

A Democratic Solution for Japan's Fading Political Public Space: Constitutional Inquiry into Article 1

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The International Conference on Japan & Japan Studies 2016
Official Conference Proceedings

Abstract

The public space, where political life begins by citizens' participation in the matters of collective concerns, has faded considerably in postwar Japan. Building upon Hannah Arendt's work on the political public realm which she argues is sustainable so far as it has a balance between power which derives itself from freedom's temporality (human opinions and actions) and *nomos* (an ultimate authority and law) that endures in time, this paper contends that constitutional and democratic debates on Article 1 – which designates Japan's emperor as the symbol of the state – need to escalate further, given that *nomos* signification of emperor is obscured in this designation, sustaining the crisis of the balance between power and *nomos* throughout the postwar period. By taking Japan's post-World War II Constitution as a case in point, this paper highlights contra-democratic consequences which the modern state's inadequate application of secularization could bring about. It proposes the significance of relocating emperor's locus to the head of state, the relocation which may counteract the *privatized* public space of postwar Japan – where the permanence of the measures constitutive of public realm such as culture, tradition and rituals is at stake.

Keywords: Constitutional Amendment, Article 1, *Nomos*, Public Space, Arendt, Emperor, Secularization

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Introduction

It was in the early 1990s that public debate on the revisions of Japan's post-World War II Constitution were rekindled. As the Soviet Union dissolved and the Cold War was over in 1991, the first Gulf War broke out. For the first time in its postwar history, Japan was confronted with the need to think in all conscience the question of Self Defence Force's (SDF) overseas deployment and its constitutionality, in view of the country's international contribution (Ohara 2001, p. 18). As the United States-led war on terror escalated, Japan ended up with paying some \$13 billion (Williams 2006, p. 43) in exchange of providing what was then requested, 'human contribution' (Hughes 2006, p. 729). In the wake of rising new security agendas, the debate inescapably heightened on the question of the constitutionality of SDF's overseas dispatch (Ohara 2001, p. 18). Following Koizumi Junichiro's entrance into the Prime Minister's office in 2001, public discussion on the issues of constitutional amendment escalated further – particularly, concerning the peace clause of Article 9, which prohibits Japan from engaging in war and maintaining military forces.

Japan's 1947 Constitution,¹ originally created by 25 staff of GHQ's (General Headquarters) Government Section just over 6 nights (Ohara 2001, p. 26), has never been amended to date. The world's oldest Constitution, the Constitution of the United States ratified in 1788, has had 18 times of revision already; and the amendments of Germany's 1949 Bonn Constitution² have amounted to 46 times to date (Sakurai 2000, p. 12). According to the public opinion poll taken by Asahi Newspaper in May-April 2016, the percentage of respondents who favour the maintenance of Japan's 1947 Constitution is higher than those who support revision, with 55 percent of people in survey willing to keep the Constitution in its current form and 37 percent of people backing amendment (*Asahi Shinbun Digital* 2016, May 2). The gap between the amendment opposition and the pro-revision widened in the 2016 poll, given the result of the previous year being 48 percent rejecting amendment and 43 percent pro-change. In respect of controversial Article 9, 68 percent of people wish to keep the no-war clause and 27 percent pro-amendment (*Asahi Shinbun Digital* 2016, May 2). As for the revision of Article 1 which this paper examines with the aim of highlighting the public significance of designating Japan's emperor as the head of state, a public poll illustrates that disinterest in the emperor system has grown among the young generation by degrees, to whom neither affirmation nor negation is important (Ohara 1989, p. 9; Fuse 1969).³

This paper argues that amending Article 1 of Japan's Constitution by relocating Japan's emperor to the head of state from the symbol of the state may be pressing, given the tremendous decline of Japan's political public space in the postwar period. Japan's emperor takes a role of that which responds to the notion of *nomos*, the Greek word for law and an antiquated concept in the modern age. *Nomos*' multiple meanings propose that Japan's emperor and the emperor system are an elixir constitutive of public space, a human-political community, without which the sustainability of Japan's public realm may be at stake.

¹ The World's 13th oldest constitution

² The Basic Law for the Federal Republic of Germany

³ The 1960s' student uprisings indicated a crisis of authority, as seen in the claims of radicals who described 'both the symbol and agent of legitimation as "phony"' (Fuse 1969, p. 334).

***Nomos* and the Public Space**

In the commentary of *The Japan Times* in January 2016, one of prominent Japanologists, Hugh Cortazzi, writes on growing constitutional debates in Japan, addressing his uneasiness about Prime Minister Abe Shinzo's⁴ move to revise the 1947 Constitution – the move that may revise not only Article 9 but also the status of the emperor. Notably, Cortazzi's commentary addresses the mainstream perspectives and interpretations held in the international sphere on the emperor of Japan and the potential move in which the emperor's status and authority are promoted (Cortazzi 2016, January 29; Conrad 2003; Beer 1998). He writes, 'Any attempt to change the "peace" Constitution will be highly controversial. Anything that might suggest a return to outdated myths or undermine human rights would arouse vehement opposition'.⁵ Referring to Joseph Stalin and Mao Zedong, he speaks of 'the crimes of evil tyrants' as those that 'cannot be expunged from the records', and presumes the rise of fears about a 'revival of Japanese nationalism'. While Japan continues to suffer from a population crisis and its economy stagnation, he wonders whether there are not much more important issues that confront Japan today than the public's growing momentum for revising the Constitution.

