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Why Article 9 of the Constitution of Japan should be interpreted in line with International Law and Why Japanese Constitutional Lawyers Failed to Understand it Appropriately[1]

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Abstract

This essay provides an interpretation of Article 9 of the Constitution of Japan by illustrating the fact that the provision was originally designed to require Japan to comply with contemporary international law. This essay thus criticizes the traditional interpretation of Japanese constitutional lawyers, who sought to emphasize the distinctiveness of the provision by ignoring its purpose. This essay emphasizes that Article 9 (1) is intended to reinforce the Kellogg — Briand Pact of 1928 and the Charter of the United Nations of 1945. The Prohibition of "war potential" in Article 9 (2) should be understood in line with the first paragraph. "War" of "war potential" of the second paragraph is in the end the illegal action in contemporary international law. Thus, the second paragraph only indicates the prohibition of the possession of the means to conduct illegal actions. The renunciation of "the right of belligerency of the state" of Article 9 (2) is the provision of non-recognition of the illegal concept in the eyes of international law. Article 9 (2) only repudiates the claim in the war-time Japanese Empire against international law. In conclusion, Article 9 is the declaration of Japan to comply with contemporary international law and cannot be regarded as a provision to renounce the legitimate right of self-defense and the military means to exercise it.

[1] This essay is a revised version of the same author's essay in Japanese language, 篠田英朗「現代国際法と日本国憲法の整合性の解明～従来の憲法学通説の 9 条解釈の問題点～」, in *Hiroshima Peace Science 41 (2019)*. While this essay is not a direct translation, the substance is almost identical.

1. Introduction

The traditional interpretation of Article 9 of the Constitution of Japan dictates that the provision bans any use of force as well as the possession of the military organization. This type of interpretation was led by mainstream Japanese constitutional lawyers who have been constituting the solid base for left-wing circles in post-WWII Japanese society. Even their ideological foes in the right-wing groups tended to accept the traditional interpretation of Japanese constitutional lawyers, while insisting on its abolishment as the source of weakness of Japan. Due to the interpretation of Article 9 by Japanese constitutional lawyers as the provision of absolute pacifism, left-wing social movements in Japan have been called "the Constitution-Protecting faction (*gokenha*)".

Academically speaking, however, the interpretation of Article 9 has been ambiguous and even untouched due to political sensitivity. While the traditional view of Japanese constitutional lawyers is widespread in Japanese society due to its ideological and emotional appeal of absolute pacifism, there have always been serious doubts about the validity of their interpretation. This paper argues that, when considered from an academic point of view, the view of constitutional lawyers is not really persuasive. This essay proves it by illustrating the apparent link between the Constitution of Japan and contemporary international law.[2]

Japanese constitutional lawyers disregard the idea of locating the Constitution within the framework of contemporary international law, while it is obvious that the American drafters of the Constitution pursued it. As a result, they had no choice but to take an attitude of using intuition as a clue in interpreting the Constitution. They rather exercise their ideological or emotional appeals to left-wing circles regardless of lack of academic grounds.

The fact is that there was no need to have ideological struggles over the interpretation of Article 9, as long as we apply the framework of contemporary international law to the Constitution of Japan. Intuitive views such as the abandonment of the right of self-defense and the abandonment of all military components cannot be supported by the wording of the Constitution of Japan.

2. The Gap between the Drafters of the Constitution and Japanese Constitutional Lawyers

The officials of "GHQ" or the General Headquarters of the Occupation Powers, the drafters of the Constitution of Japan, denied the interpretation of Article 9 as the complete denial of the

[2] The author's arguments have been presented in books in Japanese language. 篠田英朗『集団的自衛権の思想史』(風行社、2016年)、篠田英朗『ほんとうの憲法』(ちくま新書、2017年)、篠田英朗『憲法学の病』(新潮新書、2019年)、篠田英朗『はじめての憲法』(ちくまプリマー、2019年)。

right of self-defense. There is no sign that GHQ officials urged the abandonment of the right of self-defense and the possession of the military despite the interpretation by Japanese constitutional lawyers. General Douglas MacArthur, Supreme Commander of Allied Powers, who ordered GHQ officials to draft the Constitution, continuously stated that Article 9 of the Constitution did not deny the right of self-defense, nor did it deny the retention of the means of exercising the right of self-defense.[3]

