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# CONSTITUTION AND NARRATIVE IN THE AGE OF CRISIS IN JAPANESE POLITICS

Keigo Komamura\*

*Abstract:* The most significant political issue facing the legal world in Japan is the drive for constitutional revision led by Prime Minister Shinzo Abe and his Liberal Democratic Party (LDP). This paper situates the revisionist movement within the context of postwar Japanese politics before drawing on theoretical literature in critical legal studies to analyze the LDP's draft constitution to reveal the magnitude of the proposed changes and to assess the risk they pose to the rule of law in Japan. The paper argues that the proposed draft constitution eschews the languages of the current constitution like "a universal principle of mankind", "individual", or "fruits of the age-old struggle of man to be free", and forgoes the basic legal rationality in favor of a mythical narrative of national essence, thereby reducing law to the realm of politics and inhibiting the ability of the former to serve as a check against the latter.

## I. INTRODUCTION

Mr. Shinzo Abe, current Prime Minister of Japan, arguably achieved a political victory by passing contentious national security bills in September 2015. This development looks like a historic turn for constitutional politics in postwar Japan. From a practical point of view, this apparent victory may be no more than an illusion. However, from a legal and moral point of view, this change of direction may be seen as a dangerous turn for constitutionalism.

With the new national security laws, the government expands its military role, and in particular, asserts the right to *collective* self-defense—something that consecutive cabinets have prohibited over four decades based on a long-standing interpretation of Article 9 of the Constitution of Japan.<sup>1</sup> PM Abe has changed the basic constitutional

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<sup>1</sup> The government has further expressed its official opinion to explain its interpretation about the relationship between self-defense measures and the Constitution of Japan. They often referred to the right to *individual* self-defense, which article 9 of the Constitution allowed Japan to hold and use under their interpretation. As for the right to *collective* self-defense, the Cabinet clarified its position

arrangement not by changing the text of Article 9 of the Constitution of Japan (1946), but rather by changing his cabinet's interpretation of the text.

Many (actually almost all) constitutional law scholars in Japan see this change of interpretation and the subsequent national security bills as unconstitutional.<sup>2</sup> Not just legal scholars, but also many professionals including former judges of the Supreme Court of Japan, former directors of the Cabinet Legislation Bureau, political and social scientists, and members of the opposition parties, and also a substantial number of students and the youth—a considerable percentage of the population—have cast doubts on PM Abe's approach to constitutional change.<sup>3</sup> In Japan today we can hear critical voices from many sectors.

To overcome the people's doubts and criticisms, PM Abe might well have attempted to formally revise the Constitution by reforming the text itself. This option might have been a royal road for PM Abe. Formal constitutional reform might have swept away certain doubts and criticisms of the reinterpretation tactic that has been perceived as underhanded. There may even have been a public benefit if PM Abe and his administration had attempted to formally revise article 9 through constitutional change. I mean to say that the proposal for a formal revision of the Constitution would lead to public awareness of the fundamental nature of the proposed change.

It is generally said that throughout most of postwar period the Japanese People have been keeping themselves distant from realistic

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in 1972: Japan has collective self-defense right under international law, but cannot use it due to constitutional restriction. *See* Government's written answer submitted to the Audit Committee of the House of Councilors, Oct. 14, 1972. In other words, as long as Japan is a state it naturally holds this right, but it refrains from using it as a constitutional pre-commitment. This basic position had long been maintained since 1972, but in July 2014, the current Cabinet with PM Abe changed the position and made it possible for Japan to use the limited right to collective self-defense. *See* Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect Its People (National Security Committee & Cabinet Decision, July 1, 2014) [http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei\\_eng.pdf](http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei_eng.pdf). For the Japanese version, *see* <http://www.cas.go.jp/jp/gaiyou/jimu/pdf/anpohosei.pdf>.

<sup>2</sup> But the reason why the experts see this measure as unconstitutional varies. They actually are not monolithic in reasoning, but concurrent in conclusion.

<sup>3</sup> *See, e.g.,* Linda Sieg & Teppei Kasai, *SEALDs student group reinvigorates Japan's anti-war movement*, THE JAPAN TIMES (Aug. 29, 2015), <http://www.japantimes.co.jp/news/2015/08/29/national/politics-diplomacy/sealds-student-group-reinvigorates-japans-anti-war-protest-movement/#.WB8toi2LRdg>.

views on war and peace. In other words, as some critics suggest, pacifist Japan has not been a “normal country” in regards to international standards.<sup>4</sup> To wake people from this postwar “daydream,” PM Abe should have pushed for formal constitutional revision, thereby initiating a change in public awareness of security issues.<sup>5</sup> I am claiming that PM Abe’s maneuver—simply changing the interpretation of the Constitution without changing the text of the law—has in part served to cloud public awareness of the magnitude of the constitutional transformation currently in progress. This kind of subterfuge is not the higher politics that Japan needs at this crucial moment. The risk of PM Abe’s strategy is that the deep-seated attitudes and ignorance about the harsh realities of war and security will not be changed at all so long as people stay in the postwar daydream of *Pax Americana*.

Instead of such a self-righteous method as the interpretive change, Abe should base his ambitious project of constitutional change on a true deliberation subject to public oversight. This would be the only way to realize the goal of transforming public awareness about the current international security situation. PM Abe has opted instead for reckless bravery, while leaving his own people in the dark about the kind of fundamental changes he is trying to produce.

