

Fundamental Human Rights and ‘Traditional Japanese Values’: Constitutional Amendment and Vision of the Japanese Society

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Abstract

Ever since the Constitution of Japan was enacted in 1946, conservative Japanese people must have been unhappy with it. Their past attempts to enact a new constitution or to make radical revisions have been unsuccessful, but they might finally accomplish their goal under the current Abe Cabinet. Why are conservative people unhappy with the Constitution? It is because the Constitution prevents Japan from becoming a ‘normal state’, and it is deemed not in line with ‘traditional Japanese values’. The fundamental human rights provisions are their main target. Therefore, conservative people want to restore ‘traditional Japanese values’ by amending the bill of rights of the Constitution. This article will examine the reasons why conservative people are upset with the Constitution, how they would like to amend it, and whether their arguments are persuasive. It will conclude that their arguments, just like the ‘Asian values’ theory, are hardly justifiable and could completely undermine the foundation of individual rights protection.

I. THE CONSTITUTION OF JAPAN AND ‘TRADITIONAL JAPANESE VALUES’

Ever since the 1946 *Constitution of Japan* (Constitution of Japan)¹ was enacted, conservative Japanese people must have been unhappy with it. Despite missing an opportunity to revise it during the occupation, they came to form the Liberal Democratic Party (LDP) in 1955, a political party dedicated to pushing for the enactment of a new constitution or fundamental revisions to the Constitution.² Although the LDP won the 1955 election, it failed to achieve its goal to amend the constitution. Ever since then, the LDP has almost always formed the government and

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1. Nihonkoku kenpō [Constitution of Japan] (promulgated on 3 November 1946).
2. Jiyū minshutō [Liberal Democratic Party (LDP)], ‘Rittō sengen/kōryō [Declaration of the Party Policy], Tō no shimei [Mission of the Party]’ (*Jiyū minshutō*) <www.jimin.jp/aboutus/declaration/index.html> accessed 30 September 2017.

has continuously pushed for constitutional amendment. But this seemed impossible for a long time. However, the LDP might finally accomplish its goal under the current Cabinet headed by Prime Minister Shinzo Abe.

Why does the LDP argue for a fundamental revision to the current constitution? Simply put, it is because the Constitution of Japan, aside from preventing Japan from becoming a ‘normal state’,³ is not consistent with ‘traditional Japanese values’. According to the LDP, the Constitution of Japan was forced on the Japanese people, denying Japanese people armed forces, and it destroyed inherent, valuable, and traditional values in Japanese society. They thus believe it necessary to restore the destroyed ‘traditional Japanese values’. For them, perhaps the most egregious part of the Constitution that is against tradition is the bill of rights, ie the fundamental human rights provisions. It follows that they insist on amending the Constitution so that the fundamental human rights provisions will conform to ‘traditional Japanese values’.

But what kinds of amendments do they envision? Are their arguments persuasive? This article purports to examine the vision of Japanese society, the individual rights provisions dealt with in the LDP’s amendment proposals, and their implications for the future of Japan. Part II will outline why the LDP is extremely unhappy with the current Constitution of Japan. Part III will closely examine the LDP’s constitutional amendment proposals as well as alternative proposals from other conservative organizations to see the kinds of amendments they wish to enact. Part IV will explore the vision of Japanese society and the individual rights provisions underlying the LDP’s proposals. It will critically examine whether the LDP’s arguments are persuasive. The article will conclude by suggesting that a call to restore ‘traditional Japanese values’ is merely anachronistic nostalgia for the Meiji era. It shows that what they call ‘traditional Japanese values’ were created only one hundred and fifty years ago, and that they have not provided any compelling reasons as to why Japan should follow these traditions. Moreover, what the LDP considers ‘traditional Japanese values’ might not truly be ‘traditional Japanese values’, and instead might destroy true ‘traditional Japanese values’.

The issue surrounding possible amendments to the Constitution of Japan has been closely followed, and it has even received international attention.⁴ In particular, significant attention has been placed on the pacifism clause of Article 9.⁵ This article intends to highlight that the protection of individual rights needs to be seriously considered as well. Moreover, while the concept of ‘Asian values’ is alien to Japan,

3. The term ‘normal state’ was first used by Ichiro Ozawa, who used to be an influential member of the LDP but later left the party to become the leading member of the opposition. But this term is believed to show the basic ideas shared among conservative politicians. Of course, the special limitation introduced by the pacifism clause of the constitution, noted below, is the main culprit. Ichiro Ozawa, ‘Watashi no kihon rinen [My Fundamental Principles]’ (*Minshutō [Democratic Party of Japan]*), 11 September 2006 <www.eda-jp.com/dpj/2006/ozawa0911.html> accessed 30 September 2017.

4. Glenn D Hook and Gavan McCormack, *Japan’s Contested Constitution: Documents and Analysis* (Routledge 2001). See eg ‘Constitutional Revision Research Project’ (*Reischauer Institute of Japanese Studies*) <<https://projects.iq.harvard.edu/crrp>> accessed 30 September 2017.

5. Michael A Pantone, ‘Politics, Practice and Pacifism: Revising Article 9 of the Japanese Constitution’ (2010) 11(2) *Asian-Pacific Law & Policy Journal* 163; Craig Martin, ‘Change It to Save It: Why and How to Amend Article 9’ (2017) 18 *Ritsumeikan Journal of Peace Studies* 1.

there are certain similarities between the arguments in favour of 'traditional Japanese values' and arguments in favour of 'Asian values'. The arguments for 'traditional Japanese values', therefore, have the same deficiencies that the 'Asian values' theory is likely to have. This article concludes that arguments in favour of 'traditional Japanese values', just like the 'Asian values' theory, are hardly justifiable and risk undermining the protection of individual rights.

II. WHY ARE CONSERVATIVE JAPANESE PEOPLE UNHAPPY WITH THE CONSTITUTION?

A. *Process of Enactment*

The enactment process of the Constitution of Japan is one of the reasons why conservative people have been unhappy with it.⁶ After the Meiji Restoration in 1868, Japan underwent rapid modernization, a process which included the adoption of a Westernized legal system. The Japanese government needed to build a new legal system from scratch, since there was previously no well-established notion of legal rights or property rights.⁷ To accomplish this, Japan enacted major legislation such as the *Civil Code* and the *Criminal Code*. After successfully enacting these pieces of legislation, in 1889 Japan enacted its first modern constitution: the *1889 Meiji Constitution* (Meiji Constitution).⁸ Under the Meiji Constitution, the Emperor was sovereign,⁹ and he had all the power to govern Japan, just as he had before the enactment of the Meiji Constitution.¹⁰ Indeed, the Emperor simply promised to abide by the Meiji Constitution voluntarily.¹¹ Furthermore, while the Meiji Constitution protected the rights of the public by affording rights to the subjects of the Emperor, such protection was granted only by the grace of the Emperor, and it was protected only within the confines of statute.¹² Therefore, the Emperor could infringe the rights of the public without any constitutional restriction. Moreover, there was no system of judicial review. Consequently, the protection of rights and freedoms granted to the people was not very effective. Under the Meiji Constitution all Japanese citizens, as subjects of the Emperor, were expected to sacrifice themselves for the Emperor and for the Empire of Japan.

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6. For a general description of the enactment process of the Constitution of Japan, see Shoichi Koseki, *The Birth of Japan's Postwar Constitution* (Ray A Moore tr, Westview Press 1998); Theodore McNelly, *Origins of Japan's Democratic Constitution* (University Press of America 2000); Ray A Moore and Donald L Robinson, *Partners for Democracy: Crafting the New Japanese State under MacArthur* (OUP 2004); Robert E Ward, 'The Origins of the Present Japanese Constitution' (1956) 50(4) *American Political Science Review* 980.
 7. There are some precedents, which suggest the existence of arguments similar to arguments about rights in Japan. Eric A Feldman, *The Ritual of Rights in Japan: Law, Society, and Health Policy* (CUP 2000). But they had not been crystallized into the arguments of rights and it cannot be denied that the government had to invent the Japanese words for 'right' after the Meiji Restoration.
 8. Dai-nippon teikoku kenpō [Constitution of the Empire of Japan] (promulgated on 2 November 1889) (Meiji Constitution).
 9. *ibid* art 1. Indeed he was sacred and inviolable; *ibid* art 3. He was a 'living God'.
 10. *ibid* preamble.
 11. *ibid* art 4.
 12. *ibid* art 29 (protection of freedom of speech 'within the limits of law').