Japanese constitutional lawyers tend to overemphasize the so-called "MacArthur Note," which is nothing more than a short internal note written by General MacArthur when ordering the drafting of the Constitution. Japanese constitutional lawyers insisted that the "MacArthur Note" indicated a complete ban on Japan's use of force, as it mentioned the idea of abandoning not only "war" as an illegal act of the state, but also "means for maintaining one's own security." But the fact is that MacArthur never publicized the note, nor did he intend to interpret it as a complete ban. The note was handed over by MacArthur to the Director of Government Section of GHQ, Courtney Whitney, who actually led the process of drafting the Constitution of Japan. Then, the actual wording of the Constitution was arranged in the way it could coincide with the framework of contemporary international law. In fact, Whitney had the view that it was impossible to have a provision contradictory to international law and thus the Constitution could not repudiate the legitimate right of self-defense. While his idea at the time of writing the Note remains unknow, it is obvious that MacArthur accepted the draft Constitution written by Whitney's team.

There is still a considerable amount of misunderstanding among Japanese constitutional lawyers that the renunciation of the right of self-defense was stated by Shigeru Yoshida, the Prime Minister of Japan at the time of the deliberation of the Draft Constitution in the Diet. Yoshida later denied the accusation that he had once supported the abandonment of the right of self-defense. But as in the case of MacArthur, Yoshida's explanation about his own position has been rejected by Japanese constitutional lawyers as a lie. When the draft Constitution of Japan was deliberated in the Diet in 1946, a member of the House of Representatives, Sanzo Nosaka, of the Communist Party, asked a question whether the draft Constitution abandoned "defensive war". In response, Prime Minister Yoshida replied that as recent wars were conducted in the name of the state's claims on legitimate defense (*seito-boueiken*), the idea to justify war in the name of the state's legitimate defense should be avoided.[4] It is noteworthy that seito-boeiken, is the word used in domestic criminal law, which is different from *jieiken* in international law.

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[3] Douglas MacArthur, *General of the Army Reminiscences* (New York: McGrow-Hill Book Company, 1964), p.304.

[4] The record of the House of Representatives in the 90th Imperial Diet, 28 June 1946.（第90回帝国議会衆議院本会議［昭和21年 6 月28日］[『官報』号外昭和二十一年六月二十九日・第九十回帝国議会衆議院議事速記録第八号、124頁]）。A similar statement is found in the record of the House of Representatives in the 90th Imperial Diet, 26 June 1946.（第90回帝国議会衆議院本会議［昭和21年6月26日］[『官報』号外昭和二十一年六月二十七日・第九十回帝国議会衆議院議事速記録第六号、81-82頁]）。

Yoshida clearly indicated that the Constitution denied the acts of imperial Japan during WWII ranging from its atrocities in China to surprise attacks to the US and Great Britain in the name of "defensive war". But Yoshida did not necessarily deny the application of contemporary international law in which the right of self-defense is legal against an armed attack. What Yoshida denied was rather pre-war constitutional lawyers' idea to justify war in the name of the state's natural right of legitimate self-defense in accordance with the traditional obedience of Japanese constitutional lawyers to anthropomorphism of nations in the tradition of Prussian State Theory (*Staatslehre*). Yoshida denied the idea that had existed only in prewar Japan. He did not say that the Constitution would abandon the right of self-defense in the framework of international law. It was simply wrong to assume with Japanese constitutional lawyers that the renunciation of the acts of imperial Japan would require the renunciation of international law.

Japanese constitutional lawyers tend to insist that the outbreak of the Cold War changed the positions of MacArthur and Yoshida. According to them, both of them initially understood that the Constitution prohibited Japan from exercising the right of self-defense in international law, while both of them later hid their original understanding and changed their positions. But this insistence lacks solid grounds. It was rather natural that both of them denied pre-war Imperial Japan's acts in the name of "defensive war". It is not necessary to challenge contemporary international law to deny the acts of Imperial Japan. Rather, the rigid application of contemporary international law would lead to denial of the acts of Imperial Japan. The prejudice toward contemporary international law could arise only when we cling to Prussian State Theory's idea of the "basic right (*Grundrechte*) of the state". The right of self-defense is justified not because state sovereignty is sacrosanct and the state has an inviolable right to conduct war without legal limits. The right of self-defense is exercised for the maintenance of international order and not as war outlawed in contemporary international law.

3. Strange Interpretation of Article 9 by Japanese Constitutional Lawyers

The actual wording of Article 9 of the Constitution of Japan does not show denial of the framework of contemporary international law. It rather uses many expressions that follow international legal texts. It is thus natural that the Constitution is intended to set Japan comply with contemporary international law. The interpretation of the Constitution should be based upon the assumption that it does not repudiate international law.