The time-consuming, but deeply meaningful, process of formal constitutional change through public deliberation could have worked for PM Abe. He could have actualized his original aim. In his memoir, *Toward a New Country*, PM Abe explains what he means by the slogan for his 2012 LDP (Liberal Democratic Party) campaign: “Take Back Japan.” He stated that this slogan does not mean merely taking back Japan from the opposition DPJ (Democratic Party of Japan). He concludes like this: “I dare to say it means taking back our country from its own postwar history and delivering it to the hands of the Japanese people.”<sup>6</sup> His own personal political creed, “Break Away From the Postwar Regime,” is a much more striking expression of his actual position than is the LDP’s seemingly innocuous slogan. In public

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<sup>4</sup> For an explanation of “normal country” in the Japanese context, see Lionel Pierre Fatton, *Is Japan Finally A Normal Country?*, THE DIPLOMAT (Dec. 27, 2013), <http://thediplomat.com/2013/12/is-japan-now-finally-a-normal-country/>.

<sup>5</sup> I have argued this position before. See Keigo Komamura, *Anpo Hoan to “Kyu Jo no Wa” [National Security Bills and “Circle of Article 9”]*, in YASUO HASEBE AND ATSUSHI SUGITA ED., ANPO HOSEI NO NANI GA MONDAI KA? [WHAT IS THE PROBLEM WITH NATIONAL SECURITY LAW?] 18, 27–29 (Iwanami shoten, 2015).

<sup>6</sup> SHINZO ABE, ATARASHII KUNI E: UTSUKUSHII KUNI E (KANNZEN BAN) [TOWARD A NEW COUNTRY: TOWARD A BEAUTIFUL COUNTRY (COMPLETE EDITION)] 254 (2013).

debates, PM Abe emphasizes that he “would like to take significant steps to reconsider this country by drafting a new constitution from a *tabula rasa* with all the people.”<sup>7</sup> It almost looks like he is proposing an “Abexit” (!)— departure from the status quo of postwar Japan to some more uncertain future.

In short, PM Abe feels a strong urge to erase or delete the history of postwar Japan itself. The target of his ambitions is the Constitution of Japan. By erasing the current Constitution on the grounds that it was imposed by the U.S., he can simultaneously reshape the fundamental law of the land and extinguish the uncomfortable history of the postwar period. Thereby, PM Abe thinks he will be able to recover Japan’s independence as a “normal country” and draw his own picture of a new Japan on a blank canvas.

But what kind of picture would he like to draw? Some critics claim it would be a picture designed to fit the ambitions that his own grandfather, former Prime Minister Nobusuke Kishi, left unrealized.<sup>8</sup> In the 1950’s and early 1960’s, PM Kishi intended to take back true independence from, or establish an equal relationship with, the U.S.<sup>9</sup> I do not go so far as to say that this is merely family business even if a personal motive or an admiration for his own grandfather may possibly provide PM Abe with some motivation for his public cause. The fact of the matter is that independence (from the Allied Occupation or other constraints) provides freedom to write any kind of constitution, and PM Abe is not necessarily intending to reproduce the type of constitution that might have suited his own grandfather, PM Kishi. The truth is that we do not know exactly what kind of constitution we will end up with if PM Abe gets his way. In fact, PM Abe has not explicitly stated which specific constitutional changes will bring about the desired goal of national independence, nor has he clarified how changing the Constitution can be expected to bring about such a result.

We still have to ask PM Abe what picture he would like to draw on the blank canvas of his constitution. In this short essay, I will examine what PM Abe and the LDP would bring about for Japan’s postwar

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<sup>7</sup> ABE SHINZO TAIRONSHU: NIHON WO KATARU [A COLLECTION OF THE DEBATES BY SHINZO ABE: SPEAK ON JAPAN] 78 (PHP ed., 2006).

<sup>8</sup> Johnathan Soble, *Shinzo Abe’s Bid to Redefine Japan and Its Military Has Echoes of Family History*, THE NEW YORK TIMES (Aug. 13, 2015), [http://www.nytimes.com/2015/08/14/world/asia/japan-military-shinzo-abe-family-history.html?\\_r=0](http://www.nytimes.com/2015/08/14/world/asia/japan-military-shinzo-abe-family-history.html?_r=0).

<sup>9</sup> As for PM Abe’s memories of his grandfather and his father, Shintaro Abe and his view on the lost mission of the LDP, see ABE, *supra* note 6, at 25–42; ABE, *supra* note 7, at 38–41.

constitutional project in place of the current Constitution of Japan. To accomplish this goal, we should turn our concerns away from the issue of the national security laws (2015) and look closely into their own constitutional project, the LDP's draft constitution (2012). Actually the LDP's draft constitution is not a proposal for partial revision. Their aim is to replace the current Constitution with a totally new one.<sup>10</sup> That means the draft will introduce a dramatically different vision of Japan, and, more importantly from a legal point of view, it will fundamentally change the role of constitutional law. If the draft constitution were to be realized, then constitutional law in Japan would undergo an irreversible and dangerous transformation.

The central problem with the LDP's draft can be understood as follows. In the LDP's draft constitution, narrative formations are introduced and function to establish constitutional norms. As I will argue in the following sections, the draft codifies narratives—myths—into the constitutional text. If the Constitution maintains its basic nature as a *legal* code, it should be based on universal principles, not contextual notions like narratives.

## II. NARRATIVE, CONSTITUTION, AND CONSTITUTIONAL LAW

### A. *Constitution and Narrative*

Constitutions are enacted at moments of truth for a country. These can include revolutions, the achievement of independence, or defeat in war. As the term constitution means a basic frame or structure of government and society, the 'moment of truth' from which a constitution is born is also a time to build or rebuild the nation or state. Generally, "nation-building" or "nation-rebuilding" are terms closely related to making constitution. Usually, nation-building refers to the project of building a 'nation-state.' This means that would-be national founders have to carry out a double task: they must build a state and also define the terms of membership in that state. In order to define its

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<sup>10</sup> For a comparative table of the current and the LDP's draft constitutions, see Jiyumintô, Shin kenpô sôan [New Draft Constitution], Oct. 28, 2005, at [www.jimin.jp/jimin/shin\\_kenpou/shiryô/pdf/051028\\_a.pdf](http://www.jimin.jp/jimin/shin_kenpou/shiryô/pdf/051028_a.pdf) [hereinafter LDP Draft].

territory and membership and to establish democratic government based upon national “borders,” the project of building the nation-state is always inclined to assert that the identity of its people is a matter of nationalistic bonds.