When Japan lost the Pacific War, Japan was placed under occupation in order to build a liberal democracy for the purpose of ensuring that Japan would never become a threat to international order. The occupation forces established the General Headquarters of the Supreme Commander for the Allied Powers (GHQ) in Tokyo and General Douglas MacArthur, the Supreme Commander for the Allied Powers (SCAP), led the occupation forces. These occupation forces ordered the Japanese government to abrogate various statutes that restricted individual freedoms and to immediately release political prisoners.¹³ The occupation forces strongly believed that strong protection of individual rights was essential for Japan to become a liberal democracy.¹⁴

The occupation forces introduced a number of legal reforms as well. One of the reforms they introduced was constitutional reform. From the beginning of the occupation, MacArthur and the occupation forces believed that the Meiji Constitution needed to be fundamentally revised.¹⁵ The Japanese government insisted that formal revisions were unnecessary and any necessary changes could be accomplished by revising its enforcement of the Meiji Constitution. Despite the constant pressure from the occupation forces for constitutional amendment, the Japanese government resisted changes to the constitution. However, the government eventually decided to establish a committee to discuss whether constitutional amendment was necessary.¹⁶ Yet, even at this stage the government was unwilling to pass a constitutional amendment.¹⁷ Only upon further pressure did the committee finally prepare proposals for constitutional amendment.¹⁸ Still, the constitutional amendments they were contemplating were only relatively minor revisions to the Meiji Constitution.¹⁹

When a draft of the constitution that the committee was discussing was leaked and reported by the press,²⁰ the occupation forces realized that any amendments eventually proposed by the committee would be insufficient.²¹ As a result, the occupation forces decided to make their own draft and hand it over to the Japanese government for further consideration.²² Therefore, when both parties met to discuss the proposal the

13. Office of the Supreme Commander for the Allied Powers, 'Removal of Restrictions on Political, Civil and Religious Liberties' (SCAPIN-93, National Diet Library 4 October 1945) <www.ndl.go.jp/modern/e/img_/M003/M003-001.html> accessed 30 September 2017.

14. The Potsdam Declaration listed the mandate that '[f]reedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established' as one of the terms of Japanese surrender. 'Potsdam Declaration: Proclamation Defining Terms for Japanese Surrender' (National Diet Library 26 July 1945), art 10 <www.ndl.go.jp/constitution/e/etc/co6.html> accessed 30 September 2017. One of the policies of the United States toward the Occupation was 'the development in Japan of respect for fundamental human rights and of principles of liberal and representative government'. 'United States Initial Post-Defeat Policy Relating to Japan' (Report by the State-War-Navy Coordinating Subcommittee for the Far East, SWNCC150/1, National Diet Library), art 3 <www.ndl.go.jp/constitution/e/shiry0/01/013/013_0021.html> accessed 30 September 2017.

15. Koseki (n 6) 9.

16. *ibid* 50.

17. *ibid*.

18. *ibid* 56.

19. *ibid* 56, 59–60.

20. *ibid* 60–61.

21. *ibid* 61, 76.

22. *ibid* 76.

Japanese government had submitted, the Japanese officials were stunned to receive a totally different draft made by the occupation forces.²³

Although the occupation forces did not force the Japanese government to enact the draft as it was, remarks made during the meeting were intimidating enough for the government to accept it.²⁴ Courtney Whitney, chief of the government section at GHQ, who was responsible for constitutional reform, pointed out that MacArthur had defended the Japanese Emperor against possible prosecution as a war criminal, and he suggested that it would be best for the Japanese government to support the Emperor by accepting the draft.²⁵ The Japanese officials took this remark as a threat to prosecute the Emperor as a war criminal should they decide to reject the draft.²⁶ Instead of refusing the provided draft, therefore, the Japanese government decided to accept it and try to soften or weaken the implications of the draft. Although the occupation forces were prepared to accept minor revisions, they had no intention of accepting fundamental changes to the draft. Eventually, the Japanese government managed to make minor revisions to the draft, proceeded to create its own official draft based on this draft,²⁷ and started the constitutional amendment process. Finally, using the amendment provision of the Meiji Constitution, the 1946 Constitution of Japan was enacted.²⁸

Based on the abovementioned process of enactment, conservative Japanese people believe that the Constitution of Japan is a constitution forced upon the Japanese people.²⁹ This is the reason why they want to enact a new constitution based upon the free and voluntary will of the people or, at least, to make fundamental revisions.

B. *Constitution of Japan*

The Constitution of Japan's preamble presently states:

We, the Japanese people, acting through our duly elected representatives in the National Diet, determined that we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations and the blessings of liberty throughout this land, and resolved that never again shall we be visited with the horrors of war through the action of government, do proclaim that sovereign power resides with the people and do firmly establish this Constitution.³⁰

23. *ibid* 99.

24. *ibid* 107–8.

25. 'Record of Events on 13 February 1946 when Proposed New Constitution for Japan was submitted to the Prime Minister, Mr. Yoshida, in Behalf of the Supreme Commander' (National Diet Library 13 February 1946) <www.ndl.go.jp/constitution/e/shiryo/03/077/077tx.html> accessed 30 September 2017.

26. Jōji Matsumoto, the chairperson of the government committee, left notes indicating that Whitney added that they could not guarantee the security of the person of the Emperor without the acceptance of the draft. Jōji Matsumoto, '2gatsu 13nichi kaiken ryakuki [February 13 memorandum]' (National Diet Library), <www.ndl.go.jp/constitution/shiryo/03/002_4/002_4_003l.html> accessed 30 September 2017.

27. Koseki (n 6) 133.

28. *ibid* 208.

29. Akira Momochi, 'Sengo 70nen naze ima kenpō kaisei ga hitsuyō ka [After 70 Years from the End of War, Why Is the Constitutional Amendment Necessary?]' (*BLOGOS*, 6 June 2015) <<http://blogos.com/article/115200/>> accessed 30 September 2017; Justin Williams, 'Making the Japanese Constitution: A Further Look' (1965) 59(3) *American Political Science Review* 665.

30. Constitution of Japan, preamble.

It is clear that the Constitution was enacted by '[w]e, the Japanese people' and not by the Emperor. Article 1 also declares that sovereign power resides with the people.³¹ The Emperor, who used to hold all government powers in Japan under the Meiji Constitution, is now a symbol of the state and represents the unity of the people,³² and does not have any political power.³³

Article 9 of the Constitution also renounces war as a sovereign right³⁴ and prohibits the maintenance of armed forces.³⁵ Together with its commitment in the preamble to 'the right to live in peace',³⁶ this pacifism clause came to be viewed as one of the fundamental principles of the Constitution. Many believed that Article 9 prohibited the maintenance of armed forces even for the purpose of defending Japan against foreign invasion. As a result, although the government established the Self Defense Forces (SDF), it is unclear whether the SDF are justified under Article 9. Moreover, since the SDF have been proclaimed as the minimum force necessary to defend Japan, there is a strict limitation on what they can do. Consequently, the SDF's ability to participate in international peacekeeping missions has been seriously restricted.

The Constitution of Japan has an elaborate bill of rights. It protects individual rights as 'fundamental human rights', and such protection is indeed viewed as one of the fundamental principles of the Constitution. The necessity of protecting fundamental human rights was already a policy of the occupation forces³⁷ and was embodied in one of the three fundamental principles contained within the notes prepared by MacArthur for the occupation forces' draft.³⁸ The idea of 'fundamental human rights' was rooted in the natural law philosophy that saw a resurgence after World War II³⁹ and was consistent with the position found in the Universal Declaration of Human Rights⁴⁰ that every person has certain universal human rights. Indeed, the very notion of 'fundamental human rights' itself was a clear manifestation of the universal nature of human rights.

Article 11 reflects this understanding. It declares that '[t]he people shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the

31. *ibid* art 1.

32. *ibid*.

33. *ibid* art 4(1).

34. *ibid* art 9(1).

35. *ibid* art 9(2).

36. *ibid* preamble.

37. n 14.

38. 'Three basic points stated by the Supreme Commander to be the "musts" in constitutional revision' (Alfred Hussey Papers Constitution File No 1 Document No 5, National Diet Library 3 February 1946) <www.ndl.go.jp/constitution/e/shiryo/03/072shoshi.html> accessed 30 September 2017.