The strange manner of the interpretation of Article 9 by Japanese constitutional lawyers is described as a "turn-over" interpretation.[5] Even Japanese constitutional lawyers admit that

[5] The expression is Junnen Annen's (「ちゃぶ台返し」. 安念潤司「集団的自衛権は放棄されたのかー憲法九条を素直に読む」松井茂記（編）『スターバックスでラテを飲みながら憲法を考える』（有斐閣、2016年)、284-285頁。

Paragraph 1 of Article 9 shows its close linkage with international law. It is natural to assume that Paragraph 1 is in tune with international law. But Japanese constitutional lawyers insist that we must change our interpretation after reading Paragraph 2 of Article 9, as Paragraph 2 must be interpreted as a provision to deny the framework of contemporary international law. This insistence on the "turn-over" interpretation is very strange. Legal texts must be logical. It is very strange to see Paragraph 2 denying the natural reading of Paragraph 1. A reservation may be provided by a following provision. But what Japanese constitutional lawyers insist is not about reservations. Their insistence that Section 2 changes the natural reading of Section 1 is exceptionally strange.

Article 9 (1) of the Constitution is strongly consistent with the Kellogg-Brian Pact of 1928 and the Charter of the United Nations of 1945. It is clear that Article 9 (1) is intended to create the basis in domestic law of Japan to uphold the provisions of international law. This move is very reasonable as regards the purpose of the American drafters executing their duty to make Japan comply with international law as the Potsdam Declaration had expected as a ground for the occupation of the Allied Powers. Therefore, it is natural to assume that the right of self-defense ss a principle of international law is not abandoned by the Constitution. The right of self-defense constitutes the international legal regime to prohibit war or use of force as aggression. It is one of counter-measures in addition to collective security against illegal armed attacks.

Japanese constitutional lawyers admit the clear linkage between Article 9 (1) and international law. They still insist that despite the natural reading of Paragraph 1, we must change the natural interpretation of Paragraph 1 after reading Paragraph 2. It is true that there were some minority constitutional lawyers who found this "turn-over" interpretation strange and argued that it was just natural to interpret Paragraph 2 in line with the natural reading of Paragraph 1. Such minority constitutional lawyers include Soichi Sasaki of Kyoto University and Yoshio Ohishi of Kyoto University. But such minority figures were not accepted by the majority of Japanese constitutional lawyers dominated by graduates of the Law Department of Tokyo University where Prussian State Theory has a strong tradition since the time of the introduction of the Meiji Constitution of the Empire of Great Japan of 1889.[6] Whether there is really any ground in the "turn-over" interpretation of majority constitutional lawyers is the most crucial issue in debates concerning interpretations of Article 9.

[6] Professors at Kyoto University are the only group of academics who could argue against dominant Tokyo University oriented constitutional lawyers. See, for instance, 佐々木惣一「自衛戦争能力の問題と憲法改正論」、『中央公論』67巻 7 号、1952年。

4. The Contents of Article 9 (1)

Now, let us examine the actual wording of two paragraphs of Article 9. Paragraph 1 reads as follows;

> 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.

Let us compare it with the Kellogg-Briand Pact of 1928, which reads as follows;

> Article I
> The High Contracting Parties solemly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.
> Article II
> The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

Let us also see Article 2 (4) of the Charter of the United Nations of 1945, which reads as follows;

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The relevant provision in the UN Charter is Article 51, which reads as follows;

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The wording of Article 9 (1) clearly indicates its intention to comply with the logic of contemporary international law embodied by the above two legal texts; war is illegal; state sovereignty is not sacrosanct to justify war; use of force as an armed attack is an illegal act in international law; the right of self-defense is a legal countermeasure against illegal use of force.

GHQ official wanted to insert Article 9 to meet the provision of the Potsdam Declaration concerning reforms of the government of Japan. Imperial Japan violated international law including the Kellogg-Brian Pact of 1928 and the Covenant of the League of Nations of 1919. Thus, new democratic Japan had to declare its willingness to comply with international law though the introduction of the new domestic legal regime. Otherwise, Japan would not be able to fulfil the obligation provided by the Potsdam Declaration and terminate its own occupation by Allied Powers.

Article 9 is the only provision in the Constitution which started with the subject of the sentence, "the Japanese people", except the Preamble. It coincides with the wording of the Kellogg-Brian Pact that renounced war "in the names of their respective peoples". It was Hitoshi Ashida, chairman of the Special Commission for the Constitutional Revision of the House of Representatives in 1946, who inserted the phrase "the Japanese people" at the beginning of Article 9. Ashida, highly knowledgeable about international law and also very critical of Japanese constitutional lawyers during WWII, apparently tried to intentionally highlight the linkage between Article 9 as well as the Preamble of the Constitution and international law.

