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The Legitimation Crisis of the Japanese Constitution: Reflections on Japan's Judicial Rhetoric and its Post-WWII Constitutionalization Process

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Our article examines the issue of constitutional legitimacy in the post-WWII Japanese legal system. Our analysis proceeds from the judicial rhetoric of postwar Japan, focusing primarily on the state of judicial review and executive legislative practices throughout the Japanese postwar constitutionalization process. The aim of our rhetorical analysis is to identify the main points of discursive tensions as manifested in Japanese judiciary and legislative norms. Although the postwar Japanese constitution provides a judicial review process and separation of powers like its American counterpart, their implementation is constrained by the legislative usurpation of the executive branch and judicial passivity of the Japanese Supreme Court. Whereas the written language in the postwar Japanese constitution adheres to the prevailing transnational dóxa for a democratic rule-of-law society, we find many key constitutional elements are not internationalized within the operational modality of Japanese judicial rhetoric.

Keywords: constitutionalization, Japanese Constitution, judicial rhetoric, legitimation, postwar Japan

Catchphrases such as "constitutional revision (*kenpō kaisei* / 憲法改正)", and "*goken* (護憲, lit. protecting the constitution)" have become commonplace in Japanese news media since the onset of the still-ongoing Article 9 revision debate. Yet, there is a general lack of substantive understanding of these terms, on both the official and the public level. The persistent judicial passivity of the post-WWII Japanese Supreme Court raises fundamental questions about the rule of law discourse and constitutional legitimacy in the contemporary Japanese system.

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Our paper examines the issue of Japanese constitutional legitimacy from a rhetorical angle, identifying the gap between the written constitution and unwritten practices in Japanese judicial process. In contrast with formal legal analysis, rhetorical scholarship on law and constitutionalism tends to focus on the more tacit ideological basis of legal frameworks and their *in-situ* message-audience dynamics. Representative early works in this area include James Boyd White's heuristic approach to legal study with rhetorical and theological concepts, as well as the essay on the constitutive rhetoric in the *Peuple Québécois* by Maurice Charland.[2] Given its emphasis on effective operation rather than the formal mechanics of legal practices, the rhetorical approach also responds well to the study of transnational jurisprudence. This has been well-demonstrated in the critical interventions by Marouf Hasian on transnational human rights rhetoric.[3] Nonetheless, perhaps owing to Anglo-American common law traditions, extant scholarship on judicial rhetoric still tends to focus on the close readings of specific cases and court decisions.[4] Given the predominant authority of common law courts to establish binding precedents under the *stare decisis* principle, traditional investigative impulse of judicial rhetoric stems from the narratives and argumentative devices of individual justices.[5]

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[2] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *The University- of Chicago Law Review 52*, no.3 (1985): 684-702. *See also,* Maurice Charland, "Constitutive Rhetoric: The Case of the *Peuple Québécois*," *The Quarterly Journal of Speech 73* (1987): 133-150.

[3] Marouf Hasian, Jr., "Domesticated Abolitionism, the 'Human Cargo" of Zong, and the British Legal Usage of Dehumanizing Rhetoric, 1783-1807," *Western Journal of Communication 76*, no.5 (2012): 503-519.

[4] *See, e.g.* Clarke Rountree, *Judging the supreme court: Constructions of motives in bush v. gore*. (East Lansing: Michigan State University Press, 2007); Dotan Yoav, "Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the "Intifada"," *Law and Society Review* 33, no. 2 (1999): 319-363; Annette Nierobisz, "Wrestling with the new economy: Judicial Rhetoric in Canadian Wrongful Dismissal Claims" *Law & Social Inquiry 35*, no. 2 (2010): 403-49; Dave Tell and Eric Carl Miller, "Rhetoric, Rationality, and Judicial Activism: The Case of Hillary Goodridge v. Department of Public Health," *Advances in the History of Rhetoric 15*, no. 2 (2012): 185-203.

[5] *See, e.g.* Rountree, *Judging the supreme court*, where Rountree argues that we must understand "judicial motives" of judges in order to fully understand the case. Also, Gwen C. Mathewson argues,

> "This paper examines the functions of narrative within legal argumentation. My purposes are these: 1) to repudiate common assumptions that differentiate 'argumentation' and 'storytelling' in the law; 2) to begin to theorize anew how legal argumentation functions; 3) to explore the difficulties of evaluating the law's argumentative narratives; and 4) to trace some of the anxiety that judges themselves reveal about their roles as storytellers." Gwen C. Mathewson, "'Outdoing Lewis Carroll': Judicial rhetoric and acceptable fictions" *Argumentation 12* , no.2 (1988): 233.

See also, Greig Henderson, "The Cost of Persuasion: Figure, Story, and Eloquence in the Rhetoric of Judicial Discourse," *University of Toronto Quarterly 75*, no. 4 (2006): 905-24. He claims that one should consider

The traditional textual interpretative approach is also insufficient when analyzing Japanese judicial rhetoric. The fact that many of the narrative nuances and argumentation subtleties are likely to be lost-in-translation notwithstanding, it is also important to remember that judicial rhetoric in Japan does not follow common law logic. The Japanese legal system, like in most countries outside of the Anglo-American sphere, belongs to the broadly defined *civil law* tradition where judges lack the common law authority to establish binding precedents. Thus, our paper will draw upon the legal concept of constitutionalization with analytical focus on the macroscopic rhetorical patterns of Japanese constitutional practice. Specifically, we are looking into the relationship between constitutional norms and judicial habits in postwar Japan.

Our analysis begins with the historical overview of the present-day Japanese constitutional framework, to highlight representative historical debates that place in the foreground tension points that remain in present-day Japanese constitutional discourse. The historical discussion situates the development of the Japanese constitution within the exigence of the post-WWII reconstruction of Japan and examines divergent constitutional rhetoric(s) in both U.S. and Japan during the early drafting stages of the constitution.

Following the historical overview, our discussion proceeds with a review of key legal and rhetorical concepts our analysis draws upon. The theoretical discussion section focuses on the concept of the constitutionalization process and explains its importance in helping us understand the effort to rebuild and transform the postwar Japanese legal system. Studying constitutional legitimacy vis-a-vis the concept of constitutionalization involves looking into both *form* and *practice* of judicial rhetoric and tracing the fault lines between transnational legal norms and their local practices. This rhetorical approach contrasts with formal legal analysis in that it focuses on the tacit knowledge-performance of the constitution as well as its operating modality (or *pistis*) of judicial persuasion in relation to its local audience.

"...judgments as narratives and examines the relationship between what might be called human story – the concrete narrative of who did what to whom, where, when, how, and why – and legal story – the abstract narrative of issue, fact, law, and conclusion" (905).

Following the theoretical discussion, our analysis moves closer to the constitutional text and practices in postwar Japan and presents closer readings of key rhetorical moments. By contrasting postwar Japanese constitutional habitus against the backdrop of transnationally established popular notions (or *dóxa*) on constitutional legitimacy, our analysis interrogates the inner contradictions between form and practice of the postwar Japanese constitutional system. The analysis here will keep a close eye on the state of judicial review in postwar Japan, and distill a comparative model visualizing the gap between constitutional form and practice. Our analysis finds that while the postwar Japanese constitution was drafted in a language that adheres to the prevailing transnational *dóxa* of democratic constitutionalism, many key elements of its written constitution such as the judicial review and checks and balances have not been internationalized within the operational modality (or *pistis*) of Japanese judicial rhetoric.