As Jürgen Habermas once stated, constitutional states are not necessarily composed of purely legal concepts, and those legal concepts sometimes have “conceptual gaps” through which naturalistic concepts such as the people/nation may irrupt into the constitutional state.<sup>11</sup> So, nation-building projects leave open the possibility for a naturalistic morality to be incorporated in the concept of a nation or a people. In this context, national narratives widely shared among people are the most relevant force for unifying a people into one nation. When a nation is about to be built, narratives come in to fill in the “conceptual gaps” that the constitution as a politico-legal document cannot cover.

In their co-authored book, *Making We the People*, an amazing work of comparative study on the formation of the Constitutions of South Korea and Japan, Professor Chaihark Hahm and Professor Sung Ho Kim referred to the tension between the constitutions and their “unmasterable pasts.”<sup>12</sup> They see the past as “the primary material out of which a new constitutional identity is forged,” and a new constitution sometimes stands in judgment of the past, while at other times it may exalt the past.<sup>13</sup> They state the claim like this: “More importantly, [a constitution] reinterprets the past and tries to incorporate it into a new narrative about the constitutional identity of the people” and “[I]n the process, the constitution may even invoke an imaginary past that never was.”<sup>14</sup> In the process of making a new constitution, founders have to struggle with the past—accepting, rejecting, selecting, and editing the past. So it is quite natural that attempts to master the unmasterable past bring about tension and highlight the inconsistencies regarding the legitimacy of a new regime. To make up for such tension and inconsistency, nation builders (or constitutional architects) form national narratives based upon imaginary pasts and codify them into the text of the constitution. Hahm and Kim seem to see the tension between constitutions and their

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<sup>11</sup> JÜRGEN HABERMAS, INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 115–16 (Ciaran Cronin & Pablo De Greiff eds., 1998).

<sup>12</sup> See CHAIHARK HAHM & SUNG HO KIM, MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA 128–193 (Tom Ginsburg et al. eds., 2015).

<sup>13</sup> *Id.* at 128.

<sup>14</sup> *Id.*

unmasterable pasts as positive. They conclude as follows:

Whether for or against, the people's engagement with the past via constitutional founding and/or interpretation will be beneficial to the extent that it yields a narrative about their collective identity and common destiny. As a pole of identity and contestation in the ongoing story of democratic peoplehood, presence of the unmastered and unmasterable past is essential to the making of a healthy and enduring constitutional democracy.<sup>15</sup>

I share their image of constitutional founding as a political project, however, as a legal scholar, I dare to point out some questions about this image: Should the unmasterable past remain unmasterable throughout the political life of a nation? Does the unmasterable past need to remain open to interpretation and deliberation? If so, what guarantees our ability to (re)interpret and debate about the past? The narrative formation at issue here is both the most significant and the most contentious function of constitutional founding as a political project. But what happens to the founding of constitutional *law* as a legal project?

#### B. *Constitutional Law and Legal Principle*

Needless to say, any constitutional founding is usually also the founding of constitutional *law* at the same time. As I mentioned above, a national narrative provides legitimacy and "collective identity" for a political community. It presupposes a substantially homogeneous society and sometimes, functions as a reason for the exclusion of people who do not accept or share it. To the contrary, the law presupposes a value-pluralistic society where people with different views, creeds, or tastes live together somehow or other. In such a difficult society, the law is granted special powers such as the normative power, or binding force to justify or regulate governmental actions and people's activities, and to set up an order of justice.

We can see that there is a contrast between the function of mythical narratives of identity and the functions of the law. The theory of constitutional law and the rule-of-law tradition have long been premised upon the law's independence from politics and its predominance over

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<sup>15</sup> *Id.* at 196.



politics. Given this arrangement, we can distinguish legal principles from national narratives and elevate the priority of the former over the latter. From this perspective, I will refer to a few problems of integrating the unmasterable past into an official narrative.

First, the past is not a matter of facts alone. No matter how the past, as a collection of facts, becomes integrated into narrative form, the narrative will never obtain normative force. It is a sort of naturalistic fallacy to think that facts bring about norms. When constitutional constituents select a narrative version of the past, what they are accepting or rejecting is not *the past as a collection of facts*. They are actually opting to succeed to, or to reject, *the principles* upon which the past regime was based. In fact, even Hahm and Kim, who make much of the connection between narrative and multiple pasts, use expressions like “an imaginary past,” or “the past as a source of legitimation in constitutional founding”, and argue that “neither the past to be effaced nor the past to be re-inscribed is an unmediated datum of fact.”<sup>16</sup> Those expressions and arguments might suggest that they share the goal of distinguishing a narrative version of the past from some notion of the totality of all possibly relevant historical facts, and that they thereby acknowledge the role of a *counterfactual imagination* through which a past gets well-ordered.<sup>17</sup> What inspires such a counterfactual imagination? What makes the past well-ordered? I suggest that the notion of legal principle provides a possible answer from the perspective of the law.<sup>18</sup>

Second, as for the Constitution as a nation-building project, narratives shall sort out “the past to be re-inscribed” from “the past to be effaced” and incorporate it into an integral story of the nation. From the perspective of constitutional law as a legal project, it is a matter of legal principle that has to do the work of sorting them out. As Hahm and Kim suggest, selective use of the past is a conspicuous attribute of narrative formations. Narratives selectively (arbitrarily, actually) sketch the plot of a story to form a vision of the past, whereas the law (re)interprets the meaning of the past in light of legal principle. This act of reinterpretation in light of legal principle is a strategy of law, which

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<sup>16</sup> *Id.* at 43–44, 128.