39. Daniel Mirabella, 'The Death and Resurrection of Natural Law' (2011) 2 *The Western Australian Jurist* 251.

40. United Nations General Assembly, *Universal Declaration of Human Rights* (A/RES/3/217, 10 December 1948); Olivier de Shutter, *International Human Rights Law* (CUP 2010) 31, 50; Louis Henkin, 'The Universality of the Concept of Human Rights' (1989) 506 *Annals of the American Academy of Political and Social Science* 10; Kathleen Renée Cronin-Furman, '60 Years of the Universal Declaration of Human Rights: Towards an Individual Responsibility to Protect' (2009) 25(1) *American University International Law Review* 175.

people of this and future generations as eternal and inviolate rights'.⁴¹ Moreover, Article 97 states that '[t]he fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate'.⁴² Therefore, unlike the rights of subjects under the Meiji Constitution, fundamental human rights are conferred upon every individual as natural rights that existed before the enactment of the Constitution. They are universal and inherent to all persons as human beings.⁴³

Moreover, the declaration that '[a]ll of the people shall be respected as individuals' in Article 13⁴⁴ prompted the view that the Constitution of Japan placed individuals ahead of the state or society, a total departure from the past when members of the society had to sacrifice themselves for the state or for society. Individualism has been viewed as a guiding principle of the Constitution. Furthermore, respect for the individual has been viewed as mandating respect for the human dignity of all individuals, thus placing human dignity as the highest value in the new constitution.⁴⁵

The protection of fundamental human rights does not carry any specific limitation within its protection.⁴⁶ However, Article 12 states that '[t]he freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare'.⁴⁷ Article 13 further states that the people's 'right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs'.⁴⁸ Although the Supreme Court of Japan has invoked these two articles so as to allow the government to restrict fundamental human rights in order to protect public welfare,⁴⁹ many people believe that fundamental human rights should never be restricted merely for the benefit of society.

The protection of fundamental human rights is also extremely comprehensive and strong. Following its commitment to individualism and human dignity in Article 13, the Constitution of Japan protects religious freedom⁵⁰ and mandates the separation of religion and the state under Article 20. It prohibits religious organizations from receiving any privileges from the State or exercising any political authority, and it prohibits the government from providing religious education or engaging in 'any other

41. Constitution of Japan, art 11.

42. *ibid* art 97.

43. Nobuyoshi Ashibe (Kazuyuki Takahashi (supplemented)), *Kenpō* [Constitution] (6th edn, Iwanami Shoten 2015) 80.

44. Constitution of Japan, art 13.

45. Ashibe (n 43) 82.

46. Exceptions are the protection of the right to choose one's occupation (Constitution of Japan, art 22) and the protection of the right to property (Constitution of Japan, art 29), which allow for restrictions for 'public welfare'.

47. Constitution of Japan, art 12.

48. *ibid* art 13.

49. Shigenori Matsui, *Constitution of Japan: A Contextual Analysis* (Hart Publishing 2011) 164–68.

50. Constitution of Japan, art 20(1) ('Freedom of religion is guaranteed to all.').

religious activity'.⁵¹ Under the Meiji Constitution, religious freedom was guaranteed but was subject to any obligations that a subject owed to the Emperor.⁵² Shinto, a religion native to Japan, was regarded not as a religion but as an obligation owed by subjects to the Emperor because the Emperor was not only sovereign but also the highest religious figure in Shinto. Therefore, the people did not have the freedom not to believe in Shinto. The government treated all Shinto shrines as public institutions and Shinto priests as public servants. It structured the entire Shinto organization to support the Emperor, including any military action, which was conducted in the name of the Emperor.⁵³ The occupation forces believed that this strong state support for Shinto was one of the reasons for the rise of extreme militarism in Japan. For this reason, they banned any and all government support for Shinto.⁵⁴ This historical decision was crystallized in the constitution as the guarantee of religious freedom and separation of religion and the state.

The Constitution also unconditionally protects freedom of expression under Article 21.⁵⁵ Under the Meiji Constitution, freedom of expression was subject to various restrictions. Some of the most vigorously policed expressions included insults to the Emperor and attacks on the fundamental structure of the government headed by the Emperor.⁵⁶ But all expression, no matter how minor, which were viewed by the government to be questioning the government, came to be impermissible.⁵⁷ Comprehensive censorship was also established to make sure that no newspaper or publisher could publish any illegal content.⁵⁸ Any assembly or association deemed threatening by the government was suppressed by the government.⁵⁹ The modern protection of freedom of expression included in the Constitution is meant to prevent such restrictions.

Furthermore, under Article 14, the Constitution takes a strong stance on the right to equality.⁶⁰ The Constitution also mandates that family law be based on the 'individual

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51. *ibid* art 20(1) ('No religious organization shall receive any privileges from the State, nor exercise any political authority.') and art 20(3) ('The State and its organs shall refrain from religious education or any other religious activity.').
 52. Meiji Constitution, art 28 (protection of freedom of religion 'within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects').
 53. Susumu Shimazono, 'State Shinto and the Religious Structure of Modern Japan' (2005) 73(4) *Journal of American Academy of Religion* 1077; Susumu Shimazono, 'State Shinto in the Lives of the People: The Establishment of Emperor Worship, Modern Nationalism and Shrine Shinto in Late Meiji' (2009) 36(1) *Japanese Journal of Religious Studies* 93. See also Shigeyoshi Murakami, *Tennōsei kokka to shūkyō [The Emperor and the Religion]* (Kōdansha 2007).
 54. 'The Shinto Directive' (1960) 1(2) *Contemporary Religions in Japan* 85.
 55. Constitution of Japan, art 21(1) ('Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.').
 56. Shinbunshihō [Newspaper Act], Law No 42 of 1909 (abolished on 24 May 1949), art 23.
 57. 'Taisei yokusan kai jissen yōkō [Basic Plan for Realizing the Taisei Yokusan kai]' (National Diet Library 14 December 1940) <www.ndl.go.jp/modern/img_r/084/084-001r.html> (accessed 5 December 2017). The 'Taisei yokusan kai' was an attempt to mobilize all Japanese people in the total and complete support for the imperial rule. No one was allowed to refrain from actively endorsing the government decision made in the name of the Emperor.
 58. Richard H Mitchell, *Censorship in Imperial Japan* (Princeton University Press 1983).
 59. Chian ijihō [Peace Preservation Act], Law No 54 of 1941 (abolished on 5 October, 1945), art 1; Gregory Kasza, *The State and the Mass Media in Japan, 1918-1945* (University of California Press 1993).
 60. Constitution of Japan, art 14(1) ('All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.').

dignity and the essential equality of the sexes' in Article 24.⁶¹ Under the Meiji Constitution, family law was built upon the notion of the *ie* (the house). The house-master was granted great power over all other members of the house.⁶² Women were deprived of the power to manage property and were subject to the control of the house-master, who was usually their father or husband. Women were often not allowed to marry freely, not allowed equal access to education opportunities, and were often forced to work in accordance to the decision of the house-master. Article 24 appears to be included in order to remove all such discriminatory treatment against women.

The Constitution of Japan declares itself to be 'the supreme law of the nation and no law, ordinance, imperial rescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity'.⁶³ Therefore, even a statute passed by the Diet, the national legislature, cannot infringe upon fundamental human rights protected by the Constitution. The Constitution also specifically accepts the system of judicial review by stipulating that '[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation or official act'.⁶⁴ The Supreme Court of Japan can thus review the constitutionality of any statute and strike it down as unconstitutional and void if it infringes upon fundamental human rights. Moreover, the Constitution of Japan is designed to place limits on government powers. Therefore, it provides that '[t]he Emperor or the Regent as well as Ministers of State, members of the Diet, judges, and all other public officials have the obligation to respect and uphold this Constitution'⁶⁵ but it does not require the people themselves to abide by the Constitution.⁶⁶ Seemingly, the Constitution exists for the protection of fundamental human rights and not for the imposition of obligations upon the people.

C. *What is Wrong with the Constitution of Japan?*

The LDP and the Japanese conservatives are also deeply dissatisfied with the contents of the Constitution. First, many complain that the text of the Constitution reads like a direct translation from English to Japanese – reflective of the origin of the draft.⁶⁷

61. *ibid* art 24(1) ('Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis.') and art 24 (2) ('With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.')