The first thing that Article 9 (1) renounces is "war as a sovereign right of the nation." This clearly corresponds to the Kellogg-Brian Pact that "condemn(s) recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." "War", which used to be justifiable before WWI through the declaration of war by a sovereign state in pursuing its national policy, became outlawed in the 20th century. The Covenant of the League of Nations of 1919 had already stipulated "the acceptance of obligations not to resort to war" by the contracting parties "[i]n order to promote international co-operation and to achieve international peace and security". The Draft Treaty of Mutual Assistance of 1923, the Protocol for the Pacific Settlement of International Disputes of 1924, the Locarno Treaties of 1925, the resolution of the General Assembly of the League of Nations on September 25, 1925 that declared that the war of aggression was an international crime, and the resolution of the General Assembly of the League on September 24, 1927 that declared that all wars of aggression were banned, led to the establishment of new international legal order to outlaw "war".

During WWII the concept of "war" was abused by Axis countries like Imperial Japan, which sought to justify aggressive actions by insisting that "defensive war" was not outlawed and it was only committed to "defensive war". Then, the UN Charter introduced the legal regime of illegality of "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Following this

development in international law, Article 9 (1) of Japan's Constitution renounced "the threat or use of force as means of settling international disputes".

Japan ratified the Kellogg-Brian Pact, which however stimulated controversies as regards the sacrosanct right of the Emperor to decide to go to war embodied in the Meiji Constitution. The military leaders who identified themselves as special executors of the sovereign prerogative of the Emperor demanded that civilian politicians should not interfere with military affairs, as they are the matters of the Emperor's sacrosanct discretion. This controversy led to the take-over of political power by military officials and eventually the prolonged wars from 1931 until 1945 in the name of "defensive war". The Constitution of Japan drafted by American GHQ officials was an attempt to set Japan comply with the obligation of the Kellogg-Brian Pact through domestic law in Japan. While the UN Charter was already effective at the time of drafting the Constitution, occupied Japan was not a member of the UN. In the first place, unless government reforms are successful, the occupation of Japan would not be terminated and Japan would not become an independent member state of the UN. Compliance to the regime of the UN Charter should not be a consequence, but rather a condition, to terminate the occupation of Japan. So, the Constitution needed to have a provision to pledge allegiance to the UN Charter, which was a clear reason of having Article 9.

International law does not renounce the right of self-defense; rather it includes it as an indispensable institution to maintain international order. Thus, the Constitution of Japan did not have to abandon the right of self-defense. The "war" abandoned by the 1928 Kellogg-Brian Pact was the "war" perceived in 19th century European international law. "War" prohibited in contemporary international law does not include exercises of the right of self-defense and collective security. Article 51 of the UN Charter clearly shows that the right of self-defense is not prohibited by Article 2 (4) of the Charter. This was an established understanding of international law after the Covenant of the League of Nations. This is what Article 9 (1) of the Constitution of Japan indicates by referring to "war as a sovereign right of the nation and the threat or use of force as means of settling international disputes."

Imperial Japan was understood to have violated this logic of international law. The occupation of Japan should have the purpose of making Japan a new "peace-loving" country; namely, Japan should become a country that continues to comply with contemporary international law. The phrase, "peace-loving peoples", in the Preamble of the Constitution of Japan, clearly resonates with the use of the phrase by the Allied States (for instance, the Atlantic Charter) during Wrold War II and the UN Charter (Article 4 [1]). This logic was quite clear throughout the period from the time of the Potsdam Declaration to the drafting of the Constitution of Japan among the Allied Powers, especially among American GHQ officials. Then, the Preamble of the Constitution of Japan proclaims that;

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.... We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth.

The Constitution declares that by eliminating war criminal and war-time imperial military machines, Japan establish a democratic government based upon the principle of individual freedom and compliance to international law to pursue peace. The regime of contemporary international law in which "war" is outlawed and the right of self-defense is legal is what the Constitution declares to uphold. This logic is clear in the text of the Constitution from the Preamble to Article 9.

However, unfortunately, Japanese constitutional lawyers refused to acknowledge the development of events in this way. After the termination of the occupation and the introduction of the US-Japan Security Treaty in 1951, they began to mobilize ideological movements to confront the US-led international order as a product of militaristic imperialism. They began to claim that Article 9 was the only one distinctively unique provision in the world as regards its absolute pacifism and thus it was superior to international law. They sought to justify their doctrine of the superiority of the Constitution over international law in the name of sovereignty of the Japanese nation.