<sup>17</sup> *Id.* at 44 (quoting Michel Rosenfeld, *The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049, 1064 (1995)).

<sup>18</sup> As for the arrangement of the current Constitution of Japan, it seems to take the notion of legal principle seriously. It refers to “a universal principle of mankind” in its preamble instead of national tradition or narrative (*see* Appendix 2). For the details of the current preamble, *see* *infra* Part III.A.

makes the unmasterable past masterable.

Third, narrative is communal, but the notion of legal principle is grounded in the universalistic ideals of enlightenment reason. Some scholars argue that narrative provides legitimacy for the law, or at least that judges should respect narratives as a form of *nomos*—a source of norm for each insular and autonomous community.<sup>19</sup> When this argument is extended from the law of insular and autonomous communities to the law of a nation, a narrative provides a legitimate foundation for constitutional law as well as for the law of communities. I agree with the idea that legal scholars should pay attention to, and respect, the norm-generating functions of particular communities, but I would like to be cautious of expanding this arrangement to constitutional law.<sup>20</sup>

Although narrative sometimes gives strength to constitutional law, the latter should not be replaced with the former. The reason for this limitation is that communal and inward-looking narratives cannot resolve conflicts of value. By contrast, if legal principles are of a universalistic nature,<sup>21</sup> then we can rely on legal principles to bring a right answer to even hard cases.<sup>22</sup> Legal principles include individual rights, liberty, equal treatment under the law, separation of powers, and so on. These legal principles are based on comprehensive doctrines that reasonable persons can accept as matters of rational choice.<sup>23</sup> Unlike narrative-based norms, these principles are incorporated as a mode of legal norm into the institution of a positive law.

In the next section, I will refer to problems in the LDP draft constitution, including the proposal to revise important parts of the current constitution like the preamble, Article 13, and Article 97. We will see that what they intend to do in this draft clearly demonstrates a typical case of serious tension between legal principles and national

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<sup>19</sup> Robert Cover argued that insular and autonomous communities like religious communities have norm-generating function as interpretive communities and that each of those communities has its own *nomos*—narratives, experiences, and visions to which the norm articulated—as basis of its own law or its own interpretation of what the law truly means. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

<sup>20</sup> In other words, norms which autonomous community generates shall not be *legal norms*.

<sup>21</sup> As for what I mean by “universal,” I use this term in this essay not as “global” or “international” but as “being valid or valuable for every agent.” So “a universal principle” is a comprehensive doctrine to be applicable, valid, and valuable beyond differences between states, groups, and individuals.

<sup>22</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22–28 (1977).

<sup>23</sup> JOHN RAWLS, *COLLECTED PAPERS* 498 (Samuel Freeman ed., 1999).

narrative.<sup>24</sup>

### III. THE LDP DRAFT CONSTITUTION AND ITS PROBLEMS

The LDP issued its most recent draft constitution in 2012.<sup>25</sup> At that time, the Democratic Party (DPJ), the largest opposite party to the LDP, took the administration. As the then-president of the LDP, Mr. Abe promised voters revision of the Constitution, carrying this new draft constitution as a flag in the general election in November 2012. The LDP won the election, and took back the administration from DPJ. On December 16, 2012, Mr. Abe became the Prime Minister of Japan once again.<sup>26</sup>

In 2013, facing the House of Councillors election, the Upper House of the Diet of Japan, the LDP toned down its call to substantively revise the Constitution in order to gain more seats so that the LDP would then have the opportunity to revise the Constitution as it wished. Actually, PM Abe led the LDP to a landslide victory, but they could not gain the super majority that would have made it possible for the LDP to propose a revised draft of the Constitution. In 2015, as mentioned earlier, PM Abe won the victory in the debate on the National Security Law. With this background, PM Abe revived the proposal to revise the Constitution and then focused on incorporating an emergency clause into the current Constitution. In July 2016, the LDP won another victory in the election of the House of Councilors. This time the LDP and its companion parties gained the super majority in both Houses, which may enable them to launch constitutional revision in the near future.<sup>27</sup>

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<sup>24</sup> I have briefly written about this issue. See Keigo Komamura, *Kindai tonō Ketsubetu, Monogarai heno Kaiki: Jiminto Kaikenan wa ikanaru imi de Rikkenshugi no kiki nanoka?* [Break Away From Modernity, Return to Narrative: In What Sense the LDP Draft Constitution is Dangerous for Our Constitutionalism], in *KAIKEN NO NANI GA MONDAI KA? [WHAT IS THE PROBLEM WITH CONSTITUTIONAL REVISION?]* 31–49 (Yasuhiro Okudaira et al. eds., 2013).

<sup>25</sup> *Supra* note 10.

<sup>26</sup> His first administration was September 26, 2006 to September 26, 2007. This administration lasted only one year because Mr. Abe suddenly resigned due to ulcerative colitis. See Alexander Martin, *Japan's New Leader Says Recover From Illness*, THE WALL STREET JOURNAL (Dec. 16, 2012), <http://www.wsj.com/articles/SB10001424127887324407504578182794060294914>.