Historical Context

Japan, like the vast majority of modern states after the 19th century, has adopted a written constitution.[6] Like the majority of modern states, the legitimacy of the Japanese government and governmental action is assumed to be judged by their conformity to the provisions of that document.[7] At the same time, the first written Japanese constitution introduced in 1889, commonly known as the Meiji Constitution, was founded on the basis of traditional monarchical principles, organized under the exclusive leadership of the God-Emperor.[8] Chapter 1 of the Meiji Constitution vested both legislative and executive power in the Emperor, and the constitution does not provide any judicial review process.[9] The government under the Meiji Constitution was marked by the absence of a Western-style multi-party system, and substantive political power was in the hands of oligarchs from former feudal clans.

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[6] *See, e.g.,* Zachery Elkins et al., The Endurance of National Constitutions 36-64 (2009);
see also, generally, Henc Van Maarseveen & Ger Van Der Tang, Written Constitutions: A Computerized Comparative Study (1978).
[7] Larry Catá Backer and Keren Wang, "State and Party in the Scientific Development of a Legitimate Rule of Law Constitutional System in China: The Example of Laojiao and Shuanggui" (2013): 3-4. Available at SSRN: http://ssrn.com/abstract=2273044.
[8] The National Diet Library, "Constitution of the Empire of Japan (1889)," https://www.ndl.go.jp/constitution/e/etc/c02.html (accessed December 1, 2020).
[9] *Ibid.*

The current Constitution of Japan (日本国憲法 *Nihon-Koku Kenpō*) was introduced on November 3, 1946 and came into effect on May 3, 1947.[10] It is also known as the "postwar constitution (戦後憲法 *Sengo-Kenpō*)" and sometimes "peace constitution" (平和憲法 *Heiwa-Kenpō*), in part to differentiate it from the prewar Meiji Constitution, but also as a rhetorical response to the historical exigency that directly led to its creation – the unconditional surrender and Allied occupation of Japan in the aftermath of WWII. The post-WWII Japanese constitution marked a fundamental shift of the locus of national sovereign power away from the rule of the military oligarchy, and towards a multiparty representative democratic framework with separative executive, legislative and judiciary branches. Nonetheless, significant gaps between the written law and *de facto* political practice still persist in the contemporary Japanese constitutional order, especially in areas of separation of powers and judicial review.

Formal discussions of the postwar constitutional transformation of Japan were already underway before the end of WWII. Joseph Grew, then U.S. Under Secretary of State, had already voiced tentative plans for postwar Japan during the height of the Pacific theater. In his public address in Chicago, December 29, 1943, Secretary Grew expressed harsh criticisms on what he called the "fraudulent Constitution" of Japan:

> I think we should bear in mind an important historical fact. The attempt in Japan to erect a free parliamentary system was a grim failure. That attempt was bound to fail because Japan's archaic policy ruled out any possibility of parties dividing over basic political problems which are elsewhere resolved by parliamentary processes. So long as the constitution fixed sovereignty in the Emperor, it was impossible for any party to come forward with the doctrine that sovereignty resided in the people or for another party - in the absence of any such issue - to deny that doctrine.[11]

[10] The Constitution of Japan, The National Diet Library, https://www.ndl.go.jp/constitution/e/etc/c01.html (accessed December 1, 2020).
[11] Joseph Grew, "Address at the Annual Banquet Celebrating the 90th Anniversary of the Illinois Education Association, Chicago, Illinois, at 8:00 p.m., December 29, 1943," The National Diet Library, https://www.ndl.go.jp/constitution/e/shiryo/01/003/003_001r.html (accessed December 1, 2020.)

In addition to dismissing the legitimacy of the Meiji Constitution, Grow also outlined a vision for democratizing Japan after the War:

> When certain constitutional changes are made and the Japanese are given adequate time to build up a parliamentary tradition, Japan will then, for the first time, have an opportunity to make the party system work... ...We are laying the foundations of a new order which we conceive to be suited to the modern world in which we live. The riches of the earth will be freely and fairly open to all nations, and the primitive or backward or simply weak peoples will have the protection of an authority representing civilized humanity instead of being left to the chance that may give them a mild or a harsh taskmaster.[12]

Grow's remarks not only foreshadowed the extensive U.S. involvement in the postwar constitutionalization of Japan, but also highlighted those transnational aspirations of his institutional reconstruction plan.

On July 26, 1945, the United States, the United Kingdom, and the Republic of China collectively issued "The Proclamation Defining Terms for Japanese Surrender," commonly known as the Potsdam Declaration. Unsurprisingly, Joseph Grew, who served as the U.S. Ambassador to Japan prior to WWII, was heavily involved in the drafting of terms listed in the Potsdam Declaration. The Declaration stipulated conditions for democratic reform that are similar to the 1943 Grow proposal, that "[t]he Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established."[13] The abolishment of the Meiji Constitution and the drafting of a new Japanese Constitution thus became a historical inevitability following the unconditional surrender of Japan on September 2, 1945.

The question of constitutional legitimacy, which stems from Japan's transition from its homegrown Meiji Constitution to the postwar "U.S. exported" constitution has

[12] Grow, ""Address at the Annual Banquet Celebrating the 90th Anniversary of the Illinois Education Association," *ibid.*
[13] "Proclamation Defining Terms for Japanese Surrender, Issued, at Potsdam, July 26, 1945," The National Diet Library, http://www.ndl.go.jp/constitution/e/etc/c06.html (accessed December 1, 2020).

been one of the fundamental issues among Japanese legal scholars.[14] The question of how the transformation of the sovereignty from the God-Emperor to the people and its entailing basic principle of human rights has been primarily accounted by "the August Revolution Theory" proposed by an influential constitutional law scholar at the time of post-WWII reconstruction, Toshiyoshi Miyazawa.[15] The August Revolution theory considers that the Potsdam Declaration and the substantial effect of the surrender of Japan as an effective equivalent to a democratic revolution, which led to the postwar constitutional transformation. Miyazawa stated as follows in the article published in May 1945: "because of the defeat, Japan abandoned mysticism and adopted the principle of the people's sovereignty. Such a reform cannot be legally implemented by the Japanese government, nor by the will of the Emperor. Therefore, this reform must be regarded as a constitutional 'revolution.' ... a revolution, which cannot be carried out within the existing constitutional framework..."[16] Miyazawa employed the term "revolution" in order to explain the transformation of sovereignty. According to the August Revolution theory, the legitimacy of the new constitution relies on the normative power granted by the revolutionary reform enforced by the instrument of surrender, which was not permissible through the formal legal procedures of the Meiji Constitution. However, Kaoru Obata objects to Miyazawa's August Revolution theory, arguing that Miyazawa was forcing an unwarranted "national revolution" legitimation story arc without considering the supremacy of international law in post-WWII global system.[17]

Kihachiro Kanno presents an alternative interpretation to the events that took place in August, 1945 as the "returning of the sovereignty to the [Japanese] people," in which the postwar constitution was the appropriate response to such transfer of sovereignty under the forces of international law.[18] In a similar vein, contemporary

[14] Kaoru Obata, "Sociology of the Constitutional Transformation in Japan under the Allied Occupation: Review of "August Revolution" in the Light of International Law (in Honor of Professor Noriho URABE) (in Japanese)," *The Nagoya Journal of Law and Politics* 230 (2009): 65-97.
[15] Toshiyoshi Miyazawa 宮沢俊義, "Hachigatsu Kakumei to Kokumin Shuken Shugi" 八月革命と 国民主権主義 [The August Revolution and The People's Sovereignty], *世界文化* 1, no. 4 (1946): 64–71.
[16] *Ibid.*
[17] Obata, "Sociology of the Constitutional Transformation."
[18] Kihachiro Kanno 菅野 喜八郎, "Hachigatsu Kakumeisetsu Oboesho" 八月革命説覚書 [A Memorandum on the August Revolution theory], *東北大学法学会* 47, no.2 (1983):147-166.

constitutional law scholar Yoichi Higuchi proposes the legitimacy of the postwar constitution as a part of the "international democratic movement," thereby mapping Japanese reconstruction onto a global wave of democratic transformations that took place in the aftermath of WWII.[19] Higuchi observed that owning to the heavy U.S. involvement in the postwar reconstruction process, the post-WWII transnationally established norms of democratic constitutional governance tended to gravitate towards a preference for the protection civil political rights and due process, and separation of powers between executive, legislative and judiciary branches that are reflected in the U.S. Constitution. With regards to the relationship between the order of international law and that of local Japanese law, Kizaburo Yokota, international law scholar and the third chief justice of the Japanese Supreme Court, relies on the concept of "direct international administration" as the mechanism which established the supremacy of international law over any preexisting Japanese law during the reconstruction.[20] Yokota concludes that the requirement of the sovereignty of the people under the instrument of surrender revoked both the sovereignty of the Emperor and the Meiji Constitution.