62. Monjuro Tonooka, 'The Development of the Family Law in Modern Japan' (1965) 2(1) *Waseda hikaku hōgaku* [Waseda Comparative Law Review] 198; Shigenori Matsui, 'The Constitution and the Family in Japan' in Harry N Scheiber and Laurent Mayali (eds), *Japanese Family Law in Comparative Perspective* (The Robbins Collection Publications 2009) 33.

63. Constitution of Japan, art 98(1).

64. *ibid* art 81.

65. *ibid* art 99.

66. The Constitution has, however, several provisions on obligation of the people; obligation to provide education to children (art 26(2)), obligation to work (art 27(1)), and the obligation to pay tax (art 30).

67. Shūgiin Kenpō shinsakai [House of Representatives Commission on the Constitution], 'Nihonkoku kenpō zenbun nikansuru kiso shiryō [Basic Resource Materials on the Preamble to the Constitution of Japan]', (shu ken shi dai 32gō 46, Shūgiin Kenpō shinsakai July 2003) <[www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/shukenshio32.pdf/\\$File/shukenshio32.pdf](http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/shukenshio32.pdf/$File/shukenshio32.pdf)> accessed 30 September 2017.

Critics have also argued that the language of the Constitution is not sufficiently elegant or poetic within the Japanese tradition.⁶⁸

Second, they claim that the preamble lacks reference to the long history and tradition of Japan.⁶⁹ The conservative think tank *Nippon Kaigi* (Japan Conference) criticized the current constitution for ignoring the tradition of Japan and for portraying a self-deprecating version of history, by accepting unfounded blame for so-called atrocities allegedly committed by the Japanese military forces during the war and for denying the achievement of the Meiji era, which resulted in a loss of faith domestically and a loss of respect and trust internationally.⁷⁰ Because of this, the Japan Conference suggested that the new preamble should state that in pursuing the ‘vision of the state’, the government should be informed by historical traditions.⁷¹ The Japan Conference explained that the Japanese have historically aspired for harmony among fellow citizens, recognized the co-existence of diverse values, absorbed and accepted foreign culture while respecting traditions, created a unique culture that emphasizes co-existing with nature, and developed a country through the cooperation of the people and the Emperor together. It thus argued that the Constitution should state that the people of Japan enacted the Constitution based on the unique qualities of Japan in order to build upon the history and spirit of constitutionalism that has been developing since the Meiji era and to create a new country where citizens have a deep understanding of their responsibility as members of society. It also argued that this should be done while respecting the liberty and rights of the people and also fulfilling the international responsibility to contribute to international peace and co-existence.⁷²

Third, the LDP and many other conservative people criticized the Constitution for stripping the Emperor of his high status and power. They claim that it is necessary to clarify the status of the Emperor as the head of state.⁷³ Moreover, they criticized the renunciation of war and the ban on armed forces found in Article 9 as too idealistic and devoid of a realistic understanding of international politics. The LDP argues that it

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68. *ibid.*; Jiyū minshutō kenpō chōsakai [LDP Constitution Committee], ‘Kenpōkaisei taikō sōan [Outline Draft of the Amendments to the Constitution]’ (Kenpō shiryōshū [Constitution Information Centre], 1972) <www.geocities.co.jp/WallStreet-Bull/8091/kenpousouan1972inaba.html> accessed 30 September 2017. The LDP published the major points for constitutional amendment in 2004 before the publication of the draft of the new constitution. The LDP insisted on the necessity of writing the constitution in beautiful Japanese languages. Jiyū minshutō Kenpō kaigi [LDP Constitution Council], ‘Kenpō kaisei no points [Major Points of Constitutional Amendment]’ (*Kenpō kaigi*, June 2004) <www.kenpoukaigi.gr.jp/seitoutou/200406jimin-kenpoukaiseinopoint.htm> accessed 30 September 2017.
69. Momochi (n 29). The LDP argued that they need to enact a new constitution ‘emphasizing our country’s inherent values (i.e. vision of the state) based on Japanese history, tradition and culture, holding highly the idea of a sound common sense, which includes the sense of morality Japanese people inherently aspire to, finding the identity of the country of Japan and Japanese in the Constitution, and breeding patriotism naturally through the Constitution.’ LDP Constitutional Council, ‘Major Points’ (n 68); Shūgiin, ‘Basic Resource Materials’ (n 67) 46.
70. Nippon kaigi [Japan Conference], ‘Shinkenpō no taikō [Outline of New Constitution]’ (*Nippon kaigi*, 11 November 2016) <www.nipponkaigi.org/opinion/archives/8502> accessed 30 September 2017. The Japan Conference is believed to have had a very strong influence on the LDP and Shinzo Abe.
71. *ibid.*
72. *ibid.*
73. LDP Constitution Committee, ‘Outline Draft’ (n 68); Japan Conference (n 70).

prevents Japan from having armed forces to defend itself against a foreign invasion.⁷⁴ Many also are critical of Article 9 because it prevents Japan from being able to fully participate in international peacekeeping missions.⁷⁵ Moreover, critics are dissatisfied with the current constitution since there is no provision which would allow the government to take emergency measures during a crisis.⁷⁶

Fourth, the LDP criticizes the fundamental human rights provisions for over-emphasizing liberty and rights, while staying silent on the expectations and responsibilities of members of the community. They thus criticize the Constitution for failing to impose on citizens the responsibility to respect each other and the social order.⁷⁷ There are also other commentators who criticize the protection of fundamental human rights for its alleged overemphasis on individuals,⁷⁸ with little regard for social responsibilities. They also criticize the Constitution for the difficulty of placing limitations on individual rights. The Japan Conference thus argued that achieving an appropriate balance between human rights and public welfare would require the Constitution to protect human rights (as it does), but also to have the Constitution allow the government restrictions on rights if such rights pose a threat to public welfare. They argue that individuals should exercise their human rights with self-restraint and responsibility.⁷⁹ They point out, however, that under the current Constitution it is unclear what circumstances would justify restrictions on human rights, and as a result there may be some difficulties in enforcing the restrictions.⁸⁰ The absence of constitutional protection for the family and the omission of a provision that dictates respect for the family have also drawn criticism.⁸¹ Indeed, critics are unhappy to witness the unraveling of family ties in the wake of increased assertions of individual freedoms. Many also criticize the Constitution for not imposing more duties and obligations on its citizens, especially the lack of an obligation to defend the country.⁸²

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74. Momochi (n 29). They claim that it is necessary to clearly accept the Self Defense Forces as an armed force. LDP Constitution Committee, 'Outline Draft' (n 68); see also Shūgiin Kenpō shinsakai [House of Representatives Commission on the Constitution], 'Kenpō nikansuru omona ronten ni kansuru sankō shiryō [Materials on the Major Issues of the Constitution]' (shū ken shi dai77gō, Shūgiin Kenpō shinsakai May 2012), 1 <[www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/shukenshio77.pdf/\\$File/shukenshio77.pdf](http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/shukenshio77.pdf/$File/shukenshio77.pdf)> accessed 30 September 2017.
75. House of Representatives Commission on the Constitution, 'Major Issues' (n 74) 16.
76. Momochi (n 29). They argue the necessity of enacting a provision to help address an emergency; LDP Constitution Committee, 'Outline Draft' (n 68).
77. LDP Constitution Committee, 'Outline Draft' (n 68). They thus argue that it is necessary to expressly require citizens to have respect for others.
78. Hidetsugu Yagi, 'Kindai kenpō ni okeru ningenzō nitsuite [On the Vision of Human Beings in the Modern Constitution]' (1997) 20 Meiji seitoku kinen gakkai [Meiji Japan Society] 36 <www.mkc.gr.jp/seitoku/pdf/f20-3.pdf> accessed 30 September 2017.
79. Japan Conference (n 70).
80. LDP Constitution Council, 'Major Points' (n 68).
81. *ibid.*
82. Shūgiin Kenpō shinsakai [House of Representatives Commission on the Constitution], 'Kokumin no kenri oyobi gimu ni kansuru kore made no giron [Arguments Provided So far on the Protection of Right of Citizens]' (shū ken shi dai63gō, Shūgiin Kenpō shinsakai February 2005), 8 <[www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/shukenshio63.pdf/\\$File/shukenshio63.pdf](http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/chosa/shukenshio63.pdf/$File/shukenshio63.pdf)> accessed 30 September 2017.

