelly, on the other hand, suggests Kades himself could have been the source, a comment made in Kades’ presence that he did not expressly disavow. Theodore McNelly, *General Douglas MacArthur and the Constitutional Disarmament of Japan*, in *TRANSACTIONS OF THE ASIATIC SOCIETY OF JAPAN, THIRD SERIES VOL. 17*, (1982) 32–33; Charles L. Kades, *Discussion of Professor Theodore McNelly’s Paper, ‘General Douglas MacArthur and the Constitutional Disarmament of Japan*, in [Third Series Vol. XVII] *TRANSACTIONS OF THE ASIATIC SOCIETY OF JAPAN* 35–52 (1982). I have previously suggested that Kades himself could have earlier suggested a renunciation of war provision but, without first-hand knowledge of MacArthur’s thoughts, could not have known whether such remark could have been the source for MacArthur’s idea. John O. Haley, *Waging War: Japan’s Constitutional Constraints*, 14 *CONST. F.* 18, 21 (2005).

¹³ *Id.*

¹⁴ For details of the Kellogg-Briand Pact including the right to self-defense, see OFFICE OF THE HISTORIAN, *THE KELLOGG-BRIAND PACT, 1928*, <https://history.state.gov/milestones/1921-1936/kellogg>.

¹⁵ See McNelly, *supra* note 12.

Article VIII War as a sovereign right of the nation is abolished. The threat or use of force is forever renounced as a means for settling disputes with any other nation.

No army, navy, air force, or other war potential will ever be authorized and no rights of belligerency will ever be conferred upon the State.¹⁶

A drafting session ensued comprising the SCAP Steering Committee and members of the Japanese committee responsible for a revised constitution headed initially by Jōji Matsumoto and, upon his withdrawal, Tatsuo Satō of the Cabinet Legislation Bureau. After an intense thirty-two hours of continuous negotiations, they agreed on a final draft, which MacArthur almost immediately approved. Included was Article 9, which was almost identical to Article 8 of the SCAP draft.

Article IX. War, as a sovereign right of the nation, and the threat or use of force, is forever renounced as a means of settling disputes with other nations.

The maintenance of land, sea, and air forces, as well as other war potential, will never be authorized. The right of belligerency of the state will not be recognized.¹⁷

The Emperor subsequently introduced the final draft in the Diet as a bill to amend the Meiji Constitution. During the ensuing Diet session, the Constitutional Amendment Committee chaired by Hitoshi Ashida, who was to serve briefly as prime minister in a coalition Government in 1948, proposed additional changes. Nearly three dozen were eventually adopted. With respect to Article 9, the Committee introduced the phrases, which Ashida claimed to have written, “Aspiring sincerely to an international peace based on justice and order” to paragraph 1 and “in order to accomplish the aim of the preceding paragraph” to paragraph 2. Ashida reported to the Diet that the aim of the proposed changes was to express the purpose of Article 9 not to change its meaning, which he later argued, allowed Japan to rearm for its self-defense. As finally adopted, Article 9 reads:

¹⁶ See Kades, *supra* note 10.

¹⁷ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan).

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 a 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.¹⁸

By the end of the Allied Occupation in May 1952, a persisting consensus appears to have been reached. Article 9 prohibited Japan from any military action as well as armaments except for self-defense. Every government since 1952—including the Social Democratic-Liberal Democratic coalition government (1994-1996)—had affirmed the legality of Japan's security arrangements and the Self-Defense Forces (SDF). In December 1954, in defending funding for newly established SDF at a budget committee meeting, the Government proffered its official interpretation of the Constitution:

The Constitution did not deny the self-defense right; Japan renounced war, but did not renounce the right to struggle in order to defend itself;

Establishment of the SDF is not against the Constitution because SDF's mission is self-defense and its ability is limited to necessary and adequate levels of self-defense.¹⁹

The remaining issue—the right to enter and abide by collective security agreements for self-defense—was arguably resolved when Japan signed the United Nations Charter and joined the organization. Recognized under Article 51 was, “the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations” including Japan. To what extent Japan could participate in collective security operations that did not involve self-defense was a question left largely unasked much less answered.

¹⁸ *Id.*

¹⁹ YOSAN IIN KAIGIROKU [BUDGET COMMITTEE MINUTES, HOUSE OF REPRESENTATIVES], 21st Diet Session, No. 2, 1 (Dec. 22, 1954) (Director General of the Defense Agency Seiichi Ohmura's answer at Budget Committee of House of Representatives) (cited in LIBR. OF CONGRESS, JAPAN: ARTICLE 9 OF THE CONSTITUTION, *supra* note 9, at §V(F)).