But is it true that contemporary Japan's major distresses, such as economic stagnation, demographic change as well as increasing national security agenda, are entirely unrelated to the way Japan's emperor is defined in the Constitution of this country? As Cortazzi suspects, will the revision of Article 1 – a change in the way Japanese citizens acknowledge the emperor – resurrect Japanese nationalism that generates fear? What is Japan's emperor above all, his relation to Japan's public realm, and an implication of strengthening this relation for Japan's future? This paper proposes that Japan's emperor as a thread of public-unity draws many analogies and significances from the early concept of *nomos*, which Carl Schmitt explains as 'the *ordo ordinans*, the inner measure of an original, constitutive act of spatial ordering' (Chrystostalis 2013, p. 158). Examining Arendt's work on the relation between law and the public realm, and to some extent, Schmitt's notion of *nomos*, highlights *nomos* signification of the emperor, which this paper contends may help retrieve postwar Japan's public space from privatization – a force which converts citizens to consumers. In this regard, amending the Constitution's Article 1 may not be unrelated to the major distresses of contemporary Japan, contributing to the recovery of the measures constitutive of the public space.

Hannah Arendt's political philosophy focuses on postulations which create an authentic political community,⁶ which she calls the public realm. It is opposed to the private realm where biological life is enclosed, where the activities of labouring and consumption, and the concerns of economy take its centre. On the one hand, the public space is a space of *power* and freedom, which manifest with citizens' action in

⁴ Following the Japanese convention, Japanese names are written surname first and given name second.

⁵ Beer writes that 'Japan's history and the continued resistance of some nationalistic Japanese leaders to recognize the nature of her barbaric aggression in wartime Asia suggest that a revival of the military ascendancy was more likely...' (1998, p. 816).

⁶ In this paper, an authentic political community or authentic politics is defined as the (political) public space which manifests with the actions, discussions and deliberations of citizens: their agencies are driven by the principles of virtues, and their deeds and words are facilitated and united by power.

concert (1958, p. 244).). Arendt highlights that power which is ‘what keeps the public realm’ is realized:

Only where word and deed have not parted company, where words are not empty and deeds not brutal, where words are not used to veil intentions but to disclose realities, and deeds are not used to violate and destroy but to establish relations and create new realities. (Arendt 1958, p. 200)

For her, because the products of politics – deeds and words – are ‘so fleeting’, collective actions into which power is crystalized spring out *in search of* a body politic that endures in time; power and freedom are dependent upon the measures such as culture, laws, tradition and rituals, which outlive human life-span (Arendt 2007b, p. 189-190; Arendt 1993). On the other hand, the private space is a realm of biological life, the realm which ‘uses up durability, wears it down, [and] makes it disappear’ (Arendt 1958, p. 96). In the public space of the ancient Greeks from which Arendt derives an original model of political life, citizens’ concerns rested upon the foundation of a body politic – the polis, ‘a kind of organized remembrance’ (1958, p. 198), which closed itself off from the private realm where the enduring measures are no less subject to tomorrow’s erosion and disappearance than consumption objects.⁷

The resident of public space is not consumer, but citizen, for whom the form of government – e.g. a republic, monarchy and tyranny – matters because the growth of citizen-agency or ontology, which incarnates an authentic and sustainable political community, counts upon it. For Arendt, virtues such as glory, distinction, excellence and love of equality which inspire a citizen-agency and capacitate excellent actions are acquired not only in one form of government (Arendt 2007a, p. 722-723; Kateb 2006, p. 138; Arendt 2005). For example, while the form of government is different between republic and monarchy, she argues that neither bodies politic cancel out authentic political experience, in which citizens’ concerns are directed not only to power’s perpetuation but also to the *preconditions* that facilitate and safeguard power. For Arendt, these preconditions are that which transcend time, saving human political life from its temporality (1993).

In her essay on ‘The Great Tradition I. Law and Power’, Arendt explains the problem of politics in our age, in which the criteria of citizens to judge just or unjust government are predicated primarily upon the question as to whether a government is lawful or not. For her, it overlooks the question of the different forms of government in which authentic politics is possible. Monarchy or constitutional monarchy no less nurtures principles that construct citizen-agency than republic. She illustrates that our questions as to the different forms of government have waned, as an old inquiry into

⁷ For Arendt, action and speech, which represent the political faculty of human beings and give rise to the phenomena of public space, are as transient as the human activities of consumption and labour that are those of private realm. What distinguishes the activities of the political from those of the private is that the former could appeal to the memory of spectators through the manifestation of distinctive and excellent – virtuous – actions, whereas on the other hand the latter ‘leaves no permanent trace’ and produces ‘the least durable of tangible things’ (1958, p. 90, 96); Owing to the capacity of political faculty to remain in human memory, in other words, to become memorable deeds and words, these activities of the public are, albeit as ephemeral as those of the private, different from the activities of the private, where everything (e.g. human interactions, communications and products of labour) is taken to be analogous, namely, common denominator such as human *behaviour* which Arendt argues is distinct from human action which addresses the distinctiveness of identity or personality (1958).