Fifth, many criticize the Constitution for not including some ‘new rights’.⁸³ These include the right to enjoy the environment (ie, environmental rights), the right to know (ie, the right of access to government information), the right to privacy, the right of access to mass media, rights of crime victims, intellectual property rights, and the right to a dignified life.⁸⁴

Finally, many point out the fact that the Constitution of Japan has not been amended for seventy years since its enactment, which has resulted in many discrepancies between the text of the Constitution and its enforcement.⁸⁵ They thus argue that the Constitution must be updated.

D. Past Attempts to Revise the Constitution

The Constitution of Japan was enacted on 3 November 1946, and it took effect on 3 May 1947. The government actively defended the Constitution during the enactment process and made every effort to praise and publicize it after enactment. MacArthur gave Prime Minister Shigeru Yoshida an opportunity to reconsider the Constitution after one year. As nobody called for reconsideration, Yoshida decided not to revise the Constitution.⁸⁶

Japan successfully concluded the Peace Treaty of San Francisco in 1951,⁸⁷ marking the end of the occupation. Shortly after, the frustration of conservative politicians surfaced, with vocal calls for the enactment of a new constitution or, alternatively, radical changes to the present one. Two conservative parties joined together in 1955 to form the LDP, with its primary party goal to answer these calls. However, a constitutional amendment must be approved by a two-thirds majority in both Houses of the Diet, and subsequently approved by majority vote in a public referendum.⁸⁸ Despite their success in the 1955 election, the LDP failed to win the necessary two-thirds of the seats in both houses to initiate a constitutional amendment. Ever since then, although the LDP has almost always formed the government and pushed for constitutional amendments, it has consistently failed to obtain a two-thirds majority in both houses. During the 1980s, therefore, the prospect of constitutional amendment seemed almost impossible and the call for constitutional amendment was seen as little more than lip-service with little hope of realization.

In the 1990s, however, the tide suddenly turned in favour of a constitutional amendment. Despite the Japanese government’s commitment to spend 9 billion USD to support the multi-national forces led by the United States to aid Kuwait during the Gulf

83. *ibid* 11.

84. *ibid* 11–13; LDP Constitution Council, ‘Major Points’ (n 68).

85. Momochi (n 29).

86. Shūgiin Kenpō shinsakai [House of Representatives Commission on the Constitution], ‘Nihonkoku kenpō no seiteikatei nikansuru shiryō [Materials on the Enactment Process of the Constitution of Japan]’ (Shū ken shi dai90gō, Shūgiin Kenpō shinsakai November 2016), 9 <[www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/shukenshio90.pdf/\\$File/shukenshio90.pdf](http://www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/shukenshio90.pdf/$File/shukenshio90.pdf)> accessed 30 September 2017.

87. United Nations, *Treaty of Peace with Japan. Signed at San Francisco, on 8 September 1951*, (No 1832 United Nations Treaty Series 46, 1952) < <https://treaties.un.org/doc/publication/unts/volume%201836/volume-1836-i-1832-english.pdf>> accessed 30 September 2017.

88. Constitution of Japan, art 96.

War, Japan's contribution was criticized as too small because of its failure to send troops.⁸⁹ In response, many came to support a constitutional amendment that would allow the SDF to participate in international peacekeeping missions more actively. People rushed to propose various constitutional amendments. The Yomiuri Newspaper, which has the largest circulation in Japan, published its draft of a new constitution in 2004.⁹⁰ In 2005, the LDP officially proposed a draft of a new constitution.⁹¹ In 2007, the government enacted a statute detailing the framework for the referendum necessary to pass a constitutional amendment,⁹² established the commission on constitutional amendment in both houses of the Diet, and started discussions on constitutional amendment.⁹³

Although the LDP lost an election in 2009 to its rival, the Democratic Party of Japan (DPJ), it bounced back in 2012 to capture the government in a landslide victory with its coalition partner, the Kōmei Party.⁹⁴ With the inauguration of Prime Minister Shinzo Abe, the LDP strongly endorsed constitutional amendment, with its 2012 draft of constitutional amendments published before the election.⁹⁵ Then, with a critical victory in the 2016 House of Councillors election, the LDP coalition finally obtained a sufficient number of seats in both houses to initiate the constitutional amendment process.⁹⁶ With the Japanese government likely to begin the long-awaited first constitutional amendment procedure, the LDP's dream might finally come true.

So far, most observers have focused their attention on the possible amendments to the pacifism clause and Article 9.⁹⁷ However, possible amendments to the fundamental

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89. Hiroshi Nakanishi, 'The Gulf War and Japanese Diplomacy' (*Nippon.com*, 6 December 2011) <www.nippon.com/en/features/coo202/> accessed 30 September 2017.
 90. Yomiuri Newspaper, 'Kenpō kaisei shian zenbun [Full Text of Draft of the Yomiuri Constitutional Amendment]' *Yomiuri Shimbun* (Tokyo, 2004) <<https://info.yomiuri.co.jp/media/yomiuri/feature/kaiseishian.html?>> accessed 30 September 2017.
 91. Jiyū minshutō [LDP], 'Shin-kenpō sōan [Draft of the New Constitution]' (Jiyū minshutō 2005), <www.kenpoukaigi.gr.jp/seitoutou/051122jimin-sinkenpousouan.pdf> accessed 30 September 2017.
 92. Nihonkoku kenpō no kaisei tetsuduki nikansuru hōritsu [Act on Amendment Procedure of the Constitution of Japan], Law No 51 of 2007 (Referendum Act).
 93. Shūgiin Kenpō shinsakai [House of Representatives Commission on the Constitution], 'Shūgiin Kenpō shinsakai [House of Representatives Commission on the Constitution]' (House of Representatives 2014) <www.shugiin.go.jp/internet/itdb_kenpou.nsf/html/kenpou/index.htm> accessed 30 September 2017; Sangiin Kenpō shinsakai [House of Councillors Commission on the Constitution], 'Sangiin kenpō shinsakai [House of Councillors Commission on the Constitution]' (House of Councillors) <www.kenpoushinsa.sangiin.go.jp> accessed 30 September 2017.
 94. After another landslide victory in 2014, the LDP obtained 291 seats and the Kōmei Party obtained twenty-five seats for a combined 326 seats of 475, which is sufficient to establish a two-thirds majority in the House of Representatives.
 95. Jiyū minshutō [LDP], 'Nihonkoku kenpō kaisei sōan [Amendment Drafts of the Constitution of Japan]' (*Jiyū minshutō*, 2012), <https://jimin.ncss.nifty.com/pdf/news/policy/130250_1.pdf> accessed 30 September 2017.
 96. As a result of the 2016 House of Councillors election, the LDP obtained 121 seats and Kōmei Party obtained twenty-five seats for a combined 146 out of 242 seats. The coalition did not obtain the two-thirds necessary to unilaterally pass the constitutional amendment proposal (162 seats). But with the support from some other minority parties such as *Ōsaka Ishin* (twelve seats) and some independent members, many believe that there is a possibility to pass constitutional amendment proposals.
 97. Justin McCurry, 'Japan Could Change Pacifist Constitution after Shinzo Abe Victory' *The Guardian* (London, 11 July 2016) <www.theguardian.com/world/2016/jul/11/japan-could-change-pacifist-constitution-after-shinzo-abe-victory> accessed 30 September 2017; Adam P Liff, 'How Specifically Does Japan's LDP Want to Revise the Constitution?' *The Diplomat* (Tokyo, 14 July 2016) <<http://thediplomat.com/2016/07/how-specifically-does-japans-ldp-want-to-revise-the-constitution/>> accessed 30 September 2017; Jeffrey W Horning, 'Constitutional Revision in Japan: Why Change Is Hard to

human rights provisions are no less significant, as such amendments run the risk of undermining the protection of individual rights.⁹⁸

III. FUNDAMENTAL HUMAN RIGHTS PROVISIONS THAT THE LDP IS SEEKING

A. *Concept of Fundamental Human Rights and its Protection Scheme*

What kinds of constitutional amendments have the LDP proposed for the bill of rights? How does the LDP want to change the constitutional bill of rights provisions? In order to understand the historical development and the current position of the LDP, it is necessary to examine both the 2005 and the 2012 drafts, as well as previous discussions within the LDP. Also, in order to place the LDP's position appropriately within the context of the various conservative forces in Japan, it is also necessary to look at the drafts of other influential conservative organizations.