<sup>27</sup> The Constitution of Japan requires super majority to revise its text. Article 96 of the Constitution states “Amendments to this Constitution shall be initiated by the Diet, through a concurring vote of two-thirds of all its members, and shall thereupon be submitted to the people for ratification, which shall require the affirmative vote of a majority of all votes cast thereon at such election as the Diet shall specify.” Gaining super majority in the Diet after the victory of the upper house election in 2016, PM Abe showed an explicit ambition to revise the constitution. See Reiji Yoshida & Tomohiro Osaki, *Election Strengthens LDP as Opposition Flounders; Abe Says Talks to Begin on Constitutional Revision*, THE JAPAN TIMES (Jul. 11, 2016), <http://www.japantimes.co.jp/news/>

Now I would like to take a look at the LDP draft. In order to clarify its problematic character, I will emphasize what it deletes from the current Constitution. The provisions, which this draft removes, should be considered much more critical than the proposed new provisions because the deletions from the text erase the essentials of modern constitutionalism. I argue that for PM Abe to accomplish his political project and to “Break Away From the Postwar Regime,” he proposes breaking away from the postwar Constitution also. I will now refer to a few examples of these problematic deletions.

A. *The Preamble*

1. *Potsdam Principles* — The Constitution of Japan (1946) was established as an implementation of the Potsdam Declaration (1945) and based upon the principles which the Declaration required the Japanese Government to actualize. In the website of its digital exhibition “Birth of the Constitution of Japan”, the National Diet Library states as follows:

The Constitution of Japan was established through the confluence of efforts from both outside and inside Japan . . . The external forces to reform the Constitution of the Empire of Japan (Meiji Constitution of 1889) manifested themselves in measures taken under the Supreme Commander for the Allied Powers (SCAP) in Japan, which were necessary to implement the "Potsdam Declaration" as accepted by Japan upon its defeat. The internal forces sprang from the people's desire to realize a true democracy, which would have been impossible by merely restoring the prewar parliamentary system after the cessation of hostilities because the military control of the government during the war had seriously corrupted the framework of the Meiji Constitution.<sup>28</sup>

The Potsdam Declaration was agreed upon and issued on July 26, 1945 by the U.S. President Harry S. Truman, the United Kingdom Prime Minister Winston Churchill, and Chairman of the Nationalist Government

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2016/07/11/national/politics-diplomacy/election-strengthens-ldp-as-opposition-flounders/#.WCFJu8IK3YY.

<sup>28</sup> *Preface: Birth of the Constitution of Japan*, NAT'L DIET LIBR. <http://www.ndl.go.jp/constitution/e/outline/00outline.html> (last visited Sep. 29, 2016).

of China Chiang Kai-shek, as a call for the surrender of all Japanese armed forces. The Emperor of Japan accepted the Declaration on August 14 and announced his acceptance the next day.

While accepting the Declaration, the Japanese Government had been demanding that the Emperor be permitted to retain his authority and still remain at the center of the national polity (*Kokutai*). This means they wanted to avoid any change to the Imperial Constitution. However, Douglas MacArthur, the Supreme Commander for the Allied Powers who had been granted strong powers to take any action necessary to successfully implement the Potsdam Declaration, issued the "Civil Liberties Directive" on October 4, 1945, and met with former Prime Minister Fumimaro Konoye to discuss reforming the Constitution. On October 11, MacArthur met with Kijuro Shidehara, the newly appointed Prime Minister, and he proposed the "liberalization of the Constitution." From MacArthur's suggestions, the process of constitutional reform was launched.<sup>29</sup>

2. "*A Universal Principle of Mankind*" — Although the Japanese Government tried to resist a revision of the Meiji Constitution, the conditions the Potsdam Declaration (*see Appendix 4*) requested Japan to implement made it inevitable for them to bring about fundamental reforms to the Meiji Constitution because the conditions contained legal principles such as "a new order of peace, security and justice" (section 6), "the revival and strengthening of democratic tendencies" (section 10), "[F]reedom of speech, of religion, and of thought" (section 10), "respect for the fundamental human rights" (section 10), "a peacefully inclined and responsible government" (section 12).

Those principles became new guidelines for nation-building, which had never been introduced into, or had long disappeared from, Japan. In the process of revising the Meiji Constitution, these "Potsdam principles" were consequently reflected in the preamble and other articles of a new constitution, the Constitution of Japan.<sup>30</sup> Particularly, the preamble is a

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<sup>29</sup> See generally, RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY (2002).

<sup>30</sup> To some readers, this description here might be a bit confusing. Actually, the process of making the current Constitution of Japan was not just complicated but also inconsistent. The Potsdam Declaration requested the government of Japan to make fundamental reforms of its basic structure because its demand was totally different from the causes and principles on which the Meiji regime was based. Therefore, this request would have led the government of Japan to establishment of a new constitution not revision of the Meiji Constitution. However, in order to mitigate popular shock of dramatic change of the regime, the government of Japan and SCAP took a strange measure by using Article 73 (revision clause) of the Meiji Constitution to realize constitutional change which the

depository of the Potsdam principles as a whole. In **Appendix 1**, you will find ideas or connotations similar to the Potsdam principles such as “duly elected representatives,” “sovereign power resides with the people,” “a sacred trust of the people,” “the fruits of peaceful cooperation with all nations,” and “the blessings of liberty.” In sum, the Potsdam Declaration and the preamble of the current Constitution of Japan deeply share the great fruits of modern and contemporary thought like democracy, representative government, popular sovereignty, liberty, fundamental human rights, and pacifism.

More importantly, we should focus our attention to the last two passages of the preamble (*see Appendix 1*) because it demonstrates that the current Constitution understands its arrangement of these principles as the statement of “a universal principle of mankind”—that is, not as a contextual tenet derived solely from Japanese culture or traditions. Furthermore, the last passage states “[W]e reject and revoke *all constitutions, laws, ordinances, and rescripts in conflict herewith*” (emphasis added). In this part of the preamble, the current Constitution rejects not just laws, ordinances, and rescripts but also *all prior and prospective constitutions* in conflict herewith. This means that all laws that conflict with the universal principles of mankind are rejected. The current Constitution therefore denies any new constitutions that may come in the future if these are inconsistent with the essential values of universal humanism inscribed in the current Constitution.