an indispensable distinction inherent in *nomos* declined, that is, the distinction between the cosmic law (a higher law, universal law or ultimate authority), and the general or positive law. A declining public space in the modern age continues to unsettle Arendt, given the foregoing event of totalitarianism in the twentieth century, in which *nomos* – which withstands transient human affairs in the integration of law and the ultimate authority – began to move. For one thing, the positive law is a set of prohibitions, providing people with the standards of right and wrong (Arendt 2007a, p. 721). For another, the cosmic law – *nomos basileus panton* – which existed in the pre-Socratic world is that which is ‘an order inherent in the universe and governs its motion’ and ‘applicable to all things and to every man in every situation’ (Arendt 2007a, p. 718). According to St. Augustine, the eternal cosmic law is ‘the divine reason’ which ‘*precedes* all human laws and which is coextensive with the “eternal order of things”’ (Chroust 1944, p. 196, italics added).

In highlighting the significance of maintaining the distinction between the universal law and the positive law, Arendt emphasizes the imperative of positive codes of rules in order to forestall one universal law from overriding the border between the public and the private realms (Arendt 2007a, p. 718, 720). However, she simultaneously emphasizes the importance of acknowledging the *interdependent* relationship of two laws, given that it is the one universally valid law – the ultimate authority – from which the positive law derives its legitimacy, in other words, its relative permanence. She writes, ‘the standards of right and wrong as they are laid down in positive law... are absolute insofar as they owe their existence to a universally valid law, beyond the power and the competence of man’ (2007a, p. 720). The principal function of the general law, which aims at the prevention of wrongdoings, must be in harmony with the universal law accordingly, because it is from the latter that the precepts of right and justice, that is, the concept of virtues or virtuous life, are drawn (Chroust 1944, p. 201).

The harmony of two laws are essential because human affairs are contingent and transient; human opinions constantly change; and the birth of new generations always challenge and violate the ‘pre-existence of a common world’ (Arendt 2007a, p. 716). For Arendt, crucial to the early notion of *nomos* is its function as fences or boundaries – that which stabilises eternally changing human condition through its relative permanence (2007a, p. 717). Put differently, the *validity* of positive laws, which makes the laws endure in time, is agreed by a community of people whose integration is initiated by the cosmic law, ‘the Command of God’ (Arendt 2007a, p. 719). The contingent and temporal nature of public space is thus protected through the relative permanence of laws and regulations, which provide the citizens of a public realm in the present and the future with the historically learned and shared standards of judgement. Arendt demonstrates that the old question of the forms of government which capacitate an authentic political community must hence begin with the account of equilibrium between the cosmic law and the positive law.

Like Arendt, Schmitt speaks of the notion of *nomos* spatially in illustrating that it is ‘found at the beginning of the history of every settled people, every commonwealth, every empire... [and] every historical epoch’ (Schmitt 2003, p. 48). For him, *nomos* whose original meaning has been lost in our time is tied to earth with its beginning

resting upon ‘land-appropriation’,⁸ ‘land division and distribution’ (Chryssostalis 2013, p. 163-164). Schmitt writes that ‘jurisprudential thinking’, which stems from *nomos*, ‘occurs only in connection with a total and concrete historical order’ (2003, p. 20). Chryssostalis’ reading of Schmitt’s work on the bond of earth and *nomos* highlights the geographical character and limitation of law, as that which ‘begins with land-appropriation’ – one that is ‘the constitutive process through which law and legal order are initiated’ (2013, p. 163). It is thus irreducible to the general sense of law, regulation or rule; rather it is ‘the outer edge of legality... that precedes and constitutes the established legal order’ (Chryssostalis 2013, p. 165). For both Arendt and Schmitt, *nomos* is the constitutive process that produces (the validity of) laws and demarcates those of boundary.

Nomos Defect: Japan’s Post-World War II Constitution

Given the tie of *nomos* to earth, the identity of the inhabitants and the features that distinguish them are shaped in the bounded or shared space (Chryssostalis 2013, p. 169). Contra-*nomos*, Japan’s supreme law – the Constitution enacted in 1947 – was made by the American officials in the aftermath of its war defeat however. Combined in the package of the Occupation policies was *the Shintō directive*, which curtailed the extent of interaction between the public and Japan’s emperor whose lineage is presupposed to originate from the Sun Goddess *Amaterasu* (Mori 2015, p. 137). Japan’s emperor is, first and foremost, a sacerdotal authority (祭祀: *saishi*) which has performed *Shinto* rite – the religion which was formalised as that of the imperial household. Through the performance of ritual ceremonies which are exemplified in the ceremony of *Shihōhai* (四方拜)⁹, the emperor mediated the interaction of his people with his ancestor, the God *Amaterasu*, in pre-1945 Japan. In interweaving culture, norms, tradition and rituals through which the Japanese citizenry has been integrated, the emperor thus took a role of *nomos*.

