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DICHOTOMY OF ARTICLE 9 OF THE CONSTITUTION OF JAPAN
AND REALITY: *DE LEGE LATA, DE LEGE FERENDA*

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ABSTRACT

According to Article 9 of the Japanese Constitution, the state waives the right to have military forces and declare war. However, the country's military as well as geo-strategic potential has been developing rapidly since the second half of the XX century. Thus, the main legal problem underlined in this research paper is related to the multi-dimensional question of conformity of the aforementioned norm of the Constitution of Japan and actuality.

This issue is highly relevant for the field of constitutional legal studies, because the phenomenon of interpretation of a legal document that changes the meaning without changing the textual structure can be crucial for any Constitution as well as atypical normative regulations that are so common for a constitutional textual body. The problem establishes the necessity to consider the current provision of the law (*lex lata*), as well as the development of the military potential in/of Japan, and the possible future development of the law (*lex ferenda*) in this research, using qualitative legal research methods such as historical analysis, legal discourse analysis, observation of the legal process and atypical normative-regulations.

As a result of the study, it was evidently determined that Article 9 has now been re-interpreted to such an extent that it can hardly perform its original functions, which is not permissible for the Constitution. The potential for changing the text of the Article 9, in order to bring it closer to the real situation in the country, was also identified in the last Chapter of the paper.

Keywords: Constitution, Japan, Article 9, constitutional law, legal interpretation

INTRODUCTION

After the World War Two (WWII), Japanese constitutional law had to ‘accommodate’ a certain range of significant changes that affected not only the law in itself, but also the country’s societal order as well as political economy. Because of the war, the losing state, Japan, was forced to accept the terms of the winners, which dramatically influenced the law-making process in Japan. In particular, a new Constitution of Japan, which was proclaimed by the Shōwa Emperor after the end of the hostilities, was drafted by the USA with some modifications made by Japanese committee¹. Characteristically, it was not the only crucial influence of the Western political world on the legal ‘reshuffle’ in Japan. At the end of the XIX century, the country created a legal system for itself to be closely based on the civil law system of Germany². After the end of WWII, the main concern for the newly established United Nations’-based international system was to prevent the appearance of large-scale aggressions, so the new Constitution of Japan had to restrain the country’s military potential.

70 years have passed since the Constitution of Japan is unchanged. However, in order to fulfil the functions of a smart legislation, the law must develop reflecting the society’s requirements. In this regard, the debate on changing the Constitution represents a process that is in development throughout the XXI century attracting plenty of attention from *intra*-Japanese politicians as well as a broader international community. Many segments of the debate are directed at amending Article 9 of the Constitution, which concerns the restriction on military activity in Japan. Evidently, the reason for that is that the Article-in-question no longer reflects the actuality, because its legal interpretation (not to mention the political one) has been modified for several times without changing the text³. As a result, nowadays, Japan has not only got the right to the collective self-defence, but also Self-Defence forces.

The topic of amendment of Article 9 of the Japanese Constitution has been studied enough only to detect the need for more in-depth research. From the legal studies’ point of view, there is still lack of research into the process of informal constitutional change of Article 9 in relation to the purpose of the Article and its legal functionality after more than 50 years. The legal research problem is the crucial inconsistency of the exceptional normative document and the situation in the country, which is the result of a certain coincidence of events inside and outside the country jeopardizing

¹ Goodman, C.F. *The Rule of Law in Japan*, Kluwer Law International, Alphen aan den Rijn, 2008, 36.

² *Ibid.*, 23.

³ Dixon, R., Baldwin, G. *Globalizing Constitutional Moments? A reflection on the Japanese Article 9 Debate*, *The American Journal of Comparative Law*, Volume 67, Issue 1, 2019, 146.

the constitutional law of Japan. The phenomenon of interpretation of a legal document that changes the meaning without changing the textual structure is definitely not a nouvelle subject of research. However, this phenomenon has not been studied sufficiently in the context of Article 9 of the Constitution of Japan. The paper is aimed at filling the lack of studies on *lex lata* and the process of its interpretation, using the example of the Article 9 of the Constitution and argue on the need for certain changes to be made in the text of the Article 9 as *de lege ferenda*.

Considering the above, the hypothesis of the paper is as follows: Article 9 of the Japanese Constitution has undergone such significant informal changes through interpretation that it no longer reflects reality and does not fulfil the original purpose of its enforcement. In order to test the hypothesis, it is necessary to establish the path of progress of the military potential of Japan and its state at the moment as well as evaluate its further development and coexistence with the Article. This raises the following two research questions: a) What is the socio-political *status quo* in Japan in the context of Article 9? and b) What is Article 9 in *de lege ferenda* context?

In order to propose a findings-based practical solution to the research problem, it is necessary to use qualitative legal research methodology, which mainly includes analytical and comparative methods. To answer the first question out of the aforementioned two, a combination of the historical analysis and process tracing, which are especially important for the Oriental world in the process of detecting the humongous region-bound cultural, legal and political developments, should be employed. Another important method to be used is legal discourse analysis via semantic research of an atypical normative regulation, such as the original text of the Article 9, supplemented by the analysis of legal documents to identify the subtext and possible space for interpretation. Finally, analysis of teleological interpretation of the regulation in the form of court opinion should be included into the research to approve or disapprove governmental actions on interpretation of the Article in Japan. Since the answer to the first question requires comparison of the text of the Article and the situation in the country, the information collected by other methods will assist in comparing the two concepts through analysis. The answer to the second research question requires implementation of the analysis of legal instruments of the state, which could be used to change the text of the Constitution. Moreover, it is necessary to make clear the development of the interpretation of the Article and its consequences for Japan. To achieve that, geostrategic analysis should be applied, which includes studying the goals of Japan on the international stage as well as its membership in unions. Further, a discourse analysis should be applied in order to find out what position the Article has within the social context. It is necessary to conduct the perception studies to establish the framework of understanding of the Article by the

government of Japan, the people as well as the rest of the international community. The main base for methodology that was mentioned earlier is scientific literature.