5. The Traditional View of Japanese Constitutional Lawyers

The textbook of late Noboyoshi Ashibe, prominent Japanese constitutional lawyer at Tokyo University, *Constitutional Law*, sold more than a million copies. Ashibe was so influential in Japanese society, following the legacy of his master at Tokyo University, Toshiyoshi Miyazawa. Both of them were key to the post-WWII pacifist tradition of Japanese constitutional lawyers. Ashibe's textbook is still now a must-read standard for those who take bar examinations to become lawyers and those who take national recruitment examinations to become public servants, two major sources of politicians in Japan.

According to Ahibe, "war as a sovereign right of the nation" means merely "war".[7] War is

[7] 芦部信喜（高橋和之補訂）『憲法』（第七版）（岩波書店、2019年）、56頁。

defined by Ashibe as an act declared war by the declaration of war by a sovereign state.[8] According to Ashibe, "the threat or use of force as means of settling international disputes" means de fact war without the declaration of war. Then, Ashibe insists that Article 9 prohibits war in international law and de fact war outside of international law. In short, any kind of war or use of force is prohibited by the Constitution.[9] Ashibe evidently rejects the understanding of Article 9 by drafters like GHQ officials and those Diet members in 1946 like Prime Minister Yoshida and chairman of the Special Committee for Constitutional Revision Ashida and offers his own simplistic pacifist interpretation.

In the 19th century during the period of European international law, war was not illegal in settling disputes between states. International law functioned to establish the procedure for a sovereign state to declare war to start it officially. Until WWI, war was an exercise of state sovereignty and thus the issue of legality of war was regarded as an issue of state sovereignty. However, when US President Woodrow Wilson drafted the Covenant of the League of Nations after WWI, he was highly conscious and critical of the linkage of war and state sovereignty. He knew that the outlawry of war would become possible only with the limitation of state sovereignty. The traditional European view represented by political and legal theories like Prussian State Theory dictated that state sovereignty was absolute and thus it could not be limited by definition. Wilson challenged the European view and made a victory in reforming international law.

Imperial Japan did not recognize the revolutionary change in international law. Japanese constitutional lawyers with their strong belief in Prussian State Theory resonated in having skepticisms about the US-led move in outlawing war. It is remarkable that in a way even after WWII Japanese constitutional lawyers did not accommodate the sea-change in international law. They remained skeptical about the US-led international order and contemporary international law, even though they shifted their positions from the one affiliated with Imperial Japan to that of absolute pacifism.

Ashibe's insistence is a typical "turn-over" interpretation. He concedes that there is a possibility of interpreting Article 9 (1) in accordance with contemporary international law, namely, with more specific notions of "war" and "use of force". But he insists that due to Article 9 (2), such an interpretation is unsustainable. He insists that his own interpretation of "war" and "use of force" to prohibit exercises of the right of self-defense is more valid. He emphasizes that a majority of constitutional lawyers support his interpretation.[10] According to Ashibe, since Paragraph 2 abolishes possessions of all kinds of military functions, it is meaningless to discuss Paragraph 1 as regards the right of self-defense. Even if there is a room for the right of self-

[8] 同上、56-57頁。
[9] 同上、57頁。
[10] 芦部『憲法』、57頁。芦部信喜『憲法学Ⅰ憲法総論』（有斐閣、1992年）、259、261頁。

defense in Paragraph 1, it is impossible to exercise it because Paragraph 2 prohibits possession of an organization to exercise it. Thus, after reading Paragraph 2, we must go back to Paragraph 1 to change our interpretation to say that there is no possibility to exercise the right of self-defense without a function to do so.[11] Ashibe claims that we must reject a possibility to interpret Article 9 in accordance with the framework of contemporary international law.

In insisting so, Ashibe makes some strange remarks. For instance, he claims that the Constitution does not mention war or any other military-related concepts with the exception of Article 66.[12] But it is strange that Ashibe sees no meaning in the existence of Article 66, which stipulates that "The Prime Minister and other Ministers of State must be civilians". Article 66 implies that the Constitution assumes the possibility of existence of military officials. The fact is that the civilian clause of Article 66 was inserted by the Far Eastern Commission of the Allied Powers with the assumption that Article 9 does not prohibit Japan from having the military. But Ashibe ignores this historical fact.

Other influential constitutional lawyers like Yoichi Higuchi and Kazuyuki Takahashi at Tokyo University take the same insistence as Ashibe's. All of them take the "turn-over" interpretation of Article 9 and justify their insistence by stressing that a great majority of constitutional lawyers support their insistence[13] Actually, most of these influential constitutional lawyers in Japan are graduates of Tokyo University who have master-disciple relations. In such a traditional discipline like Constitutional Law which was set up at major imperial universities in Japan during the time of the Meiji Constitution of the Empire of Great Japan, there is a solid system of recruitment of academic faculty members at major universities with Tokyo University at the top of the pyramid.