Under the *Shintō* directive, Ohara illustrates that *Shintō* received the most severe treatment among other religious creeds, the extent of which was so thorough as to manifest as a notion of ‘absolute divisionism’ between state and church, even after the end of the Occupation in 1952 (1989, p. 111). In undertaking the drafting of Japan’s post-World War II Constitution, the Occupation staff defined Japan’s emperor as ‘the symbol of the State and of the unity of the People’ in Article 1 of the 1947 Constitution (Uleman & The Constitution of Japan Project 2004) – a new, postwar status of the emperor whose sovereign power was transferred to the will of the people. While Article 1 defines the emperor as the symbol of the state, the Constitution’s Article 20, which states ‘The State and its organs shall refrain from religious education or any other religious activity’, yet bars him from performing *Shintō* rites as

⁸ In respect of “land-appropriation” with which Schmitt illustrates that *nomos* begins, Immanuel Kant defines it as ‘law of mine and thine that distributes the land to each man’ – that which ‘is not positive law in the sense of later state codifications, or of the system of legality in subsequent state constitutions; it is, and remains, the real core of a wholly concrete, historical and political event’ (Schmitt 2003, p. 48).

⁹ It is a ritual performance of the emperor who pays homage to the four directions of the cosmos and prays for averting natural disasters and harvesting abundant crops (Hasegawa 2003, p. 63).

public functions and thus, Hasegawa Michiko contends, from being ‘a symbol of the unity of the Japanese people’ (2007, p. 63).¹⁰

One of the indicative academic discussions on the role of Japan’s emperor as *nomos* was unfolded during the Occupation period (Titus 1980, p. 535). The debate between Odaka Tomoo and Miyazawa Toshiyoshi critically scrutinized the tenor Arendt proposes, that is, the proposition that an authentic political experience cannot be realized by the general law alone, requiring the aegis of the cosmic law – the ultimate authority – for stabilizing the ‘constant motion of all human affairs’ (Arendt 2007a, p. 716). Against the view of Odaka to whom reconciliation between popular sovereignty and imperial sovereignty is possible within *nomos*, Miyazawa criticized his point as ‘an obfuscation of sovereignty’, arguing that every political system has a *single* concrete organ or locus wherein the absolute lies (Titus 1980, p. 539). While Odaka insisted that Japan’s emperor suggests a fountain which comprises *nomos* and ‘symbolizes the eternal parcel of values’ since the country’s foundation, toward which he believes citizen’s search for authentic politics should be directed (Titus 1980, p. 540, 542), it was Miyazawa’s idea of popular sovereignty, that is, the single locus of sovereignty which has no space for reconciliation, that has become the mainstream interpretation of legal scholars in postwar Japan (Titus 1980, p. 541).

Until around the revival of constitutional debate at the beginning of the 1990s, the nation’s focus was riveted to the issue of economic growth, having left the question of the emperor’s public significance unexamined.¹¹ Although Japanese intellectuals’ opinions were those of ‘vocal minority’, as opposed to the ‘silent majority’ of the ordinary people (Shimizu 1980, p. 102), given the upper hand of their publication work through which their voices are heard widely, the narratives of Marxist and neo-Marxist, whose ideology prevailed in postwar Japanese academia, exerted great leverage upon the public sphere, where political action manifested as labour-union, social and democratic movements (Mori 2015). As in the 1946 popular front ushered by the activists such as Nosaka Sanzō and Yamakawa Hitoshi, communist and socialist led socio-political movements in postwar Japan, unfolding such discussions as the urgency of constructing democratic Japan by conquering reactionary-autocratic politics, one that arose from the emperor-centred polity (Mori 2015). As the 1950 Korean War set out, the Japanese economy began to skyrocket, which was followed by the period of plateau in which the nation’s high living standard was maintained. In 1951, Prime Minister Yoshida Shigeru’s signing of the San Francisco peace and security treaties restored the state’s sovereignty and independence to Japan, officially unshackling it from the Occupation. What is known as the Yoshida doctrine,¹² through which the postwar pacifist consensus developed, amassed the support both of

¹⁰ Noah Berlin puts forth a similar argument with Hasegawa, stating that ‘the relationship between Chapter 1 and Article 20 is not, as it stands today, legally justiciable’ (1998, p. 383). Berlin argues that it is inevitable for Japan’s emperor whose historical role is not only chief shaman-priest of the Shinto religion but also constitutionally mandated symbol of the State to violate, at a minimum, Articles 4 and 20 of Japan’s Constitution if he is to accomplish these roles (1998, p. 384).

¹¹ The key newspapers and weekly magazines have spotlighted the imperial family throughout Japan’s postwar period, depicting the emperor and his family as a ‘likeable’ and ‘commoner-like’ figure, and ‘the model of Japanese family’: Owing to this, while the imperial household has been the subject of popular attention in the postwar period, the emperor’s political significance has hardly been discussed (Titus 1980, p. 557, 563).