Naturally, since the first research question includes two clusters (“Article 9” and “Real situation”), both of them should be specified and explained in order to conduct the required comparison. Firstly, to answer the first research question, the analysis of historical context and the original text of the Article should be conducted. In the first Chapter, this research work will cover the influence of the political West on the Constitution of Japan in general and on Article 9 in particular. It will consider history and different processes and determination of methods that had to be used to enforce the Article’s execution. As one of the most important elements of the paper, the first Chapter will cover the analysis of the original text of the Article of the Constitution of Japan. Chapter II will analyse the reality that exists in Japan through the amendments of Article 9, which happened without textual changes. It will contain the process of interpretation of the Article from its appearance until today. Moreover, the reasons for the establishment of the right to Self-Defence forces and collective self-defence will be included in the second Chapter. To answer the second research question, the last Chapter will include the analysis of the possibilities to change the text of the article as well as the future of Article 9. In other words, the main questions of the Chapter are as follows: what legal instruments should be applied to change the Article, and could it reflect the reality in the future.

1. THE BIRTH OF EXCEPTIONAL LEGAL RULE

Deep analysis of traditions, lifestyles and history leads to the idea of how different the western and the eastern parts of the world are. Some time ago, this was clearly seen from the direction of politics and laws governing domestic spheres. Japan was a closed country with specific laws established on the base of its religion and traditions. On the other hand, Europe developed export and communication. However, due to mass globalization, significant political borders between states began to blur, new alliances and unions appeared on the world map. More successful legal systems influenced the formation of new ones making amendments to the laws and regulations of the country. Moreover, wars with territorial occupation played a significant role in globalization. This Chapter will analyse the influence of other countries on the formation of post-war Japan and its Constitution and Article 9 in particular.

1.1. Pre-war influence

There are several points that significantly influenced the development of the Japanese law in the history of Japan. Among them is the Tokugawa period, which started in the XVII century and lasted for more than two hundred years⁴. This period in the history of Japan is important for consideration in this work, because it influenced the development of law in Japan and regulated the effect of other states' law on the Japanese one.

During the time of Tokugawa, Japan was closed to the rest of the world, travelling to Japan and from the country was prohibited⁵. Thus, it can be noted that for a long time Japan developed without any influence of Western countries, as a separate piece of land cut off from other civilizations. The only possible paths for development were the warring states and China. This subsequently slowed down the process of developing laws in the country, on the one hand, stabilizing the legal system during times of instability within the country, but on the other hand leading a stagnation of law.

The foundations of the difference between the Japanese and Western laws can be traced back to the time of the feudal system. The feudal system in Europe was built on the basis of the concept of a “contract” with its rights and obligations. This aspect largely characterized the position of

⁴ Goodman (2008), *supra nota* 1, 15.

⁵ *Ibid.*, 15.

European Law, while in Japan, a major role in the feudal system was played by philosophy, legends and family⁶.

Western influence began in the XIX century, when the political West turned its attention to the East. Japan was unable to offer military resistance, and as a result it signed an agreement with America, Russia and some European countries,, which made Japan more open to trade and communication. It was the start of the great political and legal changes in Japan. A Constitution, created as Meiji Constitution, was built according to the Prussian model. Moreover, the need for a new legal system appeared and exchange of experience with Western scholars was used to establish it⁷. The basis for the influence of Europe on Japanese law was not so much the desire of Japan, but rather the need. The treaties on opening Japan to the rest of the world harmed Japan's sovereignty, which worried the Japanese authorities more than the opportunity to develop their own law. To restore the country's position, it was necessary to start talking on equal terms with the West. As a result, it was decided to borrow a new legal system and the Civil Code from Germany and France making necessary amendments⁸. For example, according to the Constitution, the Emperor was assigned the most important role in the state: executive and legislative power together with political immunity. However, despite the adopted amendments, there was still a conflict between the laws that were borrowed from the European texts and the life of society in Japan due to the historical difference in development, which was described previously in this part of the work.

The starting point in the internal conflict of the legal system of Japan can be seen from this moment of history of the development of law in Japan that was influenced by geostrategic factors. If we are talking about Article 9 of the modern Constitution of Japan, then Article 13 of the Meiji Constitution (1889) can be considered as its predecessor, which had the opposite purpose. Below is a translation of Article 13 of the Meiji Constitution:

“Article 13. The Emperor declares war, makes peace, and concludes treaties.”

As previously stated in this work, the Meiji Constitution was based on the Constitution of Prussia. Therefore, Article 13 of the Meiji Constitution is analogous to Article 48 of the Constitution of the Kingdom of Prussia (1848).

The following is a translated text of Article 48 of the Constitution of Kingdom of Prussia (1848):

⁶ *Ibid.*, 16.

⁷ *Ibid.*, 21.

⁸ *Ibid.*, 22.

“ART. 48. The king shall have power to declare war and make peace, and to conclude other treaties with foreign government...”

On the other hand, similar laws allowing the ruler to declare and end a war were throughout Europe at the end of the XIX century. For example, according to the Constitution of the German Empire (1871), the law also gives the emperor the right to declare war.

Using the right to declare war, Japan began to build up its military potential in order not only to protect its sovereignty, but also to strengthen its influence on neighbouring countries. Moreover, Japan did not like the spread of European influence in Korea and other Asian countries. To support its territorial ambitions, Japan started and won the Sino-Japanese War at the end of the XIX century and fought yet another successful campaign with the Russian Empire at the beginning of the XX century. Geo-strategically, politically, and normatively these two wars made a significant difference for Japan in the international system. Even the First World War, causing considerable damage to the state, turned out to be advantageous for Japan. Thus, the country regularly took the side of the winner, asserting its influence and increasing strength, rising in the eyes of the western world. However, Japan was not able to achieve an equal treatment from the Western countries⁹. As a result, it continued to develop and took part in all of the post-WWI international treaties, always on the winning side, being one of the leading great powers countries in the newly established international system. At the same time, Japan did not stop trying to reach new territories, from time to time carrying out military and strategic actions on the border with China. Being aware of the ability to act independently, because of influence and power, Japan withdrew from the League of Nations. Arguably, the country's position changed later, after the WWII.