By the end of the decade the precedent-setting decision in *Sunakawa* affirmed the political function of Article 9 without, however, establishing any criteria or standards for defining its legal parameters. The case was the first of three *en banc* decisions by the Court on the constitutionality of the 1951 U.S.-Japan Security Treaty.²⁰ Although the court unanimously affirmed Japan's fundamental right of self-defense and legal capacity under Article 9 to enter treaties for mutual security, it held that unless the policies or actions constituted an unmistakable or "clear" violation of Article 9, the courts were to defer to the judgment of the political branches.²¹ For over half a century *Sunakawa* has remained the controlling judicial decision on Article 9.²² Since then the issue has been resolved as a political decision by the Government in power.

In 1960 the Cabinet Legislation Bureau (CLB)²³ filled the vacuum. In answer to questions raised in the Diet by opposition party members in the context of approval of the 1960 U.S.-Japan Security Treaty, the CLB issued an interpretation of Article 9 that set parameters for any government actions for the next five and a half decades. First, the Japanese Government had to be at least notified if not give its approval for any deployment of U.S. forces from Japan. More significant, Japan could not engage in combat activities independently (*kobetsu-teki ni*), and only when directly attacked or at least threatened. Article 9, in the view of the Bureau, did not permit Japan to otherwise participate in mutual security operations.²⁴ This view prevailed for over a half century.

²⁰ The other two *en banc* decisions were *Japan v. Sakane*, Saikō Saibansho [Sup. Ct.] Apr. 2, 1969, no. 27670505, 214 HANREI TAIMUZU [HANTA] 260 (Japan), in THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 103-31 (Hiroshi Itoh & Lawrence Ward Beer eds., 1978) and *Ota v. Hashimoto*, Saikō Saibansho [Sup. Ct.] Aug. 28, 1996, no. 28011109, 50 MINSHŪ 1952 (Japan) (the *Okinawa Bases* case, translated in *Prominent Judgments of the Supreme Court*, <http://courts.go.jp/promjudg.nsf>). Although neither involved the constitutionality of the 1951 U.S. Japan Security Treaty as a primary issue, the question was raised and answered in both with express affirmation of the holding in *Sunakawa*.

²¹ The *Sunakawa* Case, *supra* note 1.

²² For discussion and references related to the petty bench decisions through 2001, see Haley, *supra* note 12.

²³ The Cabinet Legislation Bureau is an agency of the Japanese government that is attached to the cabinet. It comprises highly respected, law-trained civil servants who are seconded from various ministries for fixed terms. Among its functions is the drafting and review of all Government-sponsored bills and policies. Such review includes constitutional interpretations. Such agencies and functions, as exemplified by the Canadian Department of Justice and the French Conseil d'État, are common in most parliamentary systems. For details on the CLB, see CABINET LEGISLATION BUREAU, <http://www.clb.go.jp/english/about.html>.

²⁴ See Hayashi Shuzō, *Hōsei kyoku jidai no omoide Hōsei kyoku no katsudō to anpo jōyaku no koto* (Recollections of My Time With the Legislation Bureau Legislation Bureau Activities and the Security Treaty), in SHŌGEN: KINDAI HŌSEI NOKISEKI NAIKAKU HŌSEI KYOKU NO KAISŌ (TESTIMONY: THE LOCUS

As stated in virtually every Government White Paper on Defense Policy through 2014:²⁵

Requirements for Exercising the Right of Self-Defense

The Government interprets Article 9 of the Constitution to mean that armed force can be used to exercise the right of self-defense only when the following three conditions are met:

- (1) When there is an imminent and illegitimate act of aggression against Japan;
- (2) When there is no appropriate means to deal with such aggression other than by resorting to the right of self-defense; and
- (3) When the use of armed force is confined to be the minimum necessary level.

.....

Geographic Boundaries within which the Right of Self-Defense may be Exercised

The use of the minimum necessary force to defend Japan under the right of self-defense is not necessarily confined to the geographic boundaries of Japanese territory, territorial waters and airspace. However, it is difficult to give a general definition of the actual extent to which it may be used, as this would vary with the situation. *Nevertheless, the Government interprets that the Constitution does not permit armed troops to be dispatched to the land, sea, or airspace of other countries with the aim of using force; such overseas deployment of troops would exceed the definition of the minimum necessary level of self-defense.* [Emphasis added.]