Taking an entirely different approach from Yokota's internationalist approach, conservative legal scholar Jiro Tanaka explains the change of postwar constitutional order by emphasizing the domestic legal continuity between the Meiji and postwar Japanese constitutions.[21] Tanaka argues the legal basis of Japan's surrender came from none other than its domestic law: the instrument of surrender was *accepted* by the Showa Emperor's prerogative prescribed in the Meiji Constitution. Tanaka claims that the Emperor's constitutional prerogative to accept the ordinance includes the power to modify the accepted constitution in the future. Thus, for Tanaka, the constitutional

[19] Yōichi Higuchi 樋口陽一, *Kindai Kenpōgaku ni totte no Ronri to Kachi* 近代憲法学にとっての論理と価値 [The Theory and Value of Modern Constitutional Studies] (Tokyo: Nihon Hyōronsha,1994).
[20] Kizaburo Yokota 横田喜三郎, "Mujyōken Kokufuku to Kokutai" 無条件克服と国体 [The Unconditional Surrender and ***Kokutai***], *国際法外交雑誌* 45, no. 1=2 (1946): 15-18.
[21] Jiro Tanaka 田中二郎, "Shin Kenpō ni okeru Jyōyaku to Kokunaihō no Kankei—Kokunaihō teki Kō satsu" 新憲法における条約と国内法の関係—国内法的考察 [The Relationship between Treaties under the New Constitution and Domestic Laws— Consideration on Domestic Laws], *日本管理法令研究* 24 (1948): 32-35.

change can be explained logically by the Emperor's prerogative, which was issued during the state of emergency.

The formal effort to promote the newly adopted postwar constitution to its domestic audience was launched in October 1945 at the Committee to Study Constitutional Problems, established upon the request of Gen. Douglas MacArthur and was led by Joji Matsumoto, a legal scholar and pre-war cabinet minister. Without fully understanding the political consequences of unconditional surrender and international influence of democratic constitutionalism, the Matsumoto Committee's first draft was a simple revision of Meiji Constitution with the fundamental principle remaining, the Emperor as the sovereign power and Japan as an imperial monarchy, slightly strengthening the protection of the civil rights and granting limited legislative powers to the parliament.[22] In addition to the Matsumoto draft, other liberal members of the Committee led by Yasuzou Suzuki and Iwasaburo Takano also submitted their alternative draft constitution in December 26th, 1945 to the government.[23] The Suzuki-Takano draft was considered most democratic among drafts by domestic Japanese constitutional scholars, and had much in common with the new constitution such as the sovereignty of the people, the symbolic position of the emperor, and the strong protection of civil-political rights except the article of the renouncement of warfare and military.

The Suzuki-Takano draft drew positive attention from the Supreme Commander for the Allied Powers (SCAP), particularly of Lieutenant Colonel Milo Rowell. Rowell commented on the draft as being "outstandingly liberal" and

[22] The National Diet Library, "2-4 Joji Matsumoto's "Four-Point Principle for Constitutional Reform," December 8, 1945," http://www.ndl.go.jp/constitution/e/shiryo/02/047shoshi.html (accessed December 1 2020).

"Matsumoto's four point principle included: 1. Maintaining the sovereignty of the Emperor, 2. Expanding the powers of the Diet, 3. Expanding the responsibilities of Ministers of State to the Diet, 4. Strengthening protections of the people's rights and liberties."

[23] The National Diet Library, "2-16 Constitution Investigation Association, "Outline of Constitution Draft," December 26, 1945," http://www.ndl.go.jp/constitution/e/shiryo/02/052shoshi.html (accessed December 1 2020).

"democratic and acceptable."[24] However, the Matsumoto draft became the sole official draft produced by the Committee due to Matsumoto's personal political influence. Due to its similarity to the prewar Meiji Constitution, Brigadier General Whitney, Chief of Government Section of the SCAP reportedly told MacArthur that the draft was "extremely conservative" in terms of unchanged status of the Emperor, and that a more genuine constitutional revision must be undertaken in order to "comply in good faith with the Potsdam Declaration."[25] The Matsumoto Committee attempted to resubmit a revised draft upon learning its negative reception by the SCAP. On February 1st, 1946, a revised draft titled "Constitutional Problems Investigation Committee Draft Proposal" was published in the newspaper *Mainichi Shimbun*. The revised proposal was known as "Miyazawa Draft A," which was written primarily by Toshiyoshi Miyazawa, who was the author of the "August Revolution theory" of postwar constitutional legitimacy discussed hereinabove and was considered a relatively liberal scholar within the Matsumoto Committee. Nonetheless, "Miyazawa Draft A" still clenched onto the notion of the Emperor's sovereignty and was ill-received by the SCAP as well as by numerous Japanese legal scholars.[26] Matsumoto Committee's furtive attempts to produce a homegrown postwar constitution also marked the end of substantive involvement by Japanese domestic legal scholars in its postwar constitution draft process. Under the order of Gen. MacArthur on Feb 3rd, 1946, the SCAP launched its own postwar constitution committee under the following guidelines are known as the "MacArthur's Three Basic Points:"

I. Emperor is at the head of the state. His succession is dynastic. His duties and powers will be exercised in accordance with the Constitution and responsive to the basic will of the people as provided therein.

[24] The National Diet Library, "3-6 Rowell "Comments on Constitutional revision proposed by private group," January 11, 1946," http://www.ndl.go.jp/constitution/e/shiryo/03/060shoshi.html (accessed December 1, 2020,).
[25] The National Diet Library, "3-9 Whitney's Memorandum Regarding the Mainichi article, "Constitutional Problems Investigation Committee Draft Proposal," February 2, 1946," accessed December 1, 2020, http://www.ndl.go.jp/constitution/shiryo/03/071shoshi.html.
[26] The National Diet Library, "3-8 Article from the Mainichi Shimbun, "Constitutional Problems Investigation Committee Draft Proposal," February 1, 1946," http://www.ndl.go.jp/constitution/e/shiryo/03/070shoshi.html (accessed December 1, 2020).

II. 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 defence and its protection. No Japanese Army, Navy, or Air Force will ever be authorized and no rights of belligerency will ever be conferred upon anti-Japanese force.