1.2. Result of the World War II

As a result of WWII, Japan was defeated, the superpower image and influence disappeared. Defeat as well as the war itself caused huge losses in many areas: the economic collapse, gap in the state government, the loss of position on the international stage, the loss of the country's sovereignty in favour of Western world as the winning side. As the losing side, Japan was forced to accept the conditions of the winning countries. The main role in the formation of the Constitution of the post-war Japan was played by General Douglas MacArthur and his team, who drafted the legal

⁹ Paine, S.C.M., *The Sino-Japanese War of 1894–1895 Perceptions, Power, and Primacy*, Cambridge University Press, New York, 2003, 18.

document¹⁰. Japan, ending war as a loser, was forced to agree to most of the rules prescribed by the American General. The new Constitution influenced some important areas of life in Japan, such as human rights, sovereignty of the people and the separation of powers¹¹.

Moreover, there was another perspective in the plan of the winning side. Tired of the World Wars, countries pursued the goal of proclaiming and maintaining a stable peace worldwide, preventing appearance of possible aggressors. As one of the aggressors of WWII, Japan became significant target for legal changes, therefore one of the main goals of creation of a new Constitution for other states was to prevent Japan from re-building its military potential and setting military goals, so the prohibition on the use of military forces as well as the proclamation of the peaceful intentions of the people of Japan became important.

In order to protect the world from possible future war in full, the initial draft of Article 9 meant not only Japan's refusal to show armed aggression, but also a ban on maintaining any armed force even in the interests of the state protection, effectively leaving the country defenceless against potential enemies¹². Later, it can be seen that the absence of defence possibilities became crucial in the development of the interpretation of the Article. However, Japan had a chance to influence the document and the original text was changed in favour of the state. The second Chapter of this work will cover changes of the draft of Article 9 in more details.

In terms of Japan in itself, Japanese people, knowing not only the horrors of war, but also the fate of the losing state, fully supported the Peaceful Constitution. According to Daniel H. Foote, the people, tired of the war, supported the peaceful path of development so easily that some people believed that aggression was not acceptable even as a response to a military attack¹³. In this regard, it is impossible to conclude that pacifism was completely imposed on Japan by the West. Furthermore, it was necessary for the country itself to recover from the devastating defeat. A serious fall in the eyes of the Western world also brought losses to the country that the victors of WWII had respected earlier. As a reflection of common intentions, the text of the preamble to the Constitution of Japan states: "We, the Japanese people, desire peace for all time..." However, the question of the people's opinion is not answered yet: it will also be covered in the next Chapters with the analysis of perception of the population of Japan, because full support of Peaceful Act

¹⁰ Glenn, D.H., McCormac, G. Japan's Contested Constitution: Documents and Analysis, Routledge, London, 2001, 1.

¹¹ *Ibid.*, 1.

¹² Hughes, C.W. Why Japan Could Revise Its Constitution and What It Would Mean for Japanese Security Policy, Elsevier, Volume 50, Issue 4, 2004, 727.

¹³ Foote, D.H. Law in Japan: A Turning Point, University of Washington Press, Seattle, 2007, 258.

seems to have been impossible, there must have been the side of opposition with their own arguments.

1.3. Analysis of the final text of the Preamble and Article 9 of the Constitution of Japan

Before starting the analysis of the text of the Constitution of Japan, some facts about the previous Constitution should be noted to compare the two texts on the basic level. The comparison factor in this case will be the general attitude of the people and government towards the war expressed by the main legislative document of the country. In terms of pre-war Constitution, it is very important that the Constitution of Meiji (1889) left to the Emperor the right to declare war, and in some articles also tried to maintain high investments into military forces, although not directly calling for a war¹⁴. This way of thinking was completely changed in the Constitution that was adopted after the WWII.

The desire to promote peace can be seen both in the establishment of specific laws, as for example Article 9, and in the attempt to make changes in the general attitude of the Japanese people towards armed conflicts. Thus, the preamble to the Constitution of Japan includes the dissemination of the idea of peace among the population of Japan including such expressions as: “desire peace for all time”, “peace-loving peoples of the world”, “have the right to live in peace”. This part of the preamble had to start the period of renewed Japan in the eyes of the international community and the people of Japan itself. However, this concerns more ideological aspirations about the peace, rather than the specific actions that Japan had to take to promote this peace. Japan’s obligations are specified in more details in Article 9 of the Constitution of Japan.

The Article 9 is covered in Chapter 2 “RENUNCIATION OF WAR”.

Below is a translation of the full text of the Article 9 from the Constitution of Japan (1947):

“Article 9. Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.”

¹⁴ Banno, J. The establishment of the Japanese Constitutional System, Routledge, London, 1995, 2.

The analysis of the Article shows that it can be divided into several main parts:

- a. Again, in addition to the Preamble, setting the aim: *“Aspiring sincerely to an international peace based on justice and order”*
- b. Means to achieve the aim: *“the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes”*
- c. The second paragraph as the explanation and clarification of the means.

Despite the fact that in order for the law to perform its functions efficiently, it is necessary to constantly develop and refine it in accordance with the needs of society, this Article does not obey this idea and is not an example of smart legislation. Phrases such as *“forever renounce war as a sovereign right”* and *“will never be maintained”* indicate that the Article was not implied as the object for further development at the time of its creation. One of the possible reasons for this is the desire of the world affected by the war to protect itself from military operations in the future and forever. Perhaps it is the reason for the appearance of these words in the text, because words like “never” and “forever” seem too critical and unusual for the text of a legislative article.

On the other hand, one of the main goals of the world’s community is to achieve stability in the absence of war. In this regard, the words “never” and “forever” seem to be appropriate elements that preserve this stability. Perhaps this kind of article does not have to be flexible in order to fulfil the functions of smart legislation.

2. BEYOND THE ORIGINAL PURPOSE OF THE ARTICLE

In his works, an American scientist Bruce Ackerman proposes a new theory of the development of the American Constitution, according to which it can be changed using official methods of changing the Constitution, but also it can be changed unofficially¹⁵. The second Chapter supplemented by the Ackerman's theory establishes the basis for the discussion platform of this research paper, confirming the existence of amendments of the Article without changing the text. Moreover, it will explain the context of reality within the meaning of the research.