The Right of Collective Self-Defense

International law permits a state to have the right of collective self-defense, which is the right to use force to stop an armed attack on a foreign country with which the state has close

OF LEGISLATION IN THE MODERN ERA REFLECTIONS ON THE CABINET LEGISLATION BUREAU) (Naikaku Hōsei Kyoku Hyakkunenshi Henshō 'inkai ed., 1985).

²⁵ See MINISTRY OF DEFENSE, DEFENSE OF JAPAN (ANNUAL WHITE PAPER), http://www.mod.go.jp/e/publ/w_paper/.

relations, even if the state itself is not under direct attack. Since Japan is a sovereign state, it naturally has the right of collective self-defense under international law. Nevertheless, *the Japanese Government believes that the exercise of the right of collective self-defense exceeds the minimum necessary level of self-defense authorized under Article 9 of the Constitution and is not permissible.* [Emphasis added.]

Japan's first military involvement after the Allied Occupation²⁶ was in what some would characterize as a collective security action that began in 2001 in a "humanitarian" effort in support of U.S.-led forces in Afghanistan. A week after the 9/11 attack, the Koizumi Cabinet announced its support for the "War on Terrorism" by sending ships to collect intelligence and provide supplies, medical assistance, and humanitarian relief.²⁷ Although naval forces were withdrawn in 2007, the humanitarian effort continued.²⁸ The first significant challenge and change with respect to the Government's policy came as a result of its acquiescence to U.S. pressures to join the coalition formed for the 2002 invasion of Iraq. For Japan not to join the 36 other coalition states would arguably have isolated Japan from its peers and the community of industrial states with which it identified.

The problem was that the CLB interpretation of Article 9 as reflected in the White Papers on Defense at least from 1981 prohibited any dispatch of forces abroad "with the aim of using force" (*buryokukōshi no mokuteki o motte*). As noted by Hitotsubashi University Professor Ichirō Urata, the 2003 White Paper revised the phrase to disallow the dispatch of armed forces "for the express aim of using armed force" (*buryoku kōshi o mokuteki to shite*).²⁹ The implication is that incidental, as opposed to intentional, use of force is permissible. Subsequent to the change in the language of the White Paper, between 2004 and 2006 Japan sent up to 600 army troops to the southern city of Samawah, still justified as "a humanitarian mission."

²⁶ During the Korean War, the newly established National Police Reserve sent Japanese minesweepers to support UN forces. One consequence was the first, and presumably only, post-World War II Japanese combat casualties. Auer, *Article Nine: Renunciation*, *supra* note 9. Auer notes that two minesweepers were sunk, one Japanese sailor was killed, and eight others were injured.

²⁷ See Tomohito Shinoda, *Japan's Response to Terrorism* 1, 1 (2001), <http://www.ijl.ac.jp/faculty/tshinoda/Japan%81fs%20Response%20to%20Terrorism.pdf> (paper presented on October 16, 2001 at the Woodrow Wilson Center for Scholars in Washington, D.C.).

²⁸ See Victoria Tuke, *Japan's Crucial Role in Afghanistan*, EAST-WEST CTR. (Apr. 10, 2013), <http://scholarspace.manoa.hawaii.edu/bitstream/10125/26987/1/APB%20no.%202006.pdf>.

²⁹ Urata Ichirō, *Sengo kenpō seiji ni okeru 9 jō no igi* [Meaning of Article 9 in the Context of Postwar Constitutional Politics] 1260 JURISUTO 50, 54 (2004) (cited in Haley, *supra* note 12).

Opposition in the Diet forced the Government to cancel any extension. Even so, since 2006 Japan's air force has airlifted materials and armed troops from Kuwait to locations in Iraq, including Baghdad, in support of U.S.-led forces. In January 2007 the Government authorized a more limited mission that only allowed Japanese ships to refuel those of other nations on anti-terror patrols.

Whether such actions should be characterized as examples of Japan's exercise of a right to collective security actions or to collective self-defense is less consequential than the more recent series of confrontations with China in the East and South China Seas. The actions by the Abe Government should only be viewed in this context. They also cannot be fully assessed without an understanding of the remarkable consistency over the course of a half-century in the nature and growth of Japan's military capacity under Article 9.