III. The feudal system of Japan will cease/ No rights of peerage except those of the Imperial family will extend beyond the lives of those now existent. No patent of nobility will from this time forth embody within itself any National or Civic power of government. [27]

The first basic point materialized as Chapter 1 of the finalized 1946 draft of the Constitution of Japan, which strips the Imperial Throne of all judiciary, executive and legislative powers, and limited the role of the Emperor to purely ceremonial and symbolic functions.[28] Chapters 4 to 6 further outlines roles and duties of the legislative, executive and judiciary branches of the Japanese government, and follows a checks and balances framework nearly identical to that of the U.S Constitution. The second basic point became the famous Article 9 of the Japanese Constitution, which declares "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."[29] The third basic point targets the hereditary military oligarchy of the prewar Japan, and was coded into Article 14 of the Japanese Constitution, which abolishes al peerage and prohibits extending "award of honor, decoration or any distinction" beyond the lifetime of individual who may receive it.[30]

Whereas the written language in the 1946 draft of the Japanese Constitution adheres to the expectations of the SCAP and to the transnational aspirations of the U.S. led postwar institutional reforms, we find many key elements of the postwar Japanese Constitution have never became internationalized within the operational modality (or *pistis*) of Japanese judicial

[27] The National Diet Library, "3-10 MacArthur Notes (MacArthur's Three Basic Points), February 3, 1946," http://www.ndl.go.jp/constitution/e/shiryo/03/072shoshi.html (accessed December 1, 2020).
[28] The Constitution of Japan, articles 1-8.
[29] The Constitution of Japan, article 9.
[30] The Constitution of Japanese, Article 14:

rhetoric. In the next section, we will look into the process of constitutionalization and explore main rhetorical tensions in Japan's postwar constitutional implementation.

The Japanese Constitutionalization Process

Long before the modern conceptualization of constitutionalism, the principle of organizing a political community around a shared moral rule-framework had already been articulated in Judaic biblical texts – most notably in the narratives of *Pentateuch* covering the introduction of the Ten Commandments vis-a-vis the stone tablets to the substantive implementation of those divine mandates in the book of *Deuteronomy*.[31] Similarly, the Code of Hammurabi from circa. 1760 BCE presents one of the earliest examples where stone-carved laws were presented to the public by the ruler, binding the acts of both the ruler and the people under the same set of collectively held rules. There are also rich traditions of Islamic law and Chinese legalism that embraced a governing principle of the supremacy of law.[32]

The shared modes of persuasion between religion and law rhetoric has been well noted in rhetorical scholarship, most famously in the writings of Kenneth Burke. Burke observes in his *Rhetoric of Religion* that the rhetoric of religion is situated within the *logology* of human language and politics.[33] Both religious communities and secular rule-of-law societies are organized around similar operating principles. Their proper functioning is dependent on two conditions: The first is the "good faith" of the commons – that personal ego and habits are restrained under a self-referencing set of collective core values and beliefs. The second condition is the "repetition of rituals" – those shared core values maintained via enforcing laws that reflect the material condition and pressing needs of the community. The authority of both the ecclesiastical

[31] Pentateuch here refers to the first five books of the Hebrew bible: *Bereshit* (Genesis), *Shemot* (Exodus), *Vayikra* (Leviticus), *Vamidbar* (Numbers) *and D'varim* (Deuteronomy). For additional information, *see* Interlinear Pentateuch at: https://sites.google.com/site/interlinearpentateuch
[32] United Nations Rule of Law, "What is the rule of law," http://www.unrol.org/article.aspx?article_id=3 (accessed December 1, 2020).
[33] Kenneth Burke, *The Rhetoric of Religion: Studies in Logology* (Boston: Beacon Press, 1961), 7–29.

body and the constitutional state are bound by their laws precisely because the laws themselves reflect the set of basic principles that the authority organizes itself upon.

Political communities are organized around rules and procedures to help negotiate tensions among competing interests; these rules are often formalized into laws on the one hand and internalized as tacit truth-framework regulating everyday communal transactions on the other hand. On the most basic level, the phrase "the rule of law" simply stands in contrast with "the rule of personal will".[34] The supremacy of the constitution, divine or man-made, implies that these collectively maintained legitimation framework within a local community, or constitutional *pistis,* cannot be inferior to the arbitrary rule of an individual or factions within the community.[35]

In the context of constitutionalism, its *pistis* can be understood as the operating rhetorical modality that gives legitimacy to constitutional institutions in relation to its local audience. The constitutional framework organizes the subjects under a unified political *ecclesia* (community sharing a common-faith), in which the totemic field of habitus (or consubstantiality) is provided, which automatically implies certain role expectations and power-relations.[36] Furthermore, the constitutional *pistis* of a given locality does not operate in a vacuum, especially given the transnational proliferation of democratic constitutional norms in the aftermath of WWII. Instead, it operates in relation to the broader principles and popular consensus – the *dóxa* – concerning the rule of the law under a constitutional democracy. The broader rule of law *dóxa* consecrated (or contradicted) by the judicial *pistis* of the state may manifest in diverse forms, such as papal decrees, imperial edicts, executive orders, legislative statutes, and, of course, court opinions.[37]

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[34] Aristotle, *Politics, Book 3-16*: "And the rule of the law, it is argued, is preferable to that of any individual," http://classics.mit.edu/Aristotle/politics.3.three.html (accessed December 1, 2020).

[35] The use of the term *pistis* (Πίστις) here draws from the general definition of the word as "the state of mind produced in the audience." *See* William M. Grimaldi, "A Note on the Pisteis in Aristotle's Rhetoric, 1354-1356," *The American Journal of Philology* 78, no. 2 (1957), 188-192. It is not to be confused with the more constrained use of *pistic* in rhetoric referring specifically three classical modes of persuasion (*ethos, pathos, logos*).

[36] For additional info on the rhetorical concept of consubstantiality, *see* Kenneth Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1969), 29-30 & 110-112.

[37] *See* Pierre Bourdieu, *Outline of a Theory of Practice,* trans. Richard Nice (Cambridge: Cambridge University Press, 1977), 164: "when there is a quasi-perfect correspondence between the objective order and

Whereas various expressions of the rule of law throughout history may have emerged out of similar social necessities, the modern discourse on the rule of law is heavily grounded in the formal relationship between the law and the state, namely the *Rechtsstaat* ("law-state"), where the state (*Staat*) is organized within a constitutional framework that is consistent with internationally recognized governing norms, and serves the rights (*Rechte*) and prerogatives of its citizens.[38] Constitutional democracy thus has become the cornerstone for contemporary global discourse on the rule of law.[39]

This paper focuses its analysis on one understudied dynamic of contemporary Japanese legal order – its constitutionalization process.[40] The concept of constitutionalization contrasts from legal formalist understanding of constitution in the way that it focuses on the "unwritten" assumptions and practices underpinning the written law. It implies that the substantive functioning of the written constitution requires corresponding tacitly embedded societal knowledge that shape and regulate the discursive space of political contestation. Constitutionalization refers to the process in which constitutional principles are internalized as tacit socio-political norms, thereby

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subjective principles or organization, the natural and social world appears as self-evident. This experience we shall call *dóxa.*"

[38] *See* "Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (2004)," http://www.unrol.org/doc.aspx?n=2004%20report.pdf (accessed December 1, 2020). The Secretary-General defines the rule of law as:

> "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

[39] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy," *Southern California Law Review 74* (2000): 1307-52.

[40] For detailed discussion on the legal concept of constitutionalization, *see,* Larry Catá Backer, "The concept of constitutionalization and the multi-corporate enterprise in the 21st century - the body corporate from incarnation to ensoulment to ministry (but whose?)," in *Multinationals and the Constitutionalization of the World Power System*, ed. Jean-Philippe Robé et al. (New York: Routledge, 2018):170-192; Jayne Ellis, "Constitutionalization of Nongovernmental Certification Programs," *Indiana Journal of Global Legal Studies 20*, no.2 (2013):1035-59.

See also, Larry Catá Backer, "Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System," *Boston University International Law Journal 30* (2012): 331-408.

constraining state actions under a common self-referencing rule-framework.[41] To be considered as fully legitimate, the constitutional framework must be internally binding and equally enforced, while externally conforming to the prevailing transnational standards on the rule of law.