The possibilities for a formal constitutional change are usually described in the Constitution itself. According to the Constitution of Japan, Article 96, the amendments come into force when not only the legislative and political organs but also the people take part. As for the unofficial change of the Constitution, it usually happens in the form of a new interpretation without changing the textual content, which should be understood as taking actions without firstly changing the text.

Nowadays there are several positions about the need to amend or delete Article 9 in Japan, and the Liberal Democratic Party of Japan is trying to prove that this Article of the post-war Constitution does not improve Japan's international position, and even interferes with its sovereignty¹⁶. As a result of researching the military activity of Japan and the position of the Constitution in the modern political reality, it can be concluded that the Japanese society may currently be threatened by a constitutional crisis after more than 70 years of stability¹⁷. In order to understand how Japan has become a central part of a crisis situation, it is necessary to investigate what amendments occurred in the Constitution during and after its creation as well as evaluate the movement of the society that led to the change in the country's tactics after the Constitution had been written. Moreover, an analysis of the evolution of this Article will help to understand one of the reasons why there is a need for new constitutional amendments on military power. In this Chapter, we will consider official and unofficial changes that have occurred in Article 9 of the Japanese Constitution from the end of the WWII until today.

¹⁵ Dixon, R., Baldwin, G (2019), *supra nota* 3, 145.

¹⁶ Kolmas M. National Identity and Japanese Revisionism: Abe Shinzo's Vision of a Beautiful Japan and Its Limits, Routledge, New York, 2018.

¹⁷ Yamauchi, T. Constitutional Pacifism: Principle, Reality, and Perspectiv, University of Tokyo Press, Tokyo, Volume 30, Issue 1, 2001, 190.

2.1. Textual changes of Article 9

As it was stated earlier, any formal constitutional amendment in Japan is governed by Article 96. There were no official amendments in the Constitution complying with the rules of Article 96, the Constitution has remained unchanged for more than 70 years. However, some textual changes did occur at the time of its passage. This part of the paper will analyse the change itself and its importance for the future of Article 9 of the Constitution of Japan, comparing flexibility of the Article before and after the change.

As it has already been noted in the first Chapter, the main goal of the international community, in particular the United States of America, was to prevent armed conflicts that are possible in the future and to exclude Japan as an obstacle to ambitions of other countries. The task of helping the Japanese society to keep on a peaceful path and changing important legal documents was trusted to the General Douglas MacArthur, who was named as the Supreme Commander for the Allied Powers (SCAP) in Japan. To achieve peaceful aims, the Supreme Commander for the Allied Powers has limited Japan's military capabilities and prospects to a minimum, if not zero by producing a "Peace Constitution", completely preventing Japan from having "land, sea, and air forces, as well as other war potential" without any exceptions¹⁸. Despite the hostile relations between Japan and America, as well as inevitable changes in the legal system under pressure of the Western world, MacArthur was not seen as an enemy by the people of Japan: belief in his good intentions spread with the promise of food and resources for the Japanese people, who turned out to be victims of the war¹⁹. However, after such a mass conflict, the mankind clearly understood that there was a possibility of a new war against dissatisfied states. Preparation of the new Constitution caused a lot of debate in both America and Japan, several drafts were written, and some changes were made²⁰. On the other hand, a major amendment that is important in the framework of this research work is one specific textual change in Article 9. The opinion of the Japanese government on the text of Article 9 was very unstable: on the one hand, it rejected the possibility of self-defence, referring to it as one of the most frequent causes of modern wars, and on the other hand, the need to maintain the state's readiness for armed conflicts seemed obvious²¹. Because of the fear of threat to the country's security, the original text of the Article written by the American team was changed by adding the line "in order to accomplish the aim of the preceding

¹⁸ Hughes (2004), *supra nota* 12, 3.

¹⁹ Shoichi, K. *The Birth of Japan's Postwar constitution*, WestViewPress, Oxford, 1998, 159.

²⁰ *Ibid.*, 3.

²¹ *Ibid.*, 193.

paragraph” to the second paragraph, before the post-war Constitution came into force²². This amendment has the name “The Ashida Amendment” and can be considered as the first and the most significant amendment to Article 9 of the Constitution of Japan, which opened the possibility for other changes and interpretations.

As a next step of the analysis, it is important to consider how exactly the appearance of this line influenced the fate of the Article. In the first Chapter of this work, the purpose of the Article was defined as an aspiration “*to an international peace based on justice and order*”, and the line added to the original draft returns the conversation to the mentioned purpose. In other words, Japan is forbidden to have weapons with the aim of violating international peace. Despite the fact that the concept of “violation of international peace” could have a very broad meaning, based on the foregoing we can conclude that Japan may have weapons that do not violate the goals that the “Peaceful Constitution” of this country should promote. It is possible to justify the country’s military potential in other ways, without mentioning international security. As an example, supposedly Japan may have domestic military forces, the jurisdiction of which does not include interaction with the international environment.

This small amendment to the Article made it possible to change its meaning adjusting to the country’s needs. Moreover, from a strict text that leaves no room for interpretation, Article 9 of the Constitution of Japan became flexible and adaptable legislation, which is open to interpretations and unofficial changes. Various interpretations that were possible because of this first amendment made by Japan and international organisations as well as their consequences will be discussed later in this Chapter.

2.2. Interpretation of Article 9 in the context of self-defense

As it was mentioned earlier, the text of Article 9, which was included in the final version of the Japanese Constitution, gave more flexibility for the interpretation of its meaning, which made possible the dissonance between the text of the Article and the reality, as reflected in the hypothesis of this research work.

Among the legal interpretations of the Article, Shotaro Hamura and Eric Shiu distinguish two main groups: firstly, the interpretation that supports the complete renouncing of armed forces by Japan

²² Hughes (2004), *supra nota* 18, 3.

regardless of the goals, and the second which allows the use of forces for self-defence purposes²³. Because neither of the views can satisfy everyone due to different factors, such as, for example, political and economic situation in the country, both of them have the right to exist.