III. JAPAN'S MILITARY CAPACITY WITHIN A TRANSFORMING GLOBAL CONTEXT

Until 2015 no aspect of Japan's defense policy was more constant or consistent than the growth of its military capacity. Successive Japanese Governments maintained an almost constant half-century policy to maintain defense spending at about one percent of the Gross National Product.³⁰ Japan's defense spending has increased in accordance with its economic growth—especially through the early 1960s, reaching 4.159 trillion yen (US\$ 41,159 billion) by 1990.³¹ By then Japan had the second largest national economy and correspondingly the third largest defense budget in the world. As Auer explained in a footnote:

Japan's 1988 defense budget was approximately \$30 billion using then-current exchange. The 1987 budgets of the United Kingdom, France, and the Federal Republic of Germany range in the high \$20 billion to low \$30 billion range. Japan, however, does not include in its defense budget certain items that NATO countries do include for the purpose of comparing

³⁰ The 1% constraint has not been a fixed limitation. The figure apparently dates from a 1976 National Defense Program Outline. As Auer points out, in 1976 the Miki Government did fix defense spending at that percentage of the GNP but only "for the time being." Auer, *Article Nine of Japan's Constitution*, *supra* note 9, at 180. In 1987 the Nakasone Cabinet introduced a non-quantitative limit but spending—even under Abe—has never exceeded the 1% by a significant amount.

³¹ The defense budget figures are expressed in yen with U.S. dollar equivalents provided at a constant at US\$1 per ¥100. Because of continuous fluctuations in exchange rates a U.S. dollar figure tends to misrepresent the actual budget and fails to reflect accurately the real changes in amount.

individual countries' relative *burden sharing*. Using NATO criteria, Japan's 1988 budget would be approximately \$40 billion, exceeding the budgets of Great Britain, France, and the Federal Republic of Germany. Japan's budgets are also increasing at about 5% annual real growth in the 1980s, far faster than these NATO countries. Thus, Japan's hold on third place should solidify in the 1990s if trends continue.³²

But the “trends” did not continue. In 1989 the collapse of real estate prices and the soaring stock market of the 1980s ushered in two and a half decades of economic stagnation. The highest rate of economic growth since 1989 was 3.20 percent reached in the second quarter of 1990. The record low was -4 percent in the first quarter of 2009. Within the same one percent constraint, the defense budget also stagnated at less than 1 percent of GNP, increasing in real terms from 4.1 trillion yen in 1991 and 4.55 trillion in 1992 to 4.96 trillion in 2001. Japan's defense-related expenditure declined, albeit only slightly, every year thereafter until 2016. Peaking at 4.95 trillion yen in fiscal 2002, by 2015 it had decreased to 4.82 trillion yen (US \$41.12 billion). The Abe Cabinet's 5.05 trillion yen (\$50 billion) defense budget for 2016 thus represented at best a 20 percent increase, still less than 2 percent of the country's GNP for 2015. The increase is hardly as significant as generally portrayed.³³ Even assuming that other national defense budgets do not increase as exponentially, Japan will hardly regain its third-place ranking in defense spending and will continue to remain well behind both the U.S. and China not to mention Russia and the United Kingdom. Japan is arguably playing more of a game of gradual “catch-up” than one of “one-upmanship.”

Although in 2015 Global Fire Power ranked Japan fourth in overall military capacity in the Asia/Pacific region, behind Russia (#1), China (#2), and India (#3), and sixth in defense spending overall, behind the United States (#1), China (#2), Saudi Arabia (#3), the United Kingdom (#4), and Russia (#5),³⁴ Japan is credited with having one of the world's most

³² Auer, *Article Nine of Japan's Constitution*, *supra* note 9, at 179; Bender & Lubin, *infra* note 35.

³³ See, e.g., Kirk Spitzer, *Japan approves record-high budget, focusing on defense, economic recovery*, USA TODAY (March 29, 2016, 2:42 PM), <http://www.usatoday.com/story/news/world/2016/03/29/japan-government-defense-budget-economic-recovery/82376314>.

³⁴ *Defense Budget by Country*, GLOBAL FIREPOWER, <http://www.globalfirepower.com/defense-spending-budget.asp>.

advanced defensive military capacities.³⁵ In terms of naval power, Japan remains unsurpassed in Asia behind only the US (#1), with the most advanced technologies and the largest number of both aircraft carriers and destroyers, including a 600-foot, 13,500-ton helicopter carrier, and four Kongo-class Aegis destroyers. In addition, the Maritime Self-Defense Force also has 16 submarines and 170 combat aircraft. Reportedly, Japan is quietly upgrading its F-15 and F-2 fighters and increasing its submarine fleet, with improved propulsion systems on its already advanced, stealthy Soryu-class submarines.³⁶ Japan does not possess nuclear weapons and has no intercontinental ballistic missiles or other clearly offensive weaponry.³⁷ However, over the past two decades Japan has gradually yielded to China its premier military status in Asia.