The current Constitution itself tells about its procedural limitations on constitutional revision in Article 96<sup>31</sup> and its substantial limitations in the preamble mentioned above. The LDP draft totally deletes these passages. This means it will get rid of constitutional limitations on the process and substance of constitutional revision, and that it will thereby grant current and future political administrations limitless power to revise the Constitution.

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Potsdam Declaration requested. So, in its formality and procedure, the current Constitution of Japan is a revised version of the Meiji Constitution but, in its substance, it is a new constitution quite different from the former one. To justify this inconsistency, Japanese constitutional law scholars have relied on “August Revolution Theory.” For the details of the making process of the current constitution and “August Revolution Theory,” see Toshiyoshi Miyazawa, *Nihonkoku Kenpo Seitei no Hori [Legal Theory of the Birth of Japan’s Constitution]* in *KENPO NO GENRI* (1967); HAHM & KIM, *supra* note 12, at 145-147; SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN* 18-19 (2011).

<sup>31</sup> See *supra* note 28.

3. *Narrative is Substituted* — Turning our attention to the LDP draft preamble (*see Appendix 1*), it erases the current preamble in its entirety and replaces it with an alternative passage using wording like, “its long history and unique culture,” “along with treasuring conformity,” “formed this nation by families and communities helping each other,” “our beautiful land,” and “good tradition.”

These are not rational principles, and there are no universal aspirations to be seen in these concepts. These are terms that only become comprehensible to the extent that they provide a narrative reference to the history of Japan.<sup>32</sup> The subject of the first two paragraphs of the LDP draft preamble is “Our nation,” not “We, the Japanese people.” This change in literary style set the first two paragraphs in the narrative-mode of telling the story of our nation.

So the legal principles and universalistic norms are gone and instead the current LDP draft presents a narrative about Japan’s cultural uniqueness. To be sure, many legal principles like popular sovereignty, fundamental rights, and pacifism still remain in the draft. But this new arrangement places legal principles on the same status with a mythological narrative (I will discuss the details of this issue in section 4).

Furthermore, we lose words and phrases like “a universal principle of mankind,” and, “[W]e reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith.” I must emphasize that if we lose these key provisions, the textual basis for limitations on constitutional revision will be lost, and thus the normative status of the Constitution of Japan may be diluted.

4. *Emperor in the Preamble* — One more thing I think deserves to be mentioned again is that the term “Emperor” is introduced into the LDP draft preamble (*see Appendix 1*). The draft mentions the Emperor and the imperial institution in this phrase: “a country that has *the Emperor, the*

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<sup>32</sup> In fact, the LDP explains at page 5 in the Q&A of the draft why the current preamble needs to be replaced: “Since some of the articles of the Constitution of Japan are thought to have been provided based on the Western idea of natural human rights, we, the LDP, consider these articles necessary to be revised.” Also it says that “we propose our draft constitution in order to make the Constitution of Japan suitable for our country. The stiff wordings due to translating GHQ draft constitution . . . should be fully revised.” You can see the Japanese version of the Q&A at the website of the Liberal Democratic Constitutional Reform Promotion Headquarters. *See Nihonkoku Kenpo Kaisei Souan Q&A (Zouho Ban)* [Draft for the Reform of the Constitution of Japan Q&A (Revised edition)], LIBERAL DEMOCRATIC CONSTITUTIONAL REFORM PROMOTION HEADQUARTERS, (Oct. 2013), <http://constitution.jimin.jp/faq/>.

*symbol of unity of the people*, governed based on the separation of powers, legislation, government, and justice, under popular sovereignty.” (emphasis added). Actually, the Emperor system is also presented in main body of the current Constitution in Article 1 and other places. However, there is no mention of the Emperor in the current preamble.

We should consider the textual arrangement of the LDP draft preamble that mentions the Emperor. It has been noted that, “[T]he principle of popular sovereignty was stated in the text of the [current] Constitution simply as a subordinate clause in Article 1,” whose subject matter was the Emperor.<sup>33</sup> Professor Hahm and Professor Kim, based upon this textual arrangement, said that, “the exact locus of sovereignty remains less than fully articulated in the text.”<sup>34</sup> In fact, the textual arrangement is surely an important guide for legal interpretation. Instead of focusing on the interplay of the text within Article 1, I would refer to another dimension of the same issue. There is no reference to the Emperor in the current preamble mentioned above.

It is a common understanding among Japanese constitutional law experts that the preamble does not have a direct binding power or function as a judicial norm in the way that the Articles in the main body of the Constitution do. However, the preamble generally plays a role in guiding the interpretation of other Articles when there is some leeway in possible interpretations of the text of the Articles themselves. Thus, the preamble has an interpretive function. Therefore, we can understand how to interpret the meaning of the current Article 1—in which the Emperor system and popular sovereignty coexist in a state of tension—because the interpretive lens established by the the current preamble gives us a sense of how to read and resolve this tension. As mentioned above, there is no reference to the Emperor in the current preamble, and the Potsdam Declaration makes no reference to the Emperor either. However, both the current preamble and the Potsdam Declaration enumerate universal principles such as fundamental human rights, pacifism, and so on. Given this arrangement, we have textual grounds to mediate the tension in the current Article 1 between the Emperor system and popular sovereignty by making use of the universal

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<sup>33</sup> John M. Maki, *The Constitution of Japan: Pacifism, Popular Sovereignty, and Fundamental Human Rights*, 53 L. & CONTEMP. PROBS. 73, 78 (1990). The full text of Article 1 of the Constitution of Japan is as follows: “Article 1. The Emperor shall be the symbol of the State and of the unity of the people, deriving his position from the will of the people with whom resides sovereign power.”