Among legal scholars, the first interpretation is justified by several points, among which are some terms from the text of the Article as well as the initial goals of creating a Peaceful Constitution. As one of the versions, it is widely believed that the concept of “war potential” in the second paragraph refers to military power necessary for any military action, whether it is an attack or defence²⁴. On the other hand, there is no specific wording about the prohibition of use of Self-Defence Forces in the text. As a result, scholars continue to look for one solution that still has not been found.

Until the year 1952, American troops were still on the Japanese territory as a consequence of the WWII. Shortly after the escalation of the conflict in Korea, Japan was ordered to create a National Police Reserve of more than 70,000 people. Then, to maintain this order, General MacArthur claimed that the Constitution should not deprive Japan of the opportunity to defend itself²⁵. Under the influence of the international situation and the wartime situation in Korea, Ashida commented on the text of the Article in 1951. In his comments, he noted that the Article cannot be used as a mechanism restricting the use of self-defence forces. Moreover, Ashida explained that it is war actions that are limited by the text of this Article, comparing the concept of war with the “police actions” of the UN forces in Korea²⁶. It can be considered as the first pronounced amendment without textual changes made by the Japanese government and the second amendment in general. From this moment, creation of the official Self-Defence Force became a question of time. To hide the accumulation of military potential, several substitutions of concepts were used, for example, soldiers were renamed police officers, whose official goal was to regulate the situation inside the country. Moreover, The Japanese National Safety Forces were created in 1952, headed by Prime Minister Yoshida, and taking into account international situation, the agreement was reached between Yoshida and Shigemitsu already in 1953, confirming the country’s right to have Self-Defence Forces to maintain independence of Japan²⁷.

²³ Shotaro, H., Shiu, E. Renunciation of war as a universal principle of mankind - a look at the Gulf War and the Japanese Constitution, Cambridge University Press, Cambridge, Volume 44, Issue 2, 2020, 426-443.

²⁴ *Ibid.*, 426-443.

²⁵ Auer, J. E., Article nine of Japan’s Constitution: from renunciation of armed force “forever” to the third largest defence budget in the world, Law and Contemporary Problems, Duke University School of Law, Durham, Volume 53, Issue 2, 1990, 176.

²⁶ Shoichi (1998), *supra nota* 19, 194.

²⁷ Auer (1990), *supra nota* 25, 178.

However, the agreement did not convince either the international or the local community, therefore, questions about the possibility of using self-defence forces continued to arise in the political circles. Moreover, a new question appeared asking about what “war potential” mentioned in the second paragraph of the Article, includes.

Another legal document acknowledging the right of Japan to have the force for self-defence can be considered a judicial opinion made by the Chief Justice in the case JAPAN v. SHIGERU SAKATA 1959.

As an explanation of this decision, the Chief Justice presented the will of the people of Japan, who did not want to experience the horrors of war again and wanted to enjoy their rights and peace in the state. The will can be seen through the text of the Constitution as well. However, the opinion of judges divided into two depending on whether interpretation of the article is broad or narrow. On the one hand, as a result, there was no significant importance in the decision of the court. On the other hand, this situation confirmed not only the political importance of the interpretation of the Article, but also the legal one, giving a professional assessment of the situation as a judicial body of the state.

Thus, the first and the most important step was taken on the way to amend Article 9 through interpretation. Despite the active resistance of legal scholars, Japanese opposition parties and other countries, there were enough reasons for organizing Self-Defence Forces, starting from the direct command of the American general and ending with the tense world situation. The U.S. redirected most of its military forces to the war in Korea, despite not wanting to leave Japan unarmed. Moreover, Japan itself did not like the presence of a large number of American military bases and troops on its territory, which, among other things, did not guarantee full security, so it was decided to take advantage of the weakness (or strength?) of the Article to protect the country’s independence as one of the main values of the Japanese people.

2.3. Right to the collective self-defence

In order to confirm the hypothesis, it is necessary to go further and analyse not only the country’s internal military potential, but also the role of Japan in the international military defence. If the interpretation of the Constitution in the interests of freedom and independence of the people of Japan could be partially justified, then the military force that goes to the international level is more difficult to hide under various non-textual amendments.

Japan's international relations during the Cold War were built mainly on friendship with America, which created the dependence of Japan on the opinion of another state. In order to maintain the necessary level of good relations, Japan bought a huge number of American weapons and tried its best to support the ally, in order to avoid any protests from American side to other ways of development of Japan as an independent country²⁸. However, the United States alone was not enough for the successful development of trade and political communications necessary for a modern state, so the desire to regain the position of a peaceful country and reliable partner became critical for Japan. As a mechanism for restoring status in the international community, it was decided to join the reliable UN alliance, which united quite a lot of major powers, and as a result, Japan was admitted to the UN in 1956. Nevertheless, membership in the alliance brought not only the acceptance by other countries, but also responsibilities that Japan had to fulfil together with other members.

As it is stated by Michael Jonathan Green, a senior vice president for Asia and Japan Chair at the Centre for Strategic and International Studies (CSIS), the UN policy aimed at collective defence enabled the Japanese Self-Defence forces to expand their capabilities and although they were not able to take part in the Gulf War, as a result of the cooperation between the UN and Japan, International Peace Cooperation Act was established²⁹. The act, enacted in June 1992, is interesting for this paper to identify the answer to the first research question, because it contains a direct reference to Article 9 of the Japanese Constitution and serves the purpose of legitimizing the armed activity of Japan in other countries as part of the UN peacekeeping missions with the aim of promoting peace and supporting allies. According to the Outline of Japan's International Peace Cooperation provided by the Ministry of Foreign Affairs of Japan, the third point of the law establishes The Five Principles of Participation in Peacekeeping Troops, covering the contradictions between Article 9 and the participation in UN Operations.