Toshiyoshi Miyazawa, Constitutional Lawyer at Tokyo University at the time of the enactment of the Constitution of Japan, was the person who was educated in the pre-war Japan's environment of supremacy of Prussian Constitutional Theory. During the war with Allied Powers, he wrote some essays to criticize Anglo-American countries by defending actions of Imperial Japan including the surprise attack in the Pearl Harbor. Despite this militaristic record, or because of this anti-US sentiment, Miyazawa became the champion of pacifism among constitutional lawyers after the war. He made the shift in positions without making academic explanations. When he began to praise the Constitution of Japan in 1947, he did so by blaming the Kellogg-Brian Pact. According to Miyazawa, the Second World War took place because the Kellogg-Brian Pact made the reservation on the legality of the right of self-defense. Now, the Constitution of Japan abandons even "defensive wars" by going beyond the sphere of international law. Miyazawa, post-war pacifist, began to preach as early as 1947 that all the countries in the world should follow Japan for its advanced

[11] 芦部『憲法学Ⅰ』、261頁。
[12] 同上。
[13] 樋口陽一「戦争放棄」樋口陽一（編）『講座憲法学２主権と国際社会』（1994年、日本評論社）、111頁。高橋和之『立憲主義と日本国憲法』（第４版）（2017年、有斐閣）、53-54頁。

standpoint of absolute pacifism.[14]

It is as if Miyazawa made a revenge against Allied Powers, especially the US, by offering an understanding of history completely different from the Allied Powers' understanding. The drafters of the Constitution apparently believed that militarism of Imperial Japan caused war by violating international law. For Miyazawa, the flaw in international law caused the war. The drafters of the Constitution believed that the Constitution would contribute to peace by rectifying the militaristic culture of Japan which did not comply with international law. For Miyazawa, the Constitution of Japan would contribute to world peace by bringing Japan to a morally higher position than Anglo-Saxon-made international law.

The gap in interpretations of Article 9 between the drafters of the Constitution and Japanese constitutional lawyers was seriously profound in their different perceptions of history of WWII. Japanese constitutional lawyers before WWII did not fully accept the framework of new international law that US President Wilson created. It is noteworthy that even after WWII, they did not accept it in the environment of pacifist Japan. They consistently kept skepticism about US-led international order and US-led international law. It is striking that Japanese constitutional lawyers were in fact the hidden obstacles for American drafters of the Constitution who wanted to make Japan a country which would respect international law as it was.

6. The Critical Understanding of "War Potential" in Article 9 (2)

Let us now look at the critical point of Paragraph 2 in interpreting Article 9. It reads as follows;

> 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.

The very short paragraph provides two points: non-maintenance of "war-potential" and non-recognition of "the right belligerency of the state". Let us begin to examine the first issue, namely non-maintenance of "war potential".

The so-called MacArthur Note, an initial instruction by the Supreme Commander to his subordinates concerning drafting a new constitution, did not mention the concept of "war potential". The Note only mentioned "No Japanese Army, Navy, or Air Force". The second point

[14] 宮沢俊義『あたらしい憲法のはなし』(朝日新聞社、1947年)、62、64頁。

written in the Note was as follows;

> War as a sovereign right of the nation is abolished. Japan renounces it as an instrumentality for settling its disputes and even for preserving its own security. It relies upon the higher ideals which are now stirring the world for its defense and its protection. No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon any Japanese force.

It was the actual drafting team under Brigadier General Courtney Whitney, the Chief of Government Section, who inserted the phrase "war potential". "land, sea, and air forces" is now conditioned by the inserted concept, "other war potential". The phrase, "land, sea, and air forces, as well as other war potential", means land, sea and air forces as war potential, and logically, the sentence does not include no other type of land, sea and air forces. Namely, Paragraph 2 stipulates that Japan will not possess land, sea and air forces as war potential, but may possess some other types of land, sea and air forces. In other words, what is abandoned is "war potential" and nothing else.[15]

This significant move by Whitney was intentionally conducted. Whitney and his colleagues were concerned that the wording of MacArthur's Note might create the impression that Japan would not possess even the means to exercise the right of self-defense in spite of the framework of international law. For Whitney and his colleagues, such a constitutional provision would be impossible and even harmful to maintain. So, he sought to condition what was to be abandoned in order not to abandon the means required for international law.