IV. A STRATEGY OF DETERRENCE WITHIN A CHANGING GLOBAL CONTEXT

Writing in the late 1980s, James Auer could properly explain the justification (from a U.S. perspective) of Japan's military capacity in terms of deterrence of any aggressive stance threatening Japan by the Soviet Union:

Japan's survival in case of a major U.S.-Soviet military confrontation is extremely doubtful, given the value of Japan's economy and its proximity to Soviet territory. Japan's small size and vulnerable location seriously limit its war-fighting capability now and in the future. However, the Soviet Union must first concentrate its military efforts on Eastern Europe and on its long border with China before contemplating a potential third front in the Pacific. Consequently, the strategic importance of Japan's location, Tokyo's ability to finance a high-technology air defense and antisubmarine barrier 500 miles either side of Vladivostok, and a nuclear blackmail shield provided by the United States combine to provide Japan with a very strong war-detering capability. A strong deterrent

³⁵ See Jeremy Bender & Gus Lubin, *Why Japan's Smaller Military Could Hold Its Own Against China*, BUS. INSIDER (May 5, 2014, 12:55 PM), <http://www.businessinsider.com/japans-smaller-military-could-match-china-2014-5>.

³⁶ For an overview of the 2016 defense budget and programs to be funded, see MINISTRY OF DEFENSE, DEFENSE PROGRAMS AND BUDGET OF JAPAN: OVERVIEW OF FY2016 BUDGET (2015), http://www.mod.go.jp/e/d_budget/pdf/280330.pdf.

³⁷ Whether Japan could constitutionally develop nuclear weapons is another unanswered question. Perhaps this would be deemed a "clear" violation of Article 9 by the courts. Nevertheless, successive prime ministers have maintained that it would be permissible.

obviously benefits Japan and, given the increasing economic importance of the Pacific Basin, the United States, and many other countries as well.³⁸

By the turn of the 21st century, however, such arguments had become almost irrelevant. By then the Soviet Union had collapsed, but an even more portentous regional military power had emerged in China.

Not until the 1949 advent of the People's Republic of China (PRC) had China posed any threat to Japan. Quite the opposite had been true since 1895 and the first Sino-Japanese War. Even then, enthralled in decades of political and economic turmoil, China could be viewed without unease by Japan. Within the protective umbrella provided by the United States, not to mention its own military and economic superiority, the PRC posed no danger to Japanese interests. A decade after the victory over the Republican Government, the PRC experienced first the famine triggered by the "Great Leap Forward"—as described by perhaps biased observers—"one of the largest man-made disasters in human history. Estimates of the number of casualties vary greatly and are difficult, if not impossible, to verify. Conservative calculations posit that from 1958 to 1961 over 14 million people died of starvation.³⁹ The economic disasters of the "Great Leap Forward" were then compounded by those of the "Cultural Revolution" between 1966 and 1978 during which time nearly all economic activities ceased. Education came to a halt. Agricultural production stagnated. Factory production was disrupted. Shortages of raw materials, supplies and even labor ensued. Nearly all professionals—doctors, teachers, professors, scientists and technicians, religious leaders, virtually anyone with expertise or knowledge—were denounced and prosecuted. Hence until the 1980s China posed no serious economic competition or military threat for Japan.

The reforms initiated by Deng Xiaoping from 1978 until his retirement as paramount leader in 1989 transformed China and the world economy. The combination of political stability and a relatively free and competitive market economy propelled China to regain its global preeminence. 2014 marked the first time since 1820 that China had the

³⁸ Auer, *Article Nine of Japan's Constitution*, *supra* note 9, at 185–86.

³⁹ Gerhard K. Heilig, *Timeline: Details: 1959-1961*, CHINA-PROFILE (Apr. 18, 2012), http://www.china-profile.com/history/indepth/id_27.htm (citing: Basil Ashton et al., *Famine in China, 1958-61*, in 10 POPULATION AND DEV. REV. 613 (1984); Thomas P. Bernstein, *Stalinism, Famine, and Chinese Peasants: Grain Procurements during the Great Leap Forward*, in 13 THEORY AND SOC'Y 339 (1984); and Peng Xizhe, *Demographic Consequences of the Great Leap Forward in China's Provinces*, in 13 POPULATION AND DEV. REV. 639 (1987).

world's largest national economy. It had overtaken the United States, not to mention Japan and Germany, as measured by GNP, as the world's largest trading nation in terms of both exports and imports, creating in the process a global network of mutual economic dependency. China also achieved the position as the world's third largest military power, spending more on its military in 2015 than Russia, the United Kingdom, France, and Japan combined.