Part 3(5) states that "The use of weapons shall be limited to the minimum necessary to protect the lives of personnel, etc."³⁰. A closer analysis of the law shows that this rule is included in the framework of self-defence possibilities of Japan, since weapons can only be used for protection, but on the other hand, it faces with lack of correlation with Article 9, which prohibits "use of force as means of settling international disputes", as well as maintenance of any war potential. The tasks

²⁸ Shuichi, W., Article Nine of the Japanese Constitution and security policy: realism versus idealism in Japan since the Second World War, Routledge, Japan Forum, 2010, 418.

²⁹ Green, M., Japan's Reluctant Realism: Foreign Policy Challenges in an Era of Uncertain Power, PALGRAVE, New York, 2001, 197.

³⁰ Outline of Japan's International Peace Cooperation, Ministry of Foreign Affairs of Japan, 2015.

of Japan in peacekeeping missions are described in the next part of the act and, although none of them requires the direct use of weapons, many task definitions remain so broad that they leave the possibility of the necessity to use military resources and forces of Japan, at least because the list of tasks is not exhaustive. Moreover, speaking at the basic level without going into details, when peacekeeping operations are mentioned, it is important to remember that, despite the positive goal, they, nevertheless, do not exclude a possible military activity on the territory of another state. Peacekeeping military forces, even if their powers are exceeded, are subject to jurisdictional immunity³¹. Therefore, participation in such operations itself creates some doubts to the extent in which Article 9 is taken into account.

³¹ Burke, R., Status of Forces Deployed on UN Peacekeeping Operations: Jurisdictional Immunity, Oxford University Press, Journal of Conflict & Security Law, Volume 16, Issue 1, 2011, 64.

3. A NEW LEVEL OF NEED FOR TEXTUAL CHANGE

The previous Chapter showed Japan's development path from a nation that announced a complete renunciation of hostilities and weapons to a country whose military capabilities are obvious inside and outside of the country. As a result, a certain gap can be seen. Nowadays the topic of the Article remains relevant, so changes seem to be inevitable. This research work has an important impact on the discussion of the topic and a particular value, because it analyses the possible future development of the article.

This Chapter will be mainly devoted to the second question of the research, and therefore the future of Article 9. By analysing some factors, the paper will try to suggest *lex ferenda* of the Article. At the moment, three ways of development of events can be suggested: a) everything will remain as before; b) the Constitution will be amended; and c) Japan's policy will change, which will or will not bring Article 9 closer to the reality. Of course, considering the fast development of the international community and Japan in particular, in many areas, it is difficult to imagine that there will be no changes in the Japanese military policy. Therefore, the main topic of the discussion is the question of whether the Constitution will be changed. Generally, this question is based on the second question of the research. In order to answer this question, it is necessary to analyse the tools and possibility of the amendment of the Constitution and the influence that the authorities supporting constitutional reform can have.

3.1. Amendment of the Constitution in Japan

The Japanese Constitution is largely notable because of the fact that, despite the existence of the provision on the rules for changing constitutional law, it has not been amended for 70 years. Amendments to the Constitution are covered in Article 96. In his work, Takeshi Inoue states that lack of the development of the Constitution is a stop of constitutionalism, which is not inherent, for example, to the European countries, which constantly work on improving their constitutions³².

However, according to the Japanese law, it is possible to amend the Constitution under the certain conditions: a constitutional amendment can be initiated as a result of the Diet³³ voting, should the proposal receive 2/3 supporting votes out of the total number of votes; the next step is a referendum

³² Inoue, T., *The Constitution of Japan and Constitutional Reform*, Asia-Pacific Review, 2016, 7.

³³ The National Diet has legislative power in Japan.

in which the majority of voters must support the amendment³⁴. These two steps are the main ones, and after the mentioned process the amendment should be accepted by the Emperor. In this process, three important elements can be seen: legal (The Diet initiates), democratic (people vote) and traditional (Emperor accepts), so the result of the process of changing the Constitution should present the will of people of Japan through the law. The complex process of changing the Constitution is explained by the importance of the text of this legal act, as well as the dependence of other juridical documents on the Constitution.

Proposals to amend the Constitution have arisen repeatedly both within the country and from other states; this idea was supported by both government bodies and the people³⁵. However, the changes failed to go through the process described in Article 96. Despite the obvious controversy of the Article and the diverse support of the changes, the text of Article 9 remains unchanged from the day the Constitution was published. Does this mean that support is not strong enough? Further, the work will consider the status of the issue of changing the Article in Japan at the moment.

3.2. The probability for a constitutional change

Tomosuke Kasuya proposed two reasons for changing the Constitution in Japan at the end of the XX century: the law should be changed if it cannot fulfil its regulatory role or if the meaning of the Article has changed³⁶. Both situations named by Kasuya mean that the Constitution can no longer perform the functions of smart legislation, which means that a mistake was made either by the executive or legislative organ of the country. Tomosuke Kasuya's proposals support not only the relevance of this paper and the presence of a legal problem, but also the position of the importance of changing the text of the Constitution.

It has long been recognized that the topic of the Article 9 is very controversial, having a historical, cultural and legal background. Although a court decision and non-textual amendments were made on that topic, it remains relevant. The possibility of the text of the Article to be amended under the Article 96 may be seen only from the intentions of politicians and the political movement in Japan.

³⁴ The Constitution of Japan (1947)

³⁵ Fatamawati., Constitution Amendment Process: A Comparison between Indonesia and Japan, *Indonesian Journal of International Law*, 2010, 11.

³⁶ Tomosuke Kasuya, as cited by Fisher, R.H., *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Defense Guidelines*, *Cornell International Law Journal*, Volume 32, Issue 2, 1999, 403.

Since changing laws goes side by side with politics, the analysis of Japan's current internal affairs will help answer the second question of the study and understand Article 9 *de lege ferenda*.

As stated earlier, Article 96 requires at least two-thirds of all the members of each House to initiate an amendment to the Constitution. The National Diet in Japan includes two Houses: lower house, House of Representatives, and upper house, House of Councillors. Both consist of representatives of different parties; the main difference is in the functions and capabilities of the house members.