The LDP intends to maintain the fundamental human rights protections in the Constitution, albeit within the context of a different understanding of Japanese society as laid down in the proposed preamble. While the preamble of the 2005 draft declares the continued acceptance of democracy, liberalism, and respect for fundamental human rights as 'unchanging values', it also states that Japanese citizens 'share the responsibility to support and defend the country and society they belong to by themselves with affection, sense of responsibility and strong spirit, attempt to develop the liberal, fair and vibrant society and realization of national welfare, and emphasize the facilitation of education, creation of culture and development of local self-governance'.⁹⁹

Similarly, the preamble of the 2012 draft states that 'Japan is a nation headed by the Emperor as a symbol of the integration of the nation, having a long history and unique culture'.¹⁰⁰ It also declares that the citizens of Japan intend 'to defend the country and homeland with honour and a strong spirit; and, while respecting fundamental human rights, to respect harmony and to create the nation by helping one another through the family and the society as a whole'.¹⁰¹ It further reveals a commitment to 'take liberty and discipline seriously, facilitate education and scientific technology while defending our beautiful homeland and natural environment, and promote the development of the country through vibrant economic activity'.¹⁰² Moreover, it concludes by stating that 'Japanese citizens hereby enact this constitution in order to hand over the good tradition and our country to our off-springs forever'.¹⁰³

Come by' (Council on Foreign Relations 26 July 2016) <www.foreignaffairs.com/articles/japan/2016-07-26/constitutional-revision-japan> accessed 30 September 2017.

98. Lawrence Repeta, 'Japan's Democracy at Risk—The LDP's Ten Most Dangerous Proposals for Constitutional Change' (2013) 11(3) *Asia Pacific Journal* 1; Carl F Goodman, 'Contemplated Amendments to Japan's 1947 Constitution: A Return to Iye, Kokutai and the Meiji State' (2017) 26 *Washington International Law Journal* 17.

99. LDP, '2005 Draft' (n 91) preamble.

100. LDP, '2012 Amendment Draft' (n 95) preamble.

101. *ibid.*

102. *ibid.*

103. *ibid.*

The LDP's questions and answers on the draft amendments (LDP Q&A), published to provide background information on the 2012 draft, points out that the preamble should be based on the 'history, tradition, and culture of our country', something which the current preamble has failed to do.¹⁰⁴ The reference to the respect for harmony reflects the first principle of the *Seventeen-Article Constitution*, Japan's first constitution written in 604 AD by Prince Shotoku. This constitution, containing moral imperatives for public officials rather than legal restrictions on government powers, mandated that harmony needed to be respected.¹⁰⁵ This first principle is often regarded as imperative to Japanese society.

These proposals are consistent with other constitutional amendment proposals by other conservative groups such as the Japan Conference, which insists on the enactment of a constitution based on 'our tradition running through eternal history'.¹⁰⁶ The Yomiuri Newspaper draft similarly declared in its preamble that 'the Japanese people shall commit to succeed the long history and tradition of the nation, defend the beautiful homeland and cultural heritage, promote cultural and academic advancement by cultivating them in the future, and build a highly creative nation'.¹⁰⁷ The 2013 draft of Sankei Newspaper, another conservative newspaper, similarly declared that 'the state of Japan has an eternal history following its ancestors and is a constitutional country headed by the Emperor'.¹⁰⁸ It also provides:

[T]he Japanese citizens have created the modern state with dignity, relying upon the Emperor as the basis for their national integration, while avoiding despotism and emphasizing public deliberation. They have built a distinctive Japanese culture as a maritime nation, surrounded by the mountains, rivers, and natural environment. Wishing the surrounding waters to be a friend, and with the spirit of respecting harmony, they have nurtured the gallantry to face various national difficulties.¹⁰⁹

It further declares that 'the Japanese citizens recognize the existence of various value perspectives and produce the inherent traditional culture that accepts the novelty of, and cooperation with, different cultures'.¹¹⁰ Apparently, the Constitution should be designed to follow these traditions.

B. *Different Understanding of Fundamental Human Rights*

While the 2005 draft did not propose any significant changes to Article 11, the 2012 draft proposed to change the nature of fundamental human rights protections, in that it would no longer declare that they were conferred as inviolable and eternal rights to current and future

104. Jiyū minshutō [LDP], 'Nihonkoku Kenpō kaisei sōan Q&A (zōhoban) [Q&A on Amendment Drafts to the Constitution of Japan (updated)]' 5 (Jiyū minshutō October 2013) <https://jimin.ncss.nifty.com/pdf/pamphlet/kenpou_qa.pdf> accessed 30 September 2017.

105. *ibid.* See 'The Constitution of Prince Shōtoku' (Asia for Educators, Columbia University), art 1 <<http://afe.easia.columbia.edu/ps/japan/shotoku.pdf>> accessed 30 September 2017.

106. Japan Conference (n 70).

107. Yomiuri Newspaper, 'Full Text of Draft' (n 90) preamble.

108. Sankei Newspaper, 'Kokumin no Kenpō [Constitution for the Citizens]' *Sankei Shimbun* (Tokyo, 26 April 2013), preamble <www.sankei.com/politics/news/141030/pl1410300023-n1.html> accessed 30 September 2017.

109. *ibid.*

110. *ibid.*

citizens. Instead, the Constitution would simply state that such rights were inviolable and eternal.¹¹¹ It also would remove Article 97 in the chapter on the supremacy of the Constitution, which declared that fundamental human rights are conferred on citizens.¹¹²

The LDP Q&A explains the overall policy of the new draft as follows:

Rights are gradually generated from the history, tradition, and culture of the community. Accordingly, human rights provisions need to be based on the history, culture, and tradition of our country. There are some provisions in the current constitution that could be viewed as being derived from the European idea that human rights are granted by God. We believe that these provisions need to be revised.¹¹³

Therefore, according to the LDP, the protection of fundamental human rights is not universal but instead is rooted in the history, tradition, and culture of Japan. These fundamental human rights are not something granted or conferred. This was a reason why the LDP wanted to remove language in Article 11 that suggests human rights are conferred, although the LDP still views human rights as natural rights inherent to all citizens as human beings.¹¹⁴ It also justifies the removal of Article 97 on grounds of redundancy, given the existence of Article 11.¹¹⁵

However, many suspect that the real reason for the revision of Article 11 and the removal of Article 97 is to abrogate the Constitution's strong commitment to the protection of fundamental human rights — especially its commitment to the universal norm of fundamental human rights.¹¹⁶

Additionally, the 2012 draft would revise Article 13 to declare that all citizens are to be respected as 'persons' instead of as 'individuals'.¹¹⁷ Other conservative proposals also suggest similar revisions.¹¹⁸ Of course, the implication is to deny the primacy of individuals; instead, the state and society are placed ahead of individual members of society. It would thus completely change the basic philosophy of the protection of individual rights.¹¹⁹

C. *Limitation on Rights*

With respect to limitations on individual rights, the 2005 draft would have revised Article 12 to require citizens to exercise their rights in a manner that does not violate the 'public interest and public order ... mindful that liberty and rights accompany

111. LDP, '2012 Amendment Draft' (n 95) art 11.

112. *ibid.*

113. LDP, 'Q&A on Amendment Drafts' (n 104) 13.

114. *ibid.* 37.

115. *ibid.* The Sankei Newspaper draft does not have a clause declaring fundamental human rights as inviolable and eternal (Sankei Newspaper, 'Constitution' (n 108) art 17(1)). The Yomiuri Newspaper draft as well as Sankei Newspaper draft also does not include a provision corresponding to current article 97. See Yomiuri Newspaper, 'Full Text of Draft' (n 90) and Sankei Newspaper, 'Constitution' (n 108).

116. Repeta (n 98); Goodman (n 98) 45–47.

117. LDP, '2012 Amendment Draft' (n 95) art 13.

118. The Sankei Newspaper draft does not have a clause corresponding to the first sentence of Article 13 but declares that 'human dignity should not be infringed' (Sankei Newspaper, 'Constitution' (n 108) art 22 (1)).