For Japan this transformation has had predictable consequences. For the first time in over a century Japan was no longer East Asia's foremost economic and military power. That fact alone inevitably provoked nationalist sentiments. In addition, however, since the mid 1990s China had begun to make territorial claims to increasingly large swathes of the East China and South China seas.⁴⁰ In 1994 China occupied the Mischief (Meiji) reef in the Spratly Islands, virtually ignoring conflicting claims by Taiwan, the Philippines, and Vietnam. In 1995 China reached an accommodation with the Philippines, but tensions continued as China repeatedly objected to any oil exploration in the South China Sea. Similar conflicts occurred with respect to claims to territory and airspace in the East China Sea. The most longstanding has been the sovereignty dispute over the Senkaku Islands (Diaoyu Islands for the Chinese) that sit offshore Okinawa. Comprising five uninhabited islets and three rocks, the Senkaku/Diaoyu islands have been claimed by China and Japan as well as Taiwan. "The sovereignty claims involve fishing rights as well as potential oil and natural gas exploration rights." They came under Japanese control along with Taiwan at the end the first Sino-Japanese war in 1895, but after WWII remained under U.S. occupation until 1972 with reversion of Okinawa to Japan. In 2012 Japan purchased three of the islands from a private owner. In 2013 a second issue emerged when China proclaimed a new Air Defense Identification Zone (ADIZ) across the East China Sea.

In this context, not only does the 2016 Abe military budget seem remarkably moderate, but also Article 9 can be viewed as continuing to play a profound political role in maintaining peace through deterrence. But for Article 9, Japan's successive postwar Governments would have had to justify on purely policy grounds any constraint on military spending and the role of armed forces. The outcomes of public debates would have been less

⁴⁰ For a concise account of the history of Chinese claims in the South China Sea through 2011, see M. Taylor Fravel, *China's Strategy in the South China Sea*, 33 CONTEMP. SOUTHEAST ASIA 292 (2011).

certain. Above all, the courts and the Cabinet Legislation Bureau would have had little if any role.

China is not the only country of concern. North Korean efforts toward the development of nuclear weapons and the capacity to use them against its neighbors—particularly Japan—have in recent months produced serious concern in Tokyo. As a precautionary move in the interests of deterrence, on August 2, 2016, the Abe Government declared that North Korea poses “a grave and imminent threat” to Japan.⁴¹ In order to deter any further testing, within days the Ministry of Defense authorized use of force against any North Korean missile headed toward Japan.⁴² The issue is whether deterrence is effective in restraining an irrational regime.

Sunakawa was the critical factor in enabling Article 9 to play such a political role. Without set parameters except the caveat that any grave or “clear” violation could invite judicial intervention, the constitutional limits have depended on a relatively flexible but in fact enduring political consensus that has limited Japan’s military capacity to defensive weaponry and has, with minor exceptions, curtailed military actions unrelated to Japan’s defense. Equally significant, such reliance on political consensus rather than fixed legal rules has also enabled Japan to expand its defensive military capacity. Concomitantly the continued authority of Article 9 has also prevented Japan from succumbing to the risks and dangers of over-reactive nationalist pressures.

V. CONCLUSION

As indicated in the following essays, right of collective security actions that would involve military support from Japan when a foreign state but not Japan is under an imminent military threat has become the principal current issue. Many rely on their own interpretations of the words of Article 9 to deny such authority. Yet until the Supreme Court acts, the constitutionality of collective security agreements and actions will remain a highly contested political issue for Japan.

⁴¹ See Mari Yamaguchi, *Japan calls North Korea’s nuclear and missile plan a ‘grave and imminent threat’*, GLOBAL NEWS (Aug. 2, 2016, 3:41 AM), <http://globalnews.ca/news/2860092/japan-calls-north-koreas-nuclear-and-missile-plan-a-grave-and-imminent-threat/>.

⁴² Tim Kelly, *Japan orders military to be ready for North Korea missile launch at any time*, YAHOO! NEWS (Aug. 8, 2016), <https://www.yahoo.com/news/japan-orders-military-ready-north-korea-missile-launch-112122856.html>.