<sup>34</sup> HAHM & KIM, *supra* note 12, at 132.



principle of reason.<sup>35</sup> This is how the text resolves the tension between the coexistence of popular sovereignty and the Emperor system: it has set the priority of the universal principles of reason in its preamble, so when tensions arise, they are to be resolved by the means of legal rationality. I think that this arrangement in fact presupposes a theoretical or interpretive superiority of legal principles over the Emperor system.

On the other hand, the LDP draft preamble changes this textual arrangement and therefore also alters the implied interpretive strategy. In the LDP draft, the Emperor and narrative-based concepts are introduced in the proposed preamble, and then these concepts are given the same priority as legal principles. This new arrangement means that the interpretive tension between the Emperor system and popular sovereignty will be deepened as the narrative concepts are moved up from Article 1 to the preamble itself. If we think the preamble provides a frame to guide us in our interpretation of the Constitution, then we must admit that this proposed arrangement introduces a fundamental tension between law and narrative which disrupts the theoretical or interpretive superiority of legal principles over the Emperor system.<sup>36</sup>

To my interpretation and understanding, the preamble of the current Constitution, and the significance of the Potsdam principles as its ancestor, have just barely defended the foundation of our constitutional law over the years. It defends our Constitution from a populist urge to

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<sup>35</sup> Of course, the Emperor system is based upon the unique culture and history of Japan, and the Constitution itself recognizes the system in Article 1. But this uniqueness has to be interpreted and shaped to conform to the legal principles inherent in the interpretive guidance offered by the preamble and by other related Articles. It is always a difficult task for us to find the optimal balance between cultural uniqueness and universal reason. That is to say, the task of legal rationality is difficult, to be sure, but it is not impossible.

<sup>36</sup> I would like to discuss a bit more about this issue. As I mentioned in the main body of this essay, in the current Constitution, the Emperor system first appears in article 1 but is absent from the preamble. The preamble instead introduces the principle of legal rationality as the foundation of Japanese law. In this case, even the construction of the Emperor system must be in accordance with the principles of legal rationality. But how will this situation change if the Emperor system and the principle of legal rationality are both introduced in the preamble—both given the same level of priority? If the Emperor system and legal rationality are both introduced in the preamble, then the architecture of Japanese law will be made to stand on two foundations that will be in a fundamental tension with each other.

If that happens, then there are two possibilities. First, in order to allow for the coexistence of both legal rationality and the Emperor system, then some form of optimal balance will have to be achieved (presumably through the nuancing of the Articles of the draft constitution). The other option is problematic, but unfortunately, more likely. The two foundations—legal rationality and the Emperor system—are granted equal legal status. If that happens, the two foundations will be pulling in two different directions. I am saying that in the LDP draft an irrational myth of national uniqueness takes on the same legal force as the universal principle of rationality. If so, then there is a likelihood that the Emperor system will be granted the status of a legal *exception*, placed beyond the realm of legal rationality. In other words, the myth of uniqueness will be rendered “sacred” as in placed off limits to rational interrogation and critique.

stake the foundation of our legal system not on universalist principles but rather on narrative or mythology. The LDP draft preamble denies the independence of law from narrative and thus degenerates the most basic legal project of this country.

B. *Article 13*

Article 13 (*see Appendix 2*) is another example of a problematic deletion proposed by the LDP in its draft constitution. The current Article 13 states that, “[A]ll of the people shall be respected *as individuals*.” In a sharp contrast with this, the LDP draft changes this to “[A]ll of the people shall be respected *as persons*.”

Replacing “individuals” with “persons” makes a difference. Needless to say, the concept of personhood includes not just individual persons but also so-called legal persons, such as corporations, groups with common ethnicity, or religious groups with common faiths. In the modern tradition, we set up individual rights against not just state or government but also against churches, feudal organizations, or many types of craft guilds. So this seemingly minor change in wording is another major departure from modern constitutionalism.

C. *Article 97*

Article 97 of the current Constitution will be entirely deleted by the LDP draft (*see Appendix 3*). The LDP explains in the Q&A that the Article is a sort of redundancy because the draft uses several terms of rights in other places so that the draft still serves as a sufficient guarantee of fundamental human rights.<sup>37</sup> I disagree. I do not think it is a redundancy.

This Article lies at the head of CHAPTER X: SUPREME LAW and Article 98 follows. The full textual arrangement is cited here:

#### CHAPTER X. SUPREME LAW

Article 97. The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time

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<sup>37</sup> *See supra* note 32, at 37.

inviolable.

Article 98. This Constitution shall be the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity.

(2) The treaties concluded by Japan and established laws of nations shall be faithfully observed.

Clearly, Article 98 refers to formal force or validity of the highest legal norm. It provides that the Constitution is the supreme law and the highest in the hierarchy of laws of the nation so that the Constitution holds the power to deny the legal force or validity of subordinate laws in conflict with it. In Article 98, the Constitution refers to a function of the supreme law, that is, it states how the supreme law works.

In contrast, Article 97 explains the reason why the Constitution is supreme. Significantly, it places a legal principle at the core of this reason. That is, “fundamental human rights by this Constitution guaranteed,” and “fruits of the age-old struggle of man to be free.” So the idea of the supremacy of fundamental human rights finds its place here in Article 97, via the preamble, from the Potsdam Declaration. Undoubtedly, this Article is not a redundancy, but one of the most important clauses of the Constitution as it tells us the reason why our Constitution should be the supreme law and it traces a generating process of the current Constitution of Japan.