The analysis of the constitutionalization process involves zeroing in on the complementary relations between those explicit symbolic expressions and tacitly embedded beliefs. The analysis of the tacit dimension, on the other hand, primarily focuses on the development of societal legal consciousness and practices that confirms those written constitutional principles. Regarding any given democratic constitutional system, it follows that the presumption of its formal legitimacy does not necessarily translate into corresponding legitimate judicial practices on the ground. In our study, we find that post-WWII transnational *dóxa* concerning democratic (as broadly shared understandings on the basic characteristics of a legitimate constitutional democracy, e.g. the protection of civil-political rights and due process, and separation of legislative, judicial and executive powers with checks and balances) often finds itself to be dissonant against the domestic Japanese constitutional *pistis* (the operating modality of judicial persuasion for its local audience).[42]

The process of constitutionalization can be roughly divided into three phases: it begins with the *incarnation* of an autonomous constitutional body, followed by the *ensoulment* of transnational normative standards. And the process completes with the formation of a constitutional *ecclesia,* where state institutions and societal values are harmonized under a common rule-framework.

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[41] *See, e.g.*, Gunther Teubner, "Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?" in *Constitutionalism And Transnational Governance*, ed. Christian Joerges et al. (Oxford: Oxford University Press, 2004) 3-28.

[42] A representative summary of post-WWII transnational *dóxa* concerning democratic constitutionalism and the rule of law can be found in this 2009 Report of the UN Secretary-General: "The rule of law and transitional justice in conflict and post-conflict societies," where "[a] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

The constitutionalization phase begins with the *incarnation stage*, which is marked by the formal introduction and adoption of a constitution, thereby legally creating an autonomous, independent, and self-referencing political body. In this sense, the enactment of the Japanese Meiji Constitution on November 29, 1890 marked the *de jure* "birth" of a new constitutional monarchy. However, while the Meiji Constitution formally declares the Empire of Japan as an independent, autonomous polity in relation to other sovereign nations, it does not provide basic separations of powers, nor does it offer any substantive limitation to the executive power of the Emperor.[43] It can be said that in practice, the Meiji Constitution created an autonomous political body that is subject only to its own desires and those of its ruling class without rule-of-law limitations. Thus, the *incarnation* of Japanese constitutional monarchy vis-a-vis the Meiji Constitution merely provided the form that could serve as the basis for constitutional institutional formation, it merely provided the rudimentary precondition for the constitutionalization process to begin. Under the Meiji Constitution, Japan did enjoy a brief period of democratic advancement during the Taisho era (1912-1926), when a multi-party parliamentary government began to take shape in Japan. However, the incipient "Taisho Democracy" became quickly displaced by the rise of military hard-liners by the 1930s, and thus the Meiji Constitution ultimately failed to progress past the initial *incarnation* stage.

The second phase of the constitutionalization process can be described as the *ensoulment stage,* which represents the democratization of the constitutional framework itself. In the context of post-WWII global order, the "ensoulment" metaphor refers to a drive towards transnationally accepted norms of legitimate democratic governance – specifically liberal notions of popular sovereignty grounded on the rule of law grounded in the protection of fundamental individual rights.[44] The *ensoulment stage* of constitutionalization thus proceeds from the *dóxa*[45] (formulated

[43] *See* the discussion on the Meiji Constitution in the Introduction section above.
[44] Joseph Nye Jr, "Will the Liberal Order Survive?," *Foreign Affairs* (January/February 2017), https://www.foreignaffairs.com/articles/2016-12-12/will-liberal-order-survive (accessed December 1, 2020).
[45] Δόξᾰ (*dóxa*, formulated opinion, conjecture, philosophical *maxims*). *See, Perseus,* "δόξα." Available: http://www.perseus.tufts.edu/hopper/morph?l=do%2Fca&la=greek#Perseus:text:1999.04.0057:entry=do/ca^-contents

maxims) of the prevailing post-WWII transnational constitutionalism. It expresses in general, abstract political creeds that are recognized internationally, such as separation of powers and the equal protection of civil-political rights of citizens.[46] It is through the legal *dóxa* of transnational constitutionalism that allowed for the post-WWII proliferation of a prevailing global legal consciousness concerning constitutional legitimacy, one that would serve as the common base-standard for judging the legitimacy of a constitutional democracy.[47] When formally expressed *dóxa* of transnational constitutionalism are translated into its local multiformes, and became socially-embedded *písteis*[48] (tacit societal knowledge), it is then possible to persuade people the presence and force of the otherwise intangible constitutional principles, and compel both officials and citizens to adhere to the common constitutional platform in their everyday political life.

Whereas the *incarnation* stage formally establishes a constitutional state, the *ensoulment* stage marks the critical step towards achieving formal constitutional legitimacy. It is achieved by embracing transnationally established consensus concerning constitutional legitimacy, either via constitutional revisions or introducing an entirely new constitution. The postwar Japanese Constitution would be an example of the latter. In his announcement of a new Constitution for Japan on 6 March 1946, General MacArthur's provided an excellent summary the normative structures of

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[46] Civil-political rights (e.g. religious freedom, due-process protection,) refers to those legal protections that stem out of the traditional Western liberal conceptualization of individual *natural rights. See* "The Universal Declaration of Human Rights," Article 2:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

[47] Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems, The American Journal of Comparative Law 45*, no.1 (1997): 149-169; Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart Publishing, 2010). *See also,* Gunther Teubner, "Societal Constitutionalism: Alternatives to State-centered Constitutional Theory", *Yale Law School Sorrs Lectures* (2003), https://fhi.duke.edu/sites/default/files/Teubner,%20Societal%20constitutionalism.pdf (accessed December 1, 2020).

[48] Πίστεις, the plural nominative form of πίστις (*pístis*, good faith, personal trust). *See, Persus,* "πίστις", http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.04.0057:entry=pi/stis (accessed December 1 2020).

constitutionalism that provides the legitimating "soul" for the planned new Japanese constitution:

> Declared by its terms to be the supreme law for Japan, it places sovereignty squarely in the hands of the people. It establishes governmental authority with the predominant power vested in an elected legislature, as representative of the people, but with adequate check upon that power, as well as upon the power of the Executive and the Judiciary, to insure that no branch of government may become autocratic or arbitrary in the administration of affairs of state. It provides for and guarantees to the people's fundamental human liberties which satisfy the most exacting standards of enlightened thought. It severs for all time the shackles of feudalism and in its place raises the dignity of man under protection of the people's sovereignty...[49]

Interestingly, in addition to those already widely accepted constitutional principles listed above, General MacArthur also hinted at a rather idiosyncratic element of the new Japanese constitution: "foremost of its provisions is that which, abolishing war as a sovereign right of the nation, forever renounces the threat or use of force as a means for settling disputes with any other nation."