¹² The doctrine through which the concerns of Japan’s national security are left with the sphere of the U.S.-Japan security alliance.

the Liberal Democratic Party's (LDP) Yoshida faction, and of socialist and communist (Kataoka & Myers 1989, p. 18). In the 1950s and 1960s, progressive intellectuals representing postwar Japanese academia such as Kuno Osamu (1996) celebrated the arrival of the postwar period, where he argued the border of private and public life emerged due finally to the dismantlement of *kokutai*, the emperor-centred polity.¹³ For Maruyama Masao (1963), a key cause of the rise of 'psychology of ultra-nationalism' in pre-1945 Japan stemmed from the emperor's assumption of sovereignty and the belief of the Japanese people in the emperor that he represents absolute values.

But would the recession of ultimate authority not destroy the necessary balance between the general and cosmic laws? That is, given the retreat of ultimate authority from which values and norms have generated, would it not precipitate Japan's public space into a constant motion of human affairs, in which citizens lose the standards of judgment? To that extent, would it not be the trend of the time that starts to influence people's opinions?¹⁴ Furthermore, would the new generations not be stripped of the wisdom and memory of the pre-existence of a common world? For Japanese citizens, what does the symbol of the state denote? Leaving the issue of necessary harmony between the general law and the cosmic law, those very important yet neglected and marginalised questions accordingly have been subject to critical scrutinies time and again in the postwar period (Sakurai 2006; Mizubayashi 2006; Ohara 1989; Okudaira 1990; Shimizu 1980). In pointing to the French term "*symbole*", Ohara illustrates that its concept does not just mean sign and mark, but contains also the signification of unity and integrity (1989, p. 28). Moreover, Ohara denounces the orthodoxy of contemporary constitutional scholarship in Japan which highlights Japan's emperor to be a *mere* symbol of the country, stressing that even the Occupation's Government Section did not characterize the emperor as a mere symbol (1989, p. 26), as testified by Milo E. Rowell, one of the key officers who worked on the draft of Japan's Constitution. According to Milo, the use of the term, the symbol of the state, by no means disregards the meaning of the head of state as in the usage of the West (Ohara 1989, p. 15-16). However, given that the Constitution's Articles 3 and 4 request every action of the emperor to go through Cabinet's advice and approval, and bar him from having powers related to government, Japan's emperor does not have any political power and is precluded from engaging in actions related to government or the public at will – a condition which raises the question as to whether Japan's emperor can be appropriately considered, within such definitions and limitations, as the head of state (Shiraki 2013, p. 60-61).¹⁵

For Nishio Kanji who explores the foundation of Japan's polity, it is a misconception to equalize monarchy with dictatorship. In Japan's history, the former suggests a form of government in which the notion of justice prevails through the monarch's work to

¹³ As Schmitt writes, it is important to note that 'land-appropriation... precedes the distinction between private and public law; in general, it creates the conditions for this distinction' (2003, p. 46). In this regard, as the next passage illustrates, it is possible to suggest that the act of Japan's emperor in the lead-up to *taihō ritsuryō* was that of *nomos*, a constitutive process.

¹⁴ According to Kataoka Tetsuya (2006, p. 119), today Japan has become a country that can be characterized as the direct democracy of a mass society. Everything is decided according to the climate of the day.

¹⁵ For example, the countries such as Sweden and Spain which have a monarch define him/her as the head of state in their constitutions (Yomiuri Shibun Seijibu 2013, p. 181).

expropriate lands and people from powerful clans, and to divide and reappropriate them (2001, p. 148-149). This process was preparatory to the birth of *Taihō* code (*taihō ritsuryō*: 大宝律令)¹⁶ at the beginning of the eighth century, the code through which the idea of the public ownership of land was realized. Nishio points out that the ‘emperor-centred’ meant for Japan to ground the public (2001, p. 149). As though it upheld Schmitt’s theory of *nomos* which is originally ‘an initial distribution and allocation of mine and thine’ – ‘the truly constitutive event of legal order’ (Chryssostalis 2013, p. 164; Schmitt 2003, p. 345), Nishio’s examination of the process before the advent of the *ritsuryō* state, which was propelled by Japan’s emperor, points to the inseverable relation of Japan’s geographical public space with *nomos*, the emperor.

Despite such characteristics of the emperor as *nomos*, as found in David Titus’ review of Satō Isao’s analyses, the emperor is ‘negative’ in postwar Japan, one that responds ‘passively to the “trends of the times”’ no longer figuring as ‘some eternal bundle of values eternally unique to Japan and the Japanese polity’ (1980, p. 549). Characterizing Japan as an ‘economic animal’, Kataoka Tetsuya describes the nation as one whose primary concern rests on the survival of its biological life, the nation which has neither dignity nor ideal – a behaviour observed, particularly, in its handling of foreign affairs (2006, p. 64). Seen from Arendt’s viewpoint, given the activity and concern of economy and consumption being the character of private realm, it is open to question as to whether Japan has a public space, whose resident is not consumer who ‘uses up durability’ (1958, p. 96), but citizen for whom the forms of government are an essential question concerning the sustainability of his or her public space (Arendt 1993; Arendt 2007a). Evidenced in the case of many citizens’ indifference to the National Foundation Day on February 11, contemporary Japanese hardly know the meaning of this national holiday, which is related to the first Emperor of Japan, Jimmu (Tōjō 2012, p. 74-75). Such phenomenon raises the question as to the extent in which nationalism exists in Japan; as to whether people consider themselves as a member of the public space. While the LDP’s draft on constitutional revision publicized on April 27, 2013 amends Article 1, wherein the emperor is defined as the head of state, as in Cortazzi’s view a fear of the extent to which Japan’s emperor acquires ‘actual political and government-related powers’ (*The Japan Times* 2013, Mar 14) continues to be expressed both domestically and internationally, given the memory of Japan’s expansion in Asia in the years preceding 1945.