Article 97 and 98 articulate the substance and function of the supreme law. These two taken together clarify the nature of our Constitution as a legal project. If we lose Article 97 as proposed by the LDP draft, then we will also lose the universalistic and fundamental values used to justify the functions that the highest law should hold. The risk is that without such a foundation, the supreme law and its functions might be arbitrarily exercised based on the limited set of narrative-based norms that the LDP draft constitution attempts to introduce.

#### IV. CONCLUSION

In July 10, 2016, the Liberal Democratic Party and its coalition partners won a two-thirds majority in the House of Councilors, the upper house of the Diet of Japan, to go along with their two-thirds majority in the House of Representatives, the lower house. A two-thirds majority is required in each house to launch the process of revising the Constitution. PM Abe seemed to be refraining from placing the issue of constitutional reform on the agenda during the election. However, now that PM Abe has won the game and gained a super majority in both Houses, constitutional revision might be reloaded as one of the central issues in the LDP's platform.

In this short essay, I have been focusing on the LDP draft constitution because it is the only draft provided by the ruling parties so far. As mentioned above, however, as far as the LDP draft constitution is concerned, it raises a host of thorny issues. One of the most dangerous qualities of the draft is its clear tendency to dilute the autonomy of law from narrative. This dilution reduces law to the realm of politics and inhibits the ability of the former to serve as a check against the latter. A brief list of some of the fundamental problems with the LDP draft is daunting: the replacement of the current preamble, the erasure of "universal principle of mankind" from the text, the introduction of many narrative-based norms into our Constitution, the abandoning of our legal principles in favor of the elevation of a nationalist narrative, and so on.

In closing, I ask: why does the LDP propose a shift to narrative now? Considering the present state of tension in the Far East, I would emphasize that inward-looking measures are only heightening the tensions between the states in eastern Asia. By contrast, a state based upon a universalistic foundation is qualified to open the channel to communicate with other states. So as far as Japan maintains the supremacy of universalistic legal principles as the foundation of our Constitution, we will be able to critically engage with China, Korea, and even the United States. In a sharp contrast with such a constitutional law strategy, however, the LDP draft constitution seems to make our country more inward-looking, reducing the import of our Constitution to the realm of nationalist myths based on narratives of cultural uniqueness.

How does this, "every country has its own taste" measure work

for us? The field of law and its interpretive strategies provide legal principles as a common ground. These principles are a foundation that can be open to a particular *modus vivendi* while also requiring each state to make the effort to justify their own. As for narrative, however, there is no other way to engage with it but to accept it or reject it. There is no ground to stand upon for any negotiation.

## Appendix

—Comparison between the current Constitution (the Constitution of Japan (1946)) and the proposed constitution (the LDP draft constitution (2012)).<sup>38</sup>

—Relevant sections of the Potsdam Declaration (1945).

### Appendix 1 THE PREAMBLE

—**The Preamble of the current Constitution of Japan (the first paragraph)**

*We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution. Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people. This is a universal principle of mankind upon which this Constitution is founded. We reject and revoke all constitutions, laws, ordinances, and rescripts in conflict herewith. (emphasis and underline added)*

—**The Preamble of the LDP draft constitution**

*Our nation, with its long history and unique culture, is a country that has the Emperor, the symbol of unity of the people, governed based on the separation of powers, legislation, government, and justice, under popular sovereignty.*

*Our nation has overcome and developed from the ruins of the Second World War and a number of catastrophes and now currently holds a prominent position in the global community, promoting friendlier relations and contributing to the peace and prosperity of the world*

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<sup>38</sup> *Supra* note 10. English translations of the Constitution of Japan and the LDP draft constitution were accessed at the following: *The Constitution of Japan*, NAT'L DIET LIBR., <http://www.ndl.go.jp/constitution/e/etc/c01.html> (Last modified 2003-2004); *The Constitutional Amendment Draft*, ASSOCIATION OF YOUNG LAWYERS TO PROTECT TOMORROW OF FREEDOM (November 1, 2013), <http://www.asuno-jiyuu.com/2013/11/blog-post.html>.

through pacifism.

*We, the Japanese people, protect our own country and tradition with pride and spirit, respect fundamental human rights, along with treasuring conformity, and formed this nation by families and communities helping each other.*

*We, the people, respect freedom and discipline, protect our beautiful land and natural environment as we promote education and technology, and develop the country through economic activities. We, the Japanese people, in order to transmit good tradition and our nation to posterity for many years to come, herein, establish this constitution. (emphasis and underline added)*

## **Appendix 2 ARTICLE 13**

### **—Article 13 of the current Constitution of Japan (excerpted)**

*All of the people shall be respected as individuals. (emphasis and underline added).*

### **—Article 13 of the LDP draft constitution (excerpted)**

*All of the people shall be respected as persons. (emphasis and underline added)*

## **Appendix 3 ARTICLE 97**

### **—Article 97 of the current Constitution of Japan**

*The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of mankind to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.*

### **—Article 97 of the LDP draft constitution**

*- Deleted -*

## **Appendix 4 THE POTSDAM DECLARATION (PROCLAMATION DEFINING TERMS FOR JAPANESE SURRENDER) (issued, at Potsdam, July 26, 1945)<sup>39</sup> (relevant sections**

<sup>39</sup> 2 THE MINISTRY OF FOREIGN AFFAIRS, NIHON GAIKO NENPYO NARABINI SHUYO BUNSHO:

only) (emphasis and underline added).

6. *There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that **a new order of peace, security and justice** will be impossible until irresponsible militarism is driven from the world.*

10. *We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to **the revival and strengthening of democratic tendencies** among the Japanese people. **Freedom of speech, of religion, and of thought**, as well as **respect for the fundamental human rights** shall be established.*

12. *The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with **the freely expressed will of the Japanese people a peacefully inclined and responsible government**.*