The third and final phase of the constitutionalization process is the *ecclesia stage.* In theology, the term *ecclesia* (ἐκκλησία, "ministry") is used for local ministries as well as in broader sense all members of a faith organized under a common religious institution (i.e. the Catholic Church). This paper borrows the theological term *ecclesia* precisely because a full-fledged constitutional society functions similarly to religious institutions – it both requires the interdependent presence of formal doctrines and practicing believers. For example, when a new local Zen Buddhist Temple is established, it must first adopt the basic form of a Buddhist institution (i.e. monastery building, monks, and formally declare the name of the temple, and its Zen Buddhist identity). This corresponds to the incarnation stage of constitutionalization. The new Temple must ensure its physical design, core mission statement, teachings, and rituals practices adhere to the commonly recognized premises of Zen Buddhism, for a failure

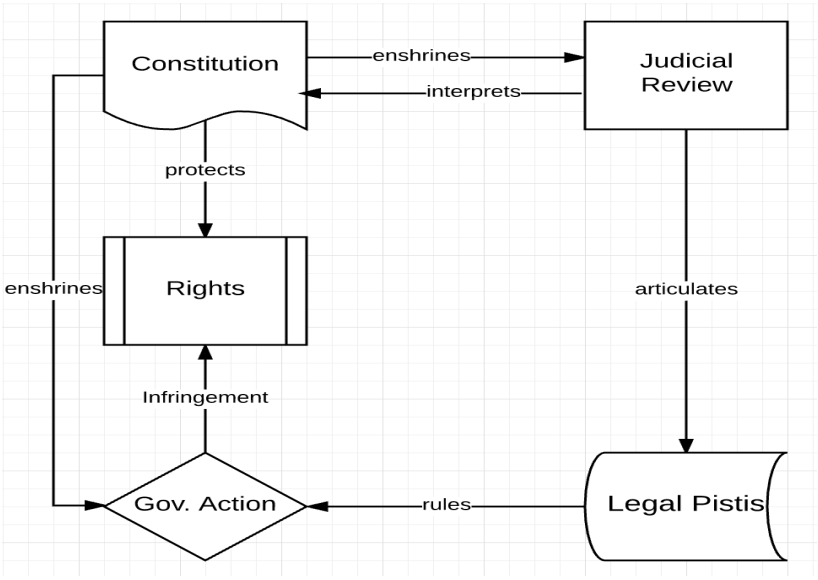
[49] National Diet Library, "General MacArthur's announcement of a new Constitution for Japan, 3rd draft, March 2, 1946," http://www.ndl.go.jp/constitution/e/shiryo/03/094a_e/094a_etx.html (accessed December 1, 2020).

to do so would result in the Zen monastery being seen as illegitimate by its peers. This precisely corresponds to the *ensoulment stage* of secular constitutionalization. Finally, even when the temple is designed and organized in ways that perfectly conforms to Zen Buddhist doctrines, it is not a functional Temple without visiting patrons and attending clerics. Similarly, constitutional institutions, however perfectly designed, cannot be considered fully functional without a corresponding community that actually believes and practices its constitution. The *ecclesia* stage thus represents the integration of constitutional *dóxa* with societal *pistis*.

The Problem of Judicial Passivity

The analysis thus far already confirms that the postwar Japanese Constitution, in terms of its formal arrangement, had completed both *incarnation* and *ensoulment* stages of institutional development. Written law and official statements only reflect the legitimacy of formal institutional design, they do not automatically imply substantive implementation of institutional design in everyday practices. In order to understand the state of *ecclesia* development of Japanese constitutional order, it is necessary to focus on the unwritten habits and norms of constitutional organs and see whether the patrons of its constitutional system actually perform in conformity to their stated doctrines. Thus, this section will focus on the *dóxa* and *pistes* of judicial review as practiced in Japan.

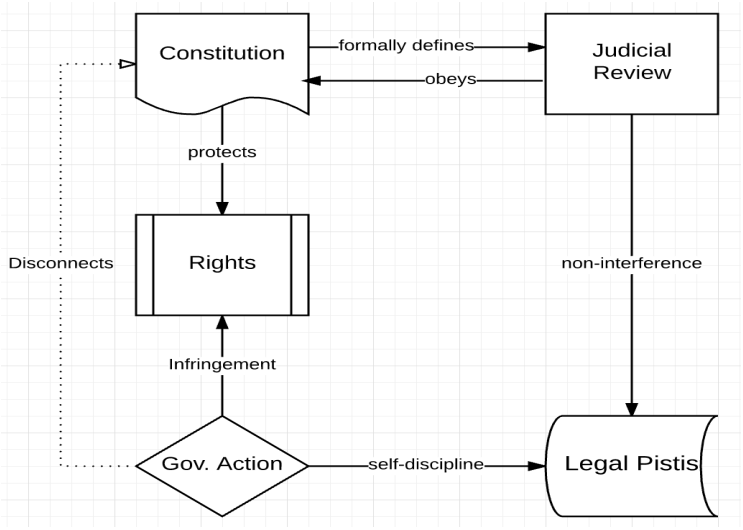
Figure 1
Formal structure of judicial review according to the Japanese Constitution



According to the Japanese Constitution, the Supreme Court of Japan (最高裁判所 *Saikō-Saibansho*), operating within its constitutionally prescribed parameters, bears the authority and responsibility to review the constitutionality of state actions. Similar to its American counterpart, the Japanese Constitution enshrines its Supreme Court the exclusive authority to act as the final interpreter of the law. Whereas the particular expressions of the constitution may be subject to interpretation (provided that such interpretation adheres to the rules prescribed by the constitution itself), the basic premise of a constitution must to be seen as sacred and incontestable in order to maintain a legitimate constitutional order. The sanctity of the constitution therefore is imputed upon the Supreme Court, providing the incontestable organizing principle of the judicial review. As the Supreme Court pronounces its ruling on the dispute brought before the court, its decision not only determines the updated meaning of the constitution, but also transforms the "petitioner" and "defendant" into "prevailing" and "losing" parties of a case concerning state actions. Thus, the Japanese Supreme Court's formal role as the "court of last resort" implies that the losing party must unconditionally acquiesce to the court's opinion. The absolute certainty, predictability and constitutional legitimacy of court-mandated sacrifice would in-turn consecrate and radicalize the dóxa of the court as "sacred opinion".

Figure 2

Japanese judicial passivism in practice



In practice, however, the Supreme Court of Japan has declared only ten cases unconstitutional since its establishment. The problem of so-called judicial passivism has been inherent in postwar Japan. Compared with Fig 1, Fig 2 illustrates an actual practice of the judicial review process in relation to the constitution and the government in Japan. Clearly seen is a substantial discrepancy between the formal constitutional *dóxa* and the legal *pistis* of judicial passivism[50]. Judicial passivism rests on the overemphasis of the separation of power. The government, through the Cabinet Legislation Bureau (CLB [内閣法制局]), self-justifies the judicial passivism in a way that does not allow the court to create constitutional "instability" or interpretation. However, as illustrated so far, the process of constitutionalization, particularly the *ecclesia* stage, needs a harmonious feedback mechanism between *dóxa* and *pistis* through which the contestation of multiple interpretations is carried out on the platform of the basic principle of the constitution. The process, in turn, produces the faith in the basic ground of the constitution. Without functional judicial review, a political community loses its abilities both to adopt historical and social contingency and to redress its organization flaws via critical self-assessment. Thus, the postwar Japanese legal system, in the process of *ensoulment*, has created its own local-legal practice of

[50] Also, the disconnection between the government and the constitution is observable from the LDP's active attempt of revising the existing constitution.

extremely passive judicial review, which has never been harmonized with the incontestable *doxes* of the constitutional principles.

Some scholars have argued that the attitude of the Supreme Court has started changing gradually since the release of an opinion paper from the Justice System Reform Council in 2001, articulating the problem of judicial passivism.[51] However, compared with counterparts in the West, the change has made little difference in ways in which substantial practices of checks and balances functions in Japan.[52] The following ten Supreme Court decisions, known as *Horei Iken* (法令違憲) cases, represent all instances throughout its seventy-five-year history of which the Japanese Supreme Court have ruled governmental actions unconstitutional. Here is the list and summery of each case:

> 1. Case Number 1970 (A) 1310 (Decision date: 1973.04.04)
> Judgment upon case of constitutionality of Article 200 of the Penal Code, which prescribe a heavier punishment for those kill their or their spouses' direct antecedents, was decided unconstitutional regarding equality under law in Article 14. [53]
> 2. Case Number 1968 (Gyo-Tsu) 120 (Date: 1975.04.30)
> Judgment upon case of constitutionality of the act to regulate location of pharmacies, where The Pharmaceutical Affairs Law (Yakuji ho, Law No. 145, 1960) was found unconstitutional regarding Article 22, the freedom to choose one's occupation.[54]
> 3. Case Number 1974 (Gyo-Tsu) 75 (Date: 1976.04.14)
> Judgment upon case of constitutionality of the provisions of the Public Offices Election Law on Election Districts and the Apportionment of Seats. The Public Offices Election Law, which allows a different weight to a vote, is ruled unconstitutional based on Article 14 which guarantees the equal right to vote.[55]
> 4. Case Number 1984 (Gyo-Tsu) 339 (Date: 1985.07.17)