Secularization’s Dilemma with Democracy: *Nomos*’ Implication for the Recovery of Japan’s Political Public Realm in the 21st Century

Closely connected to the importance of developing democratic debate on the amendment of Constitution’s Article 1 – which may open up examination on *nomos* signification of Japan’s emperor – is the need to review the notion of secularization,¹⁷ as the extent of secularism has an impact on the way in which Japan’s public sphere

¹⁶ *Taihō ritsuryō* indicates the (new) system of law which was enacted in Japan in 701: its references were derived from Confucianism and the laws of Tang dynasty.

¹⁷ Citing the definition of Peter Berger, Madan addresses that secularization is ‘the process by which sectors of society and culture are removed from the domination of religious institutions and symbols’ (1987, p. 748).

takes shape in the future. While secular state¹⁸ is commonly considered to be reciprocal to democratic society, it has been a familiar practice in many parts of the world that state is not necessarily *categorically* separated from religion under the laws outlining secularism – often constitutional. After the end of the Occupation in 1952, despite the lapse of the *Shintō* directive, many Japanese constitutional scholars inherited the Occupation's early interpretation of the directive – absolute divisionism – in their interpretation of Article 20 (Ohara 1989, p. 112, 115). The 1977 *Tsuji Chinsai* lawsuit was a landmark case in this respect, as it interpreted Article 20 of Japan's 1947 Constitution as that which requests the state to be neutral in respect of religion in illustrating that the clause is not a sanction on the state's any interaction with religion (Ohara 1989, p. 43). But as David Martin, one of the distinguished secularization theorists in the West, discusses, the concept of secularization itself remains 'a hotch-potch of ideas, [and] some of them contradictory' (2005, p. 19). He highlights that secularization was '*in part* an ideological projection on history based on an apotheosis of reason' (2005, p. 19). Should secularization be yet a contended concept among prominent secularization theorists, why would Japanese scholars not revisit its concept and scrutinize the origin and history more actively, given that the extent of secularism is a constitutional question?¹⁹

According to Hannah Arendt, while the presumed role of citizen is to have deliberation on the forms of government, due to the meagreness of democratic debate on this matter in postwar Japan, many contradictions remain to be enclosed in Japan's Constitution. These contradictions include the facts that: in spite of *nomos* which is territorially specific, Japan's post-World War II Constitution was not made by the hands of the Japanese people; Japan's emperor cannot officially play a role to unify Japanese citizens given the limitation of Article 20; he does not adequately represent the head of state under the specifications of Articles 3 and 4; and these constitutional limitations have deprived Japanese citizens of occasions and spaces to interact with a thread of permanence that has historically interwoven the unity and integrity of the people.

Further to these contradictions, Japan's Constitution is encumbered with dilemmas in which the locus of ultimate authority is equivocal and its lodging institution puzzling. With Japan's defeat in the Second World War which dissolved the ultimate authority, the 1947 Constitution appropriated the institution that lodges *nomos* to the Supreme Court which, as specified by Article 81, interprets the 'constitutionality of any law, order, regulation or official act' (Uleman & The Constitution of Japan Project 2004, p. 217). However, as Sakurai Yoshiko points out, it has been the tradition of postwar Japan that an institution known as 'the shadow authority' – the *Cabinet Legislation Bureau* (内閣法制局: *naikaku hōseikyoku*) – sets forth the Japanese government's official interpretation of Japan's Constitution as the government's consensus (政府統一見解: *seifu tōitsu kenkai*)²⁰ (2000, p. 172). In view of this, the institution that pronounces the interpretations of *nomos* remains critically ambiguous in the polity of

¹⁸ It is generally interpreted as the separation of church and state. Habermas demonstrates that secularism should be the essential norm of modern liberal democracy (2006).

¹⁹ Madan demonstrates a key problem associated with secularism, writing that '*the transferability* of the idea of secularism to the countries of South Asia is beset with many difficulties and should not be taken for granted' (1987, p. 754, italics added).

²⁰ This is despite the Bureau's locus being outside the Constitution.

postwar Japan. This enigma contributes to deepening the paradox of Japan's democracy, leaving the question of whether the emperor could in any way officially relate to and interact with the citizens and the matters of government (Yomiuri Shinbun Seijibu 2013, p. 182).