This measure taken by Whitney secured the logical bridge between Paragraph 1 and Paragraph 2 of Article 9. Paragraph 1 confirms that "war" is illegal and prohibited. If so, the means to conduct "war" will never be possessed. On the other hand, the possession of the means to exercise the right of self-defense as part of the legitimate framework of international law is allowed. "War potential" is the potential to conduct an illegal act in international law, "war as a sovereign right of the nation", and no other thing, thus, it will not be "maintained".

It is true that Paragraph 2 was a provision for disarmament. The dissolution of the Imperial Japan's Forces had not been completed at the time of drafting the Constitution. The final order from GHQ to dissolve the Royal Palace Guards was made in march 1946 after the drafting of the Constitution. The disarmament of the Imperial Japan's Forces was the action required by the Potsdam Declaration to which the government of Japan was formally committed. But it would make sense if the Constitution provides a solid legal ground for disarmament in domestic law. The

[15] 佐藤達夫『日本国憲法成立史』第 3 巻（補訂）（有斐閣、1994年）、20-21頁。

Japanese Imperial Forces were "war potential" as regards their past actions against international law. In theory, this does not mean that Japan is not able to create a "*non*-war-potential" new military function to exercise the right of self-defense in the future. "War potential" will not be "maintained" as an illegal possession. But a legal organ can legally be created.

The Atlantic Charter of 1941 proclaimed by Winston Churchill, Prime Minister of Great Britain and Franklin D. Roosevelt, President of the United States stated that both of them;

> believe that all of the nations of the world, for realistic as well as spiritual reasons, must come to the abandonment of the use of force. Since no future peace can be maintained if land, sea, or air armaments continue to be employed by nations which threaten, or may threaten, aggression outside of their frontiers, they believe, pending the establishment of a wider and permanent system of general security, that the disarmament of such nations is essential. They will likewise aid and encourage all other practicable measures which will lighten for peace-loving peoples the crushing burden of armaments.

The disarmament of the Imperial Japan's Forces was inevitable due to the logic derived from the time of the Atlantic Charter. But the disarmament was to be terminated "pending the establishment of a wider and permanent system of general security". This means that disarmament would no longer be required once Japan is committed to the framework of contemporary international law and a new military component is only to take action in accordance with contemporary international law.

The concept of "war potential" was introduced to illustrate this logic to distinguish between outlawed "war as a sovereign right of the nation" against international law and the legal exercise of the right of self-defense within international law. In spite of intuitional insistence by Japanese constitutional lawyers, the Constitution only prohibited possession of "war potential" against international law, but did not prohibit any other things within the framework of contemporary international law.

7. The Critical Understanding of "the Right of Belligerency of the State" in Article 9 (2)

The other controversial issue in Article 9 (2) is its reference to "the right of belligerency of the state". Ashibe insists that "the right of belligerency of the state" means the right of a belligerent state permitted by international law.[16] But this insistence by Ashibe does not have any legal

[16] 芦部『憲法』、67頁。

ground. There is no such a concept as the "right of belligerency of the state" in international law.[17] Ashibe's insistence is merely an imagination. Rights of a belligerent state might have existed in the period of European international law before the 20th century. It can be said that there exist rights and duties of belligerents regulated by international law. But in contemporary international law both *jus ad bellum* and *jus in bello* do not have room for special rights of a state for belligerency. There is no such a thing as "the right of belligerency of the state".

Instead of developing imaginations about non-existent right, we should pay attention to the fact that the Constitution does not abandon "the right of belligerency of the state," as Ashibe and other Japanese constitutional lawyers might have misunderstood; the Constitution does *not recognize* it. We do not lose anything by refusing to recognize something that does not exist. Non-recognition of non-existent right does not deprive anything from Japan. No other state is equipped with the non-existent right. Article 9 (2) is a provision to declare that the Japan refuses to recognize a right that does not exist in international law. The intention of the Constitution is opposite to the imaginary insistence of Japanese constitutional lawyers.

It was the MacArthur Note which suggested that the Constitution should declare that it would not recognize "the right of belligerency of the state". It is said that Whitney and his colleagues did not understand what MacArthur referred to as such a right. But they did not oppose to the insertion of the declaration of non-recognition of the right, since nothing is lost even if the Constitution does not recognize a right that does not exist.

Why did MacArthur want the Constitution to declare it would never recognize the right which does not exist? There is no record of his own explanation, but the circumstance is very clear. MacArthur wanted to draft the Constitution to prevent Imperial Japan from arising again. The non-existent right which was claimed to be existent by Imperial Japan to justify its action to violate international law must be clearly declared to be non-existent. Such a declaration of non-recognition of a dangerous non-existent right would have special importance in preventing Imperial Japan from re-appearing.