[51] 横尾日出雄 [Hideo Yoko], "最高裁の違憲審査の活性化と憲法判例—最近の最高裁判決をめぐって—," *Chukyo Lawyer* 18 (2013): 101-121.
[52] For example, the German Constitutional Court disqualified more than six hundred legislative and administrative provisions as unconstitutional. See, Harald Baum, "The Role of Courts in Japan. Seen from a Comparative German Perspective," *Max Planck Private Law Research Paper* 14/6 (2014). Available at SSRN: https://ssrn.com/abstract=2435049.
[53] Supreme Court of Japan, "1970 (A) 1310."
[54] Supreme Court of Japan, "1968 (Gyo-Tsu) 120."
[55] Supreme Court of Japan, "1974 (Gyo-Tsu) 75."

Judgement against another weighted voting law nearly identical to the Public Offices Election Law from case 1974 (Gyo-Tsu) 75 above to be unconstitutional.[56]

5. Case Number Showa 59 (O) 805 (Date: 1987.04.22)
Judgment upon case of constitutionality of the provision of the Forest Act which limits the partition of one's property. Where Article 186 of the Forest Act is declared unconstitutional by violating the right to own property in Article 22 of the constitution.[57]

6. Case Number 1999 (O) 1767 (Date 2002.09.01)
The part of articles 68 and 73 of the Law on Postal Services which exempts or limits the tort liability of the state for registered mail in cases where the loss has occurred as the result of the intention or gross negligence of the postal worker is against Article 17 of the Constitution, which states that any person who has incurred a loss as the result of a tortious act of a government or local government official is entitled to compensation from the government or the local public organizations. [58]

7. Case Number 2001 (Gyo-Tsu) 82 (Date: 2005.09.14)
The Public Offices Election Law (before amendment by Law No. 47 of 1998) was in violation of Article 15(1) and (3) (right to vote), Article 43(1) (right to be represented), and the proviso of Article 44 of the Constitution for the reason that it completely precluded Japanese citizens who were residing abroad and had no address in any area of a municipality in Japan from voting in national elections at the time of the general election of members of the House of Representatives held on October 20, 1996.[59]

8. Case Number 2006 (Gyo-Tsu) 135 (Date: 2008.06.04)
Article 3, para.1 of the Nationality Act provides that a child born out of wedlock to a Japanese father and a non-Japanese mother and acknowledged by the father after birth may acquire Japanese nationality only if *the child* has acquired the status of a child born in wedlock as a result of the marriage of the parents, thereby causing a distinction in granting Japanese nationality, and in 2003, at the latest, this distinction was in violation of Article 14, para.1 of the Constitution (equality under the law).[60]

9. Case Number 2012 (Ku) 984 (Date: 2013.09.04)
The provision of the first sentence of the proviso to Article 900, item (iv) of the Civil Code, which states the share in inheritance of a child born out of wedlock shall be one half of the share in inheritance of a child

[56] Supreme Court of Japan, "1984 (Gyo-Tsu) 339."
[57] Supreme Court of Japan, "Showa 59 (O) 805."
[58] Supreme Court of Japan, "1999 (O) 1767."
[59] Supreme Court of Japan, "2001 (Gyo-Tsu) 82."
[60] Supreme Court of Japan, "2006 (Gyo-Tsu) 135."

> born in wedlock, is in violation of Article 14, paragraph (1) of the Constitution (equality under the law)[61]
> 10. Case Number 2013 (O) 1079 (Date: 2015.12.16)
> The part of the provision ot5f Article 733, paragraph (1) of the Civil Code, which prescribes the 100-days period of prohibition of women's remarriage, violates Article 14, paragraph (1) (equality under the law) and Article 24, paragraph (2) (the equal rights of husband and wife) of the Constitution.[62]

Out of the ten rare cases of judicial review, most dealt with highly technical administrative actions, which have had little impact on the larger legal order. These cases involved rescinding density restrictions for opening new drug stores, annulling tort liability for postal service for the loss of registered mail, vacating municipal restrictions prohibiting subdivided property by joint owners of forest land, and most recently, a narrow overturning of the prohibition period only for women forbidding remarriage for six months.[63] Only the two cases which repealed harsher criminal penalty for patricide than other homicides and removed unconstitutional restrictions to the right of citizenship of certain "illegitimate" children fell outside of technical administrative nature. The persistently conservative predilection of the Supreme Court of Japan and its judicial passivism are quite pronounced, considering the number of cases judged unconstitutional and the nature of these cases that are less likely to cause severe political conflict with the government.[64]

An example that manifests Japan's judicial passivism is illustrated in the idea, "the act of the ruling government (*tōchi kōi*/統治行為)." The judicial practice of the idea, "the act of the government," was used by the Supreme Court in the two cases involved with the constitutional legality of Japan's self-defense force and the US-Japan alliance treaties. In the *Sunagawa* case (砂川事件), the Court claims that the constitutional legality of the US-Japan alliance treaty is related to a highly political agenda and the foundation of the country, thus, it cannot make a decision on the issue

[61] Supreme Court of Japan, "2012 (Ku) 984."
[62] Supreme Court of Japan, "2013 (O) 1079."
[63] David S. Law, "The Anatomy of a Conservative Court: Judicial Review in Japan," *Texas Law Review* 87, no. 4 (2009): 1545-1593.
[64] Ibid., 1546.

unless the "unconstitutionality of the issue is extremely clear (一見極めて明白に違憲無効)." Upon the decision, there was the US pressure on this sensitive issue, and the discourse of the act of the government is political in nature in that the Court made its political decision not to intervene.

On the one hand, the traditional understanding of rests on both the self-restraint of the legal branch (自制説) and the institutional limit of legal branch that is not granted its power by the people (内在的制約説). On the other hand, some scholars are more reluctant to admit the act of the government for the basic purpose of check and balance. While the cases of the act of the government is an extreme example of the Supreme Court's reluctance of its involvement with significant political issues and only used in a few cases, there are some other cases that are *less* significant (in the sense that it has less relational complexities than the international and domestic political complexities of the act of the government) and Supreme Court judgments are avoided. The Court has deferred to the government in cases of the sponsorship of Shinto ceremonies by public authorities and the authority of the Ministry of Education upon the content of school textbooks. For example, in *Ienaga v. Japan* (1965–1997), a Japanese historian, Saburo Ienaga filed three lawsuits for violation of his freedom of speech against the Japanese Ministry of Education published regarding their censorship based on the School Education Law (学校教育法) among others. After two rejections of his appeal by the Supreme Court, the third lawsuit ruled that while there was a certain abuse of discretion on the part of the Ministry upon its censoring, the authorization system and its relevant laws were *constitutional*. The deferment of even less significant political issues by the Supreme Court is a clear manifestation of its passivism and overemphasis of separation of power at the cost of checks and balances.