119. Repeta (n 98).

responsibility and obligations,' thus replacing 'public welfare' with 'public interest and public order'.¹²⁰ The 2012 draft also followed this pattern.¹²¹

The 2005 draft also revised Article 13 to mandate respect for fundamental human rights so long as it does not violate 'public interest and public order'.¹²² The 2012 draft would also revise Article 13 to demand the greatest respect for a citizen's right to life, liberty, and the pursuit of happiness, so long as 'it does not violate public interest and public order', instead of 'public welfare', as it was worded originally.¹²³

The LDP Q&A succinctly explains that 'public welfare' is ambiguous and has been viewed by some as allowing the restriction on fundamental human rights only when they conflict with another's human rights. The LDP wanted to clarify that there was no such limitation, and human rights could be restricted whenever public interest and public order were at risk.¹²⁴ This concept of 'public order' also includes the 'order of the society'. The LDP Q&A explains that it is natural that one should not frustrate the social life of others when exercising human rights. The new draft was meant to make this natural limit clear.¹²⁵

Other conservative proposals show a similar inclination. The Yomiuri Newspaper draft would revise Article 12 by mandating citizens to respect the liberty and rights of others, keeping balance with 'national security, public order, a national healthy environment, and other public interests', as well as mandating citizens not to abuse their rights.¹²⁶ This draft also replaces 'public welfare' in Article 13 with 'public interest'.¹²⁷ The Sankei Newspaper draft declares:

[R]ights are accompanied with obligations. Citizens shall respect the freedoms and rights of each other and shall not abuse them. The exercise of their freedoms and rights could be subject to restrictions by law in order to protect national security, public interest or public order.¹²⁸

It appears that these amendments were meant to clarify that fundamental human rights could be restricted for the benefit of the public, thereby making it much easier for the government to limit the exercise of fundamental human rights.¹²⁹

D. *Addition of New Rights*

The LDP drafts and other conservative drafts were partly concerned with introducing new rights,¹³⁰ in addition to strengthening the protection of some existing rights.¹³¹

120. LDP, '2005 Draft' (n 91) art 12.

121. LDP, '2012 Amendment Draft' (n 95) art 12.

122. LDP, '2005 Draft' (n 91) art 13.

123. LDP, '2012 Amendment Draft' (n 95) art 13.

124. LDP, 'Q&A on Amendment Drafts' (n 104) 13.

125. *ibid* 14.

126. Yomiuri Newspaper, 'Full Text of Draft' (n 90) art. 17.

127. *ibid* art 18.

128. Sankei Newspaper, 'Constitution' (n 108) art 18.

129. Repeta (n 98).

130. LDP, 'Q&A on Amendment Drafts' (n 104) 13, 15.

131. The 2005 draft as well as 2012 draft proposed to add disability as one of the prohibited grounds for discrimination (LDP, '2005 Draft' (n 91) art 14; LDP, 2012 Amendment Draft (n 95) art 14), while the

For instance, the 2005 draft proposed to add the right to privacy of information by stating that ‘no one should be allowed to obtain personal information improperly, retain it, or to use it.’¹³² The 2012 draft also endorses this privacy right.¹³³

The 2005 draft also proposed to add a provision that reads ‘the State has a responsibility to explain all governmental actions to the citizens’.¹³⁴ The 2012 draft also endorsed the inclusion of this provision.¹³⁵ This proposal was in response to the argument for the right to know or access government information.

There have been many calls for the addition of a right to enjoy the environment. This right was first proposed in response to government projects destroying or threatening to destroy the environment. This led to the 2005 draft proposing a new provision that would obligate the government to preserve the environment: ‘the state must strive to preserve the environment for citizens to enjoy it’.¹³⁶ The 2012 draft had a similar endorsement although it added a reference to ‘cooperation of the citizens’.¹³⁷

The current constitution does not have any provisions protecting victims of crimes. Since the current constitution was enacted, countries around the world have increased rights protection for crime victims. The LDP has adopted a tough-against-crime attitude and has been active in promoting the rights of victims. As a result, the 2005 draft proposed to provide that ‘the victims of crime have a right to receive the treatment their dignity deserves’.¹³⁸ The 2012 draft also proposed that ‘the state must respect human rights and be respectful in the treatment of crime victims and their families’.¹³⁹

The LDP Q&A explains that the obligation to disclose government information, the obligation to preserve the environment, and the obligation to respect crime victims are added as responsibilities of the government, rather than rights of individuals because they are not widely accepted as specific enough to be recognized as individual rights.¹⁴⁰ This would mean that individual citizens would not be able to invoke these rights before the courts when challenging governmental actions.

The addition of new rights is widely supported by other parties as well. The Yomiuri Newspaper draft also supported the addition of personality rights,¹⁴¹ environmental rights,¹⁴² victim rights,¹⁴³ and the right of access to government information.¹⁴⁴ The Sankei

2012 draft obligated the government to strive to provide an adequate environment for education (LDP, ‘2012 Amendment Draft’ (n 95) art 26(3)).

132. LDP, ‘2005 Draft’ (n 91) art 19-2.

133. LDP, ‘2012 Amendment Draft’ (n 95) art 19-2.

134. LDP, ‘2005 Draft’ (n 91) art 21-2.

135. LDP, ‘2012 Amendment Draft’ (n 95) art 21-2.

136. LDP, ‘2005 Draft’ (n 91) art 25-2.

137. LDP, ‘2012 Amendment Draft’ (n 95) art 25-2.

138. LDP, ‘2005 Draft’ (n 91) art 25-3.

139. LDP, ‘2012 Amendment Draft’ (n 95) art 25-4.

140. LDP, ‘Q&A on Amendment Drafts’ (n 104) at 15.

141. Yomiuri Newspaper, ‘Full Text of Draft’ (n 90) art 20. The personality right means the right to integrity as a person or the right to personhood.

142. *ibid* art 30.

143. *ibid* art 47.

144. *ibid* art 50.

Newspaper draft would also support the addition of the right to privacy,¹⁴⁵ the right of access to government information,¹⁴⁶ environmental rights,¹⁴⁷ and the rights of crime victims.¹⁴⁸

E. *Freedom of Expression*

The LDP has been frustrated by the arguments made against restrictions on freedom of expression. The 2005 draft did not significantly revise Article 21.¹⁴⁹ However, the 2012 draft attempted to make it much easier for the government to restrict freedom of expression by proposing to add Article 21(2) which states that 'notwithstanding the preceding section, no one should be allowed to engage in activity that is intended to harm public interest or public order or create an association for the same purpose'.¹⁵⁰ By allowing the government to restrict freedom of expression by merely invoking the 'public interest' and 'public order' rather than 'public welfare', the provision was clearly intended to broaden its ability to restrict freedom of expression.¹⁵¹

The LDP Q&A explains that this revision is necessary, citing the difficulty of applying the Anti-Subversive Activities Act to Aum Shinrikyo.¹⁵² Additionally, the draft only permits restricting activities or the creation of associations intended to harm public interest and public order. It asserts that the revision would not impose any other restrictions on freedom of expression.¹⁵³ However, the proposed amendment to Article 21 would surely allow far more extensive restrictions on freedom of expression than the mere denial of protection to Aum Shinrikyo.

F. *Religious Freedom*

The LDP drafts were also meant to revise provisions on religious freedom, specifically the separation of religion and the state. The 2005 draft revised Article 20(3) to prohibit the state and local government from participating in:

[r]eligious education and other religious activity, which goes beyond the scope of social ceremony or customary practice, and which has religious significance and leads to an

145. Sankei Newspaper, 'Constitution' (n 108) art 31.

146. *ibid* art 32.

147. *ibid* art 43.

148. *ibid* art 51(2).

149. LDP, '2005 Draft' (n 91) art 21(1).

150. LDP, '2012 Amendment Draft' (n 95) art 21(2). The Sankei Newspaper draft would also add that 'freedom of expression can be subject to restriction by statutes for the protection of morality and juveniles' in addition to general restrictions for national security, public interest, or public order. Sankei Newspaper, 'Constitution' (n 108) art 28(3).

151. Goodman (n 98) 53–54; Repeta (n 98).

152. LDP, 'Q&A on Amendment Drafts' (n 104) 16. The Aum Shinrikyo is a religious cult group and was accused of having engaged in various illegal activities, including spreading deadly sarin gas inside Tokyo subway trains in 1995, killing thirteen people and injuring more than 6,000 others. The government wanted to apply the Anti-Subversive Activity Act to disband the organization but failed because of the strong opposition. Hakaikatsudō bōshihō [Anti-subversive Activities Act], Law No 240 of 1952, art 7. Instead, the Aum Shinrikyo lost the status of religious corporation under the Religious Corporation Act but religious organization itself survived. Shukyō hōjinhō [Religious Corporation Act], Law No 126 of 1951.