Lawyers on war-time international law during WWII in Japan such as Junpei Shinobu and Kazuo Matsubara actually used the concept of "the right of belligerency of the state". According to Shinobu, who published an award-receiving manual on war-time international law in 1943 to be used by the Imperial Japanese Military, wrote that "the sovereign state has the right to have a war with another state". He called it the right of belligerency (*kosenken*)". According to Shinobu, "the procedure of the declaration of war is determined by appropriate exercise of this right of belligerency". Shinobu justified this problematic right by writing that "the nature of this right is

[17] 前原光雄「交戦権の放棄」『国際法外交雑誌』第51巻第２号（1952年）、筒井若水「日本国憲法における『国の交戦権』－国際法の現状との関連における解釈－」寺沢一（他編）『国際法学の再構築』（上）（東京大学出版会、1977年）所収、松山健二「憲法第９条の交戦権否認規定と国際法上の交戦権」『レファレンス』2012年11月、石本泰夫「交戦権と戦時国際法－政府答弁の検討」『国際法の構造転換』（有信堂高文社、1998年）所収。

rooted in domestic constitutional law and it is outside of jurisdiction of international law".[18] It is evident that Shinobu referred to the sovereign prerogatives of the Emperor embodied in the Meiji Constitution of the Empire of Japan of 1889. The sovereign right of the Emperor was used for war-time military leaders to justify their military rule during the war. Shinobu not only supported the problematic military rule in war-time Japan that oppressed democratic movements, but also sought to justify actions of Imperial Japan including the surprise attack against the US in the name of "the right of belligerency of the state". According to Shinobu, even if the right of belligerency is derived from domestic constitutional law, it is claimed to be valid in international law. As early as 1928, Shinobu made a commentary to the Kollogg-Brian Pact with the statement that the state could resort to "defensive war" before being attacked, if its vital interest was at stake.[19]

It is likely that MacArthur knew this type of justification of war-time actions by Imperial Japan, as he was the Supreme Commander of Allied Forces in the Southwest Pacific Area (SWPA) during WWII. It is very natural that the Supreme Commander wanted to repudiate the validity of such a non-international law concept as "the right belligerency of the state" through the provision of the new Constitution.

Kisaburo Yokota, international lawyer at Tokyo University, who was harrassed by war-time military leaders during the war due to his accusation of illegal actions by Imperial Japan, wrote in 1948 that the sea-change in international law was the repudiation of the right of belligerency to the states that started illegal wars.[20] As Yokota correctly remarked, it was international law which repudiated the claim by Imperial Japan on the right of belligerency of the state. Then, the Constitution of Japan, for the purpose of proclaiming Japan's allegiance to contemporary international law, declared that it would never recognize the right which does not exist in contemporary international law.

In short, Article 9 (2) of the Constitution clarified Japan's willingness to comply with international law, completely contrary to the groundless claim by Japanese constitutional lawyers. Ashibe and other Japanese constitutional lawyers not only misunderstood the purpose of the Constitution, but also attempted to destroy the fundamental nature of the Constitution of Japan due their commitment to ideological pacifism.

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[18] 松原一雄『国際法要義』(有斐閣、1942年)、331頁。信夫淳平『戦時国際法講義　第一巻』(丸善株式会社、1941年)、368頁、信夫淳平『戦時国際法提要上巻』(照林堂書店、1943年)、100-101頁。
[19] 信夫淳平『不戦条約論』[国際連盟協会、1928年]、13頁。日暮吉延「国際法における侵略と自衛：信夫淳平『交戦権拘束の諸条約』を読む」『鹿児島大学法学論集』45巻 2 号、2011年、32-36頁。
[20] 横田喜三郎『世界国家の問題』(同友社、1948年)、108、109、111、115頁。

8. Conclusion

This essay has argued that the traditional interpretation of Article 9 by Japanese constitutional lawyers has no legal ground and is based upon imaginations of some senior influential figures. The reason why they fell into such a trap can be found in their strong political commitment to the ideologically motivated standpoint as well as academic commitments to the conceptual framework of Prussian State Theory. The sound interpretation of Article 9 in line with relevant international law as well as the purpose of the drafters and others who were involved in the formation of the Constitution shows that Article 9 together with other parts in the Constitution like the Preamble is the attempt to make Japan a country that complies with international law. Contrary to the claim by Japanese constitutional lawyers, the Constitution of Japan has a clear vision of making itself a peace-loving state, namely a county that respects and complies with international law.