The modern history of the development of the idea of changing the text of the Article 9 includes the direct participation firstly of the Liberal Democratic Party (LDP) of Japan, which was established by the coalition of Japan Democratic Party and Liberal Party, as well as the country's Prime Minister Shinzo Abe, who set constitutional amendments as one of his main aims. As a result of the creation of the coalition, the LDP received the majority of votes, namely 2/3, since mainly only one big party was on the opposite side: the Japanese Socialist Party. This situation continued until the electoral reform, which occurred in 1994.

Presumably, the ideas of the conservative party, the LDP, were to strengthen the independence of Japan, restore the position in the political world, get away from the image of losers in WWII, have the power of self-defence fully justified by law, participate more actively in peacekeeping missions, and also stop the debate on the failure of the country's Constitution. Of course, there was another side, which mainly relied on the necessity for the stability of the Constitution as the first source of law, the fact that the Constitution is an expression of people's will, which cannot be cancelled or changed, and also that war potential as a method of problem-solving, should remain in the past. However, the opposition did not have as much political weight as pro-revisionists did.

The conservative LDP failed to reform the Constitution during the time from the party's creation until 1994. As it was pointed out by Adam N. Sterling, since the opposition could hardly change the situation, the main reasons for the absence of the constitutional reform can be seen in the internal political conflicts as well as the country's status in the international relations and economic issues³⁷. This situation haunted the country after WWII, during the Cold War and in several other wars that could have influenced Japan, for example Korean War. At the moment, the LDP, even being the leading party in both houses, does not have 2/3 of the votes in either of them.

Special attention to the constitutional problem, which could be relevant for this study and could have the potential to impact on the amendment of the Constitution, was attracted by Shinzo Abe.

³⁷ Sterling, A.N., *Implicit Limits on Amending the Japanese Constitution*, Washington International Law Journal, Volume 28, Issue 1, 2019, 244.

Talks about changing the first source of law became more specific: they were included into the election program of the LDP, led by the Prime Minister, and were again raised for a wide discussion. It gives a new notion of *de lege ferenda* of the Article. However, Abe came to power after the reform, so he had difficulty in changing the Constitution according to the rules established in Article 96. The rules were too strict and getting 2/3 of the votes was almost impossible comparing with the possibilities before the reform. In this regard, the achievement of the goal required focusing first on the amendment of Article 96, so that the Constitution could be more flexible³⁸. Most likely, it seemed to the party that it would be easier to convince the majority in the need to amend this Article than the whole Constitution or Article 9.

3.2.1. Amendment of the Article 96

The Constitution, as the basis of all the laws of the state, should be based on the real will of the people, be stable and be able to be changed only in case of an absolute necessity. These functions should be ensured by strict control over constitutional amendments, which are codified in the act itself. However, this is an ideal form of law to which society strives, rather than a real situation. In Japan, the functions of the Constitution were compromised by the direct influence of other countries on its writing, internal and external conflicts, and the rapid development of civilization in the second half of the XX century. The question arose as to whether the situation could be considered unusual enough to neglect the stability that the Constitution should have.

The prime minister's first attempt to amend the Constitution was unsuccessful due to the fact that other actions that were not at all related to his initial ideas were widely criticized by the public. As a result, the party as well as the minister himself, lost popularity.³⁹ Abe returned to power in 2012, after which the tactics of amending Article 96 was born. Shinzo Abe and supporters of the constitutional reform aimed to change the required number of votes of the National Diet to a simple majority⁴⁰. In this case, it would be easier to pass the law through the House and reach the referendum.

Since the next step is the people's support of the law during the referendum, in order to evaluate the *lex ferenda* of Article 9, it is necessary to analyse the attitude of the people of Japan towards changing the Constitution. Even if we assume that Article 96 was amended and Article 9 passed through the National Diet with a simple majority, the opinion of the people will be decisive. In his

³⁸ *Ibid.*, 245.

³⁹ Winkler, C.G., *The Quest for Japan's New Constitution*, Routledge, Oxford, 2011, 20.

⁴⁰ Albert, R., *Amending constitutional amendment rules*, *International Journal of Constitutional Law*, Volume 13, Issue 3, 2015, 660.

work, Satoshi Yokodaido notes that despite the text of the Article, at the moment, most residents of Japan support the actions of Self-Defence Forces both domestically and abroad⁴¹. This contradicts the idea expressed at the beginning of the work that the majority of the inhabitants of Japan supported complete demilitarization. However, people's opinions have changed with the development of the society. In general, it is important to understand that people no longer perceive the deviation of the Constitution from the reality as an unusual phenomenon, therefore changing the Constitution is not a priority or a necessity for the general population of the country. The Japanese policy promoted the need for some military forces for quite a long time, moreover, it could happen that for the inhabitants of the country their own security is more important than the conformity of the state's actions with the Constitution. Since residents of Japan do not feel any negative consequences from non-compliance with this law, the question remains more at the level of the government, state legislation and legal scholars.

The plan to amend Article 96 has also faced opposition from scholars and politicians in Japan, who maintained the stability of the Constitution and believed that such changes would jeopardize Japanese constitutional law⁴². Furthermore, there was low support for the plan to amend Article 96, so in the end it was decided to return directly to Article 9⁴³. Therefore, from the situation today, the *lex ferenda* excludes the appearance of a new Article 9 by changing the constitutional amendment rules.

⁴¹ Yokodaido, S., Constitutional stability in Japan not due to popular approval, German Law Journal, Volume 20, Issue 2, 2019, 270.

⁴² Albert., *Supra nota 40*, 661.

⁴³ Goodman, C.F., Contemplated amendments to Japan's 1947 Constitution: a return to Iye, Kokutai and the Meiji state, Washington International Law Journal, Washington, 2016, 50.

4. DISCUSSION: THE SIGNIFICANCE OF UNOFFICIAL CHANGES

The legislative measure in the case of the constitution has great importance if it can help to achieve some national restrictive or preventive goal. Doubts about the effectiveness of the constitutional article lead to the hypothesis of this work: Article 9 of the Japanese Constitution has undergone such significant informal changes through interpretation that it no longer reflects the reality and does not fulfil the purpose of its enforcement. A historical analysis of exceptional legal regulation, Article 9 of the Japanese Constitution, made it possible to establish the original purpose of introducing the article considering the situation of Japan at the time of writing the article. The main purposes included the elements of political relations, strategic and security measures, international economy after the Second World War. A textual analysis of the original article and its drafts that was conducted during the research in combination with the purpose showed that the Article was supposed to be the manifestation of good intentions towards other countries, as well as a mechanism for the rapid restoration of international relations after the war. On the one hand, for a specific period, the article was fully consistent with the reality and supported the achievement of the goals it was created for.