Since the end of the 1940s in which the Japanese government adopted *the reverse course* in acceptance of the Occupation policy on the reconstruction of Japan, the nation's focus has been fixed to the politics of economic growth – the subject which continues to be the centre of national interest to date and even more so after the rise of neoliberalism and the prime minister's implementation of *Abenomics*.²¹ Hence, it is open to question as to whether Japan in its postwar period has been successful in the development of political public space – the development which this paper has argued may set in if legal or *nomos* signification of Japan's emperor is re-examined – not the privatization of public realm. For Titus, 'most legal scholars... have paid little attention to the legal implications of the emperor's symbolic role' (1980, p. 548). While the great ascent of people's apathy towards the emperor system in postwar Japan and the ingrained perceptions on Japan's emperor – which arise from the legacy of prewar and wartime Japan²² – cloud the constitutional debates on Article 1, the citizen's presumed role is, as Arendt argues, to seek a form of government in which citizens engage in authentic politics (the manifestation of power and virtues) – the form which could take a constitutional monarchy.

²¹ Prime Minister Abe Shinzō's policy on Japan's economy since 2012: including fiscal stimulus, structural reforms and monetary easing.

²² When the *nomos* theories of Arendt and Schmitt are concerned, it is possible to propose an alternative historical perspective or *historiography* which – with regard to the Second World War or the Pacific War – may take its distance from appropriating moral judgments to Japan's war conduct. David Williams at The LibertyWeb interview (2014) suggests that the Pacific War (which Williams calls "the Greater East Asian War") has been seen and approached by the Western powers from the standpoint of moral crusades. While Japan has been thus condemned by the people who interpret the war on the basis of moral judgments, Williams points out that the role of historians is to analyse facts on the basis of historical objectivity (2014). Such Williams' historiography on the Greater East Asian War arguably responds plausibly to Ulmen's introduction of Schmitt's *nomos* of the earth (2003). Schmitt's theory illustrates the Treaty of Versailles in 1919 and the League of Nations as the products of a historical watershed in which President Woodrow Wilson's idea of a new world order began to advance and to destroy European public law (the *jus publicum Europaeum*) that had been constitutive of the old world order (Ulmen 2003, p. 12-13). For Schmitt, since the end of the nineteenth century, the *jus publicum Europaeum* started to decline without finding its alternative, which rendered a regime of new international law to be the law of the international sphere – one that lacks 'any spatial reference' (2003, p.11). While transforming the old model of international law, Wilson introduced 'a discriminatory concept of war – a "just war" – into [the new model of] international law', with the League of Nations having served as an arbiter of this concept (Ulmen 2003, p. 21). In this view, it is important to give a new light not only on Japan in the Greater East Asian War but also on the continuity of "spaceless universalism" (Ulmen 2003, p. 11) which capriciously warrants the sovereignty of each state today.

References

- Arendt, Hannah. (1958). *The Human Condition*. Chicago and London: The University of Chicago Press.
- (1993). *Between Past and Future*. New York: Penguin Group.
- (2005). *The Promise of Politics*. In J. Kohn (Eds.), New York: Schocken Books.
- (2007a). The great tradition I. law and power. *Social Research*, vol. 74, no. 3.
- (2007b). *Reflections on Literature and Culture*. US: Stanford University Press.
- Beer, Lawrence. W. (1998). Peace in theory and practice under Article 9 of Japan's Constitution. *Marquette Law Review*, vol. 81, issue. 3, (Spring).
- Berlin, Noar. (1998). Constitutional conflict with the Japanese imperial role: Accession, Yasukuni shrine, and obligatory reformation. *Journal of Constitutional Law*, vol. 1, no. 2, (Fall).
- Chroust, Anton-Hermann. (1944). The philosophy of law of St. Augustine. *The Philosophical Review*, vol. 53, no. 2, (Mar).
- Chryssostalis, Julia. H. (2013). Reading Arendt 'reading' Schmitt: Reading *nomos* otherwise?. In M. Drakopoulou (Eds.), *Feminist Encounters with Legal Philosophy*. UK and US: Routledge.
- Conrad, Sebastian. (2003). Entangled memories: Versions of the past in Germany and Japan, 1945-2001. *Journal of Contemporary History*, vol. 38, no.1, (Jan).
- Fuse, Toyomasa. (1969). Student radicalism in Japan: A "cultural revolution"?. *Comparative Education Review*, vol. 13, no. 3, (Oct).
- Habermas, Jürgen. (2006). Religion in the public sphere. *European Journal of Philosophy*, vol. 14, no. 1.
- Hasegawa, Michiko. (2007). The emperor as culture. *Japan Echo*, (Oct).
- Hughes, Christopher. W. (2006). Why Japan could revise its constitution and what it would mean for Japanese security policy. *Orbis*, (Fall).
- Kataoka, Tetsuya. (2006). *Kakubusō naki "Kaiken" ha Kuni wo Horobosu*. Japan: Business-sha.
- Kataoka, Tetsuya & Myers, Ramon. H. (1989). *Defending an Economic Superpower: Reassessing the US-Japan Security Alliance*. Boulder, San Francisco and London: Westview Press.