Of many elements that can explain its passivism such as the vague legal concept of "natural-ness," the self-consciousness of judges as non-political entities, and the

structural overemphasis on executive branches in the Japanese parliamentary system,[65] the Cabinet Legislation Bureau (CLB [内閣法制局]) has played a significant role. Under the Meiji Constitution, the CLB's predecessor Legislation Bureau was founded and responsible for approving all legislative matters and was under direct control of the Emperor's Privy Council. Thus, the Legislation Bureau enjoyed direct legislative power over all other Imperial institutions during the prewar era. Although the Legislation Bureau, being fundamentally incompatible with the separation of executive and legislative powers, was a top target for removal by the Supreme Commander of the Allied Powers (SCAP), it was revived as the Cabinet Legislation Bureau soon after Japan restored in its self-governance in 1952. Unlike other departments, the CLB is constituted by the senior officials with sufficient experience on legal matters. The CLB has two formal tasks: "1) to provide opinions to the Prime Minister and the Cabinet on legal issues; and 2) to examine drafts of all bills, regulations, Cabinet orders, and treaties for consistency with the constitution and legal precedents."[66] Despite its *formally* limited power and no mention of its duties in the constitution, it substantially enjoys monopolized power to approve the authority and action of any executive organs.[67] The power of the CLB has certainly influenced the culture of judicial passivism in the Supreme Court.[68] It is also noteworthy how the executive branch self-justifies the job of the CLB as the prevention of "unnecessary chaos," rather than looking at what they call

[65] Hideo Yōko 横尾日出雄, "Saikosai no Ikenshinsa no Kasseika to Kenpohanrei" 最高裁の違憲審査の活性化と憲法判例 [Vitalizing Judicial Review and Constitutional Precedents], *Chukyo Lawyer* 18, (2013): 101-21.

[66] Richard J. Samuels, "Politics, Security Policy, and Japan's Cabinet Legislation Bureau: Who Elected These Guys, Anyway?" *JPRI Working Paper*, no. 99 (2004).

[67] Ibid,

> "No administrative agency of the Japanese state enjoys higher prestige or greater independence than the CLB. Although the CLB is formally an advisory organ within the Prime Minister's secretariat and its Director General does not vote in Cabinet meetings, he is always included on the list (and in the group photograph) when a new Cabinet is formed. Indeed, the CLB Director General is the highest paid bureaucrat in the Japanese government. The CLB operates behind a shroud of secrecy—in what has been labeled a "sanctuary." This sanctuary status has been enabled by the fact that ever since the end of the Pacific War, unlike all other Cabinet appointments, the CLB Director General has been a career official rather than a sitting Diet member."

[68] David S. Law, "Why has judicial review failed in Japan?" *Washington University Law Review* 88, no. 6 (2011): 1425-1466; Junichi Satō," Judicial Review in Japan: An Overview of the Case Law and an Examination of Trends in the Japanese Supreme Court's Constitutional Oversight," *Loy. L.A. L. Rev* 41 (2008): 603-628.

"chaos" as a necessary process of checks and balances.[69] While confirming some denial by Supreme Court justices of the CLB as the cause of judicial passivism, David. S Law argues that "the CLB has enabled [the Supreme Court] to avoid potential difficulties surrounding the interpretation and enforcement of Article 9 by bearing the brunt of political conflict that might otherwise have befallen [the Supreme Court]."[70] Thus, the task of interpretation granted with the Supreme Court particularly in the cases involved highly political issues is in practice exercised by the CLB with its *de facto* power of interpreting the constitution for the sake of the executive branch.

A Brief Conclusion

Our paper finds that the executive branch of the Japanese government continues to hold substantive legislative functions that are formally reserved for the legislative diet. Furthermore, the Japanese Supreme Court remains in a paralyzing state of judicial passivism, reluctant to exercise its judicial review authority granted by the constitution.

The issue of legitimacy has been endemic throughout the development of both Meiji-era and post-WWII Japanese constitutions. There are two main legal dilemmas at stake: the first has to do with the legitimacy of the written constitution itself. Legitimacy involves the ways in which Japanese constitutionalism fits within emerging global notions of state legitimacy—that is, whether the post-WWII Japan is a functioning constitutional state guided by the basic transnational consensus on the rule of law.[71] The

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[69] Samuels, "Politics, Security Policy, and Japan's Cabinet Legislation Bureau."

> "The Supreme Court has often declined to rule on legislation and other government action it deems 'highly political . . . (and thus) beyond the authority of the judiciary to investigate.' One former Director General defended the idea that the CLB should stand before—and perhaps even above—the courts: We often have heard such criticisms as: 'Wouldn't it be desirable to leave constitutional issues to the Supreme Court?' . . . But we have to make certain there is no violation of the Constitution each time the Cabinet implements policy or exercises authority . . . If everything were left for the Supreme Court to adjudicate after the fact, there would be a great deal of confusion. It is absolutely necessary to eliminate as many problems as possible in advance.' Another put it even more bluntly: 'Should we prevent chaos beforehand or should we settle problems in courts after the chaos arises? The former is lower in social costs.'"

[70] Law, "The Anatomy of a Conservative Court," 1545.

[71] Joseph Nye Jr, "Will the Liberal Order Survive?."

> "The liberal international order that emerged after 1945 was a loose array of multilateral institutions in which the United States provided global public goods such as freer trade and freedom of the seas and weaker states were given institutional access to the exercise of U.S. power. The Bretton Woods

second dilemma concerns the actual political and administrative practices of the Japanese government and asks whether the *de facto* articulations of governing organs conform to the *de jure* constitutional principles. Constitutional implementation implicates the way in which Japanese normative principles can constrain the practices of important political institutions including the judicial branch, especially for those pre-existing normative practices that do not strictly follow the written constitution. Looking ahead, our paper calls for further examination of the problem of constitutional legitimacy in Japanese political system, specifically focusing on the challenges and possibilities concerning the post-WWII Japanese constitution in terms of its capacity to create and maintain a self-referencing framework for the legitimate expression of the general will. Provided that the general will is expressed in ways that both adhere to the established transnational constitutionalist consensus, and also conforms to the socially embedded political norms and beliefs of the Japanese public.

This paper would like to also raise two follow-up questions: first, did the post-WWII Japanese written constitution manage to internalize into socially embedded tacit knowledge which provides a legitimizing framework for the expression of the *general will* of Japanese polity? Second, is it possible to translate the basic political functions of post-WWII Japanese political system without fundamentally displacing the established transnational consensus concerning constitutional legitimacy? This paper also calls for addressing the aforementioned problems by looking into both the legal and rhetorical dimensions of constitutional legitimacy.

The concept of constitutional legitimacy understood from the rhetorical perspective contrasts from legal formalism in the way that it focuses on the "unwritten" dynamics of constitutional assumptions and practices at both transnational and local levels. It implies that the substantive functioning of written constitutional language

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institutions were set up while the war was still in progress. When other countries proved too poor or weak to fend for themselves afterward, the Truman administration decided to break with U.S. tradition and make open-ended alliances, provide substantial aid to other countries, and deploy U.S. military forces abroad. Washington gave the United Kingdom a major loan in 1946, took responsibility for supporting pro-Western governments in Greece and Turkey in 1947, invested heavily in European recovery with the Marshall Plan in 1948, created NATO in 1949, led a military coalition to protect South Korea from invasion in 1950, and signed a new security treaty with Japan in 1960."

requires corresponding tacitly embedded societal knowledge that shape and regulate the discursive space of political contestation. The unsettled tension between the written text and unwritten practices also implies that constitutive power as the pre-disclosed, deeply embedded societal norm which bestows the constitution with the absolute sovereign authority as the self-referential rule-framework of the political community. Furthermore, the constitution provides the discursive authority, distinct and separate from the personal will, on providing the formal *rituals* to decide matters that cannot be readily resolved via habitual means.

In this regard, further analyses are necessary in order to better examine the symbolic shaping of the legal boundaries between the constitutional and extra-constitutional domains of governmental practices in Japan. The long-term goal for our line of inquiry would be to identify relevant pre-existing societal knowledge-frameworks that give rise to the explicit rhetoric concerning the Japanese constitution and examine their roles in shaping our theoretical understanding of constitutional legitimacy.