On the other hand, the analysis carried out in the second Chapter showed the *lex lata* with many contradictions between the actions of Japan and Article 9. The mechanism for interpretation is also the desire of the people to avoid such a destructive military conflict as was WWII. According to this logic, only Self-Defence Forces can save Japan from a major armed conflict, excluding the country as a target for military operations. Moreover, these forces should be able to stop the enemy in the event of an attack, thus minimizing the losses of Japan. This study also showed the effectiveness of interpretation for diplomatic tactics, since it is aimed at cooperation and mutual assistance in all matters including the military. However, it is important to remember that this article is not an ordinary part of the Constitution and compliance with the basics of diplomacy is not enough, which means that Japan is in a special position regarding coordination of the international order and its own laws. Despite historical background and many factors influencing the interpretation of the Article, the development of Self-Defence Forces and the subsequent promotion of these forces to the international level does not seem sufficiently legitimized in order to be accepted in the framework of Article 9, even if the use of this kind of military potential seems quite logical in the field of international relations. As a result, it should be noted that maintenance of military potential and participation in peacekeeping operations does not correspond to the text

of the Article, which leads to the answer to the first research question – the socio-political *status quo* in Japan does not reflect the modern real situation with the military intentions of Japan.

At this point of the scientific research, there can be a new question: is this difference between the Constitution and the reality justified? However, the paper does not aim to evaluate the actions of Japan, but only to analyse *lex lata* and the situation as it is. On the other hand, the work tries to predict the possible development of the Article in the future, which is reflected in the second question of the study.

The analysis of the political side of law enforcement in Japan revealed that the country is passive in relation to constitutional changes. Low interest of the population makes it doubtful that the *lex ferenda* can include more realistic text of Article 9. Moreover, the possibility of changing Article 96 in the future was also excluded in the framework of this study.

The promotion of the idea has quite a long history, which has been accompanied with both support and opposition. There was also a more appropriate time to change the text of Article 9 within the framework of the Constitution, which the conservative party did not use. No one can clearly predict what will happen to the text of the Article in the future. However, it was found that in spite of the strong disagreement in opinions about the Japanese laws *de lege ferenda*, the main ruling party does not abandon the idea of changing the “Peace Article”. This means that the theory that the text can still be changed in the future might prove true.

However, it is important to understand that with the way people get used to the existence of Self-Defence Forces, the chances of changing the Constitution become smaller, because the enthusiasm of one party will not be able to change such an important document. It leads to the conclusion that the theory of changing the text of the Article can exist *de lege ferenda* on the level of discussion of legal scholars rather than in reality, so practical implementation of the textual amendments appears to be unlikely.

As a result, the research confirmed the hypothesis, proving that the reality that emerged as a result of unofficial changes or interpretations through which the understanding of the text of the Article passed did not correspond to the original text of the Article and the purpose of its writing. Despite the fact that some legal documents related to Article 9 were created during its development, none of them supplemented it at a sufficient level. The text was not effectively changed either directly or through other documents, therefore it does not correspond to the real situation with the armed forces of Japan.

CONCLUSION

The aim of this paper was to contribute to a broad debate in the field of constitutional law by filling the gap in the study of the development of unofficial interpretations of Article 9 of the Constitution of Japan. Methodologically, this research employed historiography, process tracing and textual analysis of a legal document, while taking into account the purpose and time of the creation of the Constitution. The study showed that this development led to a highly complex as well as multi-faceted situation when the text of the Constitution does not correspond to the current socio-political status quo in the country, which, with necessity, is jeopardizing the legal integrity of the state. Because of denial of this problem, the country-wide society of Japan do not perceive Article 9 as a law, but rather as a standard, which can be used and unofficially changed by the government depending on the situation.

An academic value added of this particular research paper is that, in addition to an attempt to contribute to the development of constitutional law, it can be of assistance in the process of developing an effective interlinkage between different academic fields and sub-fields, namely international relations, social anthropology, political theory, political economy, and global security studies. By analysing the legal basis for maintaining the armed forces, the study also contributes to strategic communication, if conceptualised in the framework of strategic narrative. However, despite this distinct multidisciplinary impact, the work can be considered as mostly to do with the law, since it used semantic research of the original text of a particular segment of the country's supreme law together with analysis of legal instruments and comparative legal analysis to recognise the purpose of enforcement and space for interpretation. It is clear that the interpretation process described in this work is not finished yet and there will be some changes in the future because of the rapid development of international relations and the perception of modern society, therefore this work contributes not only to the already existing discussion, but also gives way to the future development of the study of legal and political scholars. Moreover, this work can be useful not only to legal and political scholars who study Japan, because the concept of interpretations and historical analysis plays an important role in the constitutions and other legal documents of many countries, which can be take the experience of Japan into account and analyse the situation in their own country using this paper as well as others.

The study has clearly indicated the answer to the question of whether there is an essential need for these changes. The study of the literature and analysis has shown that there is such a need because there is a lack of connection between the law enforcement and compliance with it. A law that is

not respected by the government, especially when it comes to the Constitution, cannot be considered effective, which means it cannot fulfill the functions of smart legislation either. As a result, this work established the weak points in the *lex lata* of the Article, and also defined the framework for the subsequent development of the text itself, as well as political debate in the analysis of the *lex ferenda*. This shows that future research should focus on specific opportunities for changing the text of the Article. However, the object of this study was not to evaluate the actions of the Japanese government. Therefore, there is enough room for further research, which can be aimed at assessing the legitimacy of the interpretations that were identified in this paper, as well as establishing possible subsequent interpretations or even specific textual changes of Article 9 of the Constitution of Japan.

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