- Kateb, George. (2006). Political action: its nature and advantages. In Villa, D (Ed), *The Cambridge Companion to Hannah Arendt*. Cambridge: Cambridge University Press.
- Kuno, Osamu. (1996). *Shimin Shugi no Seiritsu*. Japan: Sunjusha.
- Madan, T.N. (1987). Secularism in its place. *The Journal of Asian Studies*, vol. 46, no. 4, (Nov).
- Martin, David. (2005). *On Secularization: Towards a Revised General Theory*. UK: Ashgate.
- Maruyama, Masao. (1963). *Thought and Behaviour in Modern Japanese Politics*. London, New York and Toronto: Oxford University Press.
- Mizubayashi, Takeshi. (2006). *Tennōseishiron: Honshitsu, Kigen, Tenkai*. Japan: Iwanami Shoten.
- Mori, Yaya. (2015). *The Japanese Question: An Arendtian Analysis of Political Public Space in Postwar Japan* (Doctoral dissertation). Retrieved from http://espace.library.curtin.edu.au/R?func=dbin-jump-full&local_base=gen01-era02&object_id=234000
- Nishio, Kanji. (2001). Kokka rinen no saikō. In Nihon Kaigi Shin Kenpō Kenyūkai (Eds.), *Shin Kenpō no Susume: Nihon Saisei no Tameni*. Japan: Meiseisha.
- Ohara, Yasuo. (2001). Naze, Ima Shinkenpōka. In Nihon Kaigi Shin Kenpō Kenyūkai (Eds.), *Shinkenpō no Susume: Nihon Saisei no Tameni*. Japan: Meiseisha.
- Ohara, Yasuo. (1989). *Shōchō Tennō kō: Seiji to Shūkyō wo Megutte*. Japan: Ten Ten Sha.
- Okudaira, Yasuhiro. (1990). Ima, tennōsei wo toitsuzukeru imi. In Yokota, K. & Ebashi, T (Eds.), *Shōchō Tennōsei no Kōzō: Kenpōgakusha ni yoru Kaidoku*. Japan: Nihon Hyōron Sha.
- Sakurai, Yoshiko. (2006). *Kedakaku, Tsuyoku, Utsukushiku are: Nihon no Hukukatsu ha Kenpō kara Hajimaru*. Tokyo: Shōgakukan.
- Sakurai, Yoshiko. (2000). *Kenpō to ha Nanika*. Tokyo: Shōgakukan.
- Shiraki, Tatsuya. (2013). Kenpō Daironsō. *Bessatsu Takarajima*, vol, 2041. Japan: Takarajimasha.
- Shimizu, Ikutarō. (1980). *Sengo wo Utagau*. Tokyo: Kōdansha.
- Schmitt, Carl. (2003). *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. US: Telos Press, Ltd.
- Titus, David. (1979). *Nihon no Tennō Seiji: Kyūchū no Yakuwari no Kenkyū*. Tokyo: The Simul Press, Inc.

— (1980). The making of the ‘symbol emperor system’ in Postwar Japan. *Modern Asian Studies*, vol. 14, issue 04, (Oct).

Tōjō, Hidetoshi. (2012). *Nihonjin no Shōmei*. Tokyo: Gakken Publishing.

Uleman, Frederick. M. & The Constitution of Japan Project. (2004). *Rethinking the Constitution: An Anthology of Japanese Opinion*. Japan Research Inc.

Williams, David. (2006). The Japanese evasion of sovereignty: Article 9 and the European canon – Hobbes, Carl Schmitt, Foucault. In R. Kersten & D. Williams (Eds.), *The Left in the Shaping of Japanese Democracy*. London and New York: Routledge.

— (2014, March 22). Pushing for the historic end to racial discrimination: Japan’s thwarted proposal for racial equality at Versailles [Interview]. *The LibertyWeb*. Retrieved from <http://eng.the-liberty.com/2014/5133/>

Yomiuri Shinbun Seijibu. (2013). *Kisokarawakaru Kenpō Kaisei Ronsō*. Tokyo: Chūōkōron Shinsha.

News Sources

Cortazzi, Hugh. Abe’s misplaced priorities. (2016, January 29). *The Japan Times*. Retrieved from <http://www.japantimes.co.jp/opinion/2016/01/29/commentary/japan-commentary/abes-misplaced-priorities/#.VtThqvl97IU>

Kaiken fuyō 55%, hitsuyō 37%, Asahi shinbun seron chōsa. (2016, May 2). *Asahi Shinbun Digital*. Retrieved from <http://www.asahi.com/articles/ASJ4L3W9ZJ4LUZPS001.html>

LDP calls for titling Emperor ‘head of state’. (2013, March 14). *The Japan Times*. Retrieved from <http://www.japantimes.co.jp/news/2013/03/14/national/politics-diplomacy/ldp-calls-for-titling-emperor-head-of-state/#.VxV7Avl97IV>

60 % say Constitution should not be changed: Kyodo poll. (2015, July 22). *The Japan Times*. Retrieved from <http://www.japantimes.co.jp/news/2015/07/22/national/politics-diplomacy/60-say-constitution-changed-kyodo-poll/#.VxQ70fl97IU>

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