153. LDP, 'Q & A on Amendment Drafts' (n 104) 16.

endorsement, facilitation or advancement or oppression or interference with a particular religion.¹⁵⁴

The 2012 draft further revised Article 20(1) to prohibit the state from granting privileges to religious organizations, instead of prohibiting religious organizations from benefiting from privileges granted by the state or exercising any political power as the current provision provides.¹⁵⁵ It also revised Article 20(3) in the following manner: ‘the state, local government, or other public organizations should not engage in education for a particular religion or other religious activities, except for those used in social ceremonies or customary practices’.¹⁵⁶

As mentioned above,¹⁵⁷ Shinto was granted a special status under the Meiji Constitution. After the occupation forces banned the government from endorsing Shinto and mandated the separation of religion and the state via the Constitution of Japan, the government has been unable to support Shinto, like any other religion. However, because of Shinto’s widespread influence, it has been difficult for the government to stay away from it entirely. Moreover, the LDP government, supported by the Shinto organization, wanted to re-establish the close relationship between the government and Shinto. The Supreme Court of Japan has allowed some kinds of relationships between Shinto and the government as long as the relationship remained within socially acceptable limits, thus allowing the government to engage in social customs such as the Shinto-style ground-breaking ceremony.¹⁵⁸ However, the Supreme Court of Japan has struck down some government connections with Shinto, such as government payment for prayers at Shinto shrines.¹⁵⁹ The LDP has criticized these decisions of the Supreme Court of Japan that struck down such practices for undermining the traditional connection between Shinto and the government.

The LDP Q&A explains that this amendment was meant to clarify the permissible connection between religion and the state based on guidance from the decisions of the Supreme Court.¹⁶⁰ However, it suggested that this amendment would also allow the government to pay for prayers at the Shinto shrines with tax money.¹⁶¹ Therefore, it is apparent that the LDP revisions are meant to widen the ambit of permissible relationships between the government and Shinto.¹⁶²

G. Family

The LDP has expressed deep dissatisfaction with how the Constitution of Japan views families. It thus attempted to restore the order within the family in the new constitution. While the LDP did not propose any significant revisions to Article 24 in the 2005 draft, the

154. LDP, ‘2005 Draft’ (n 91) art 20(3).

155. LDP, ‘2012 Amendment Draft’ (n 95) art 20(1).

156. *ibid* art 20(3).

157. See nn 52–53.

158. Supreme Court Grand Bench Judgment 13 July 1977, 3 I-4 Minshū 533.

159. Supreme Court Grand Bench Judgment 2 April 1997, 5 I-4 Minshū 1673.

160. LDP, ‘Q&A on Amendment Drafts’ (n 104) 18.

161. *ibid*.

162. Goodman (n 98) 44.

2012 draft proposed to add Article 24(1), which provides that the '[f]amily needs to be respected as a natural and foundational unit of society. Members of the family must help each other'.¹⁶³ As the text of this proposed amendment suggests, in addition to mandating respect for the family as the foundational unit of society, it would also add a new obligation for family members to help each other. Moreover, it would change the current text that states that '[m]arriage shall be based only on the mutual consent of both sexes', by omitting the word 'only'.¹⁶⁴

The LDP Q&A explains that Article 24(1) is meant to address the concern that family ties have been weakening in recent years, despite the fact that the family is a fundamental element of society.¹⁶⁵ Along with the LDP, most conservative groups – including the Japan Conference,¹⁶⁶ the Yomiuri Newspaper,¹⁶⁷ and the Sankei Newspaper¹⁶⁸ – believe in the necessity of provisions mandating respect for the family. The LDP Q&A also explains that the proposed obligation to care for each other is simply a moral obligation and is not meant to allow the government to interfere with family structure.¹⁶⁹ Nonetheless, it is important to note that there is no definition of 'family' within this proposed constitution. Since the LDP draft relies on the long tradition and history of Japan, one can likely assume that 'family' refers to a traditional family – a heterosexual legal marriage sharing the same family name.

Many people fear that this amendment would prevent the existence of more diverse forms of family structures. Moreover, by making the family the foundational unit instead of the individual, the amendment might resurrect the pre-war *ie* system. It is even possible that this change could lead to the Emperor once again being placed at the top of society, as the ultimate father of Japan.¹⁷⁰ Furthermore, it is obvious that marriage needs to be based on the mutual consent of both partners, but by removing 'only' from the current text, the possibility arises that parents and other members of the family might be able to have a say on the matter, and possibly even possess the right to approve or reject the marriages of their children.¹⁷¹

IV. THE VISION OF JAPANESE SOCIETY AND 'TRADITIONAL JAPANESE VALUES'

A. *The Vision of Japanese Society*

It is apparent that the LDP drafts are premised upon a completely different vision of what Japanese society should look like under the constitution. The LDP's drafts clarify

163. LDP, '2012 Amendment Draft' (n 95) art. 24(1).

164. *ibid* art 24(2).

165. LDP, 'Q&A on Amendment Drafts' (n 104) 16.

166. Japan Conference (n 70).

167. Yomiuri Newspaper, 'Full Text of Draft'(n 90) art 27(1).

168. Sankei Newspaper, 'Constitution' (n 108) art 23.

169. *ibid* 17.

170. Goodman (n 98) 61.

171. The LDP 2012 draft also mandated the respect for human dignity and equality of sexes with respect to other matters on family, support, guardianship, marriage, divorce, property, succession, and relatives. LDP, '2012 Amendment draft' (n 98) art 24(3).

that Japanese society is headed by the Emperor, and propose to amend the Constitution to declare that the Emperor is the head of state.¹⁷² This position is consistent with the position of other conservative organizations such as the Japan Conference, which proposed that the Constitution needed to clearly state that Japan is a constitutional monarchy, with the Emperor as the head of the country, and as a symbol of the eternity of Japan as well as the integration of the people of Japan.¹⁷³ The Sankei Newspaper draft expresses similar ideas, as it also proposes to clarify that Japan is a country led by the Emperor¹⁷⁴ and that ‘Japan is a constitutional monarchy with the Emperor as a symbol of eternity of the nation as well as the integration of the nation’.¹⁷⁵

The commitment to follow history and tradition has also led to the acknowledgment of the public’s historical responsibility to defend their community and homeland with honour and a strong spirit.¹⁷⁶ As a result, many conservative critics argue that the Constitution should declare that citizens have a responsibility or obligation to defend Japan.¹⁷⁷ Naturally, this position leads conservative people to also support the creation of armed forces capable of defending the country from foreign attacks. Thus, the LDP’s draft would permit Japan to form an armed force called the ‘Self Defense Forces’, the existence of which would require a substantial amendment to Article 9.¹⁷⁸ Other conservative proposals are generally consistent in calling for the revision of this so-called pacifism clause.¹⁷⁹ Additionally, the desire to commit to international peacekeeping operations beyond non-military contributions requires most conservative proposals to allow the SDF to take a more active military role that goes beyond mere self defence, by amending Article 9.¹⁸⁰

Judging from the commitment of the LDP and other conservative people to clarify the high status of the Emperor, to establish an obligation to defend the country, and to permit the extended use of the armed forces, it seems apparent that these proposals are premised on the belief that the Meiji era was a golden era to be followed; on the other hand, the changes to the Constitution following World War II were an intolerable and unjustifiable departure from tradition. These conservative proposals are designed to return Japanese society to the Meiji era.

172. LDP, ‘2012 Amendment draft’ (n 95) art 1. See also LDP, ‘Q&A on Amendment Drafts’ (n 104) 7.

173. Japan Conference (n 70). On the other hand, the Yomiuri Newspaper draft does not include such a provision. Yomiuri Newspaper, ‘Full Text of Draft’ (n 90) art 1 (sovereignty of the people) and art 5 (symbolic status of the Emperor).

174. Sankei Newspaper, ‘Constitution’ (n 108) preamble.

175. *ibid* art 1.

176. LDP, ‘2005 Draft’ (n 91) preamble; LDP, ‘2012 Amendment draft’ (n 95) preamble.

177. Sankei Newspaper, ‘Constitution’ (n 108) art 19(1) (obligation to defend the country and to serve for the society and for the public).

178. LDP, ‘2005 Draft’ (n 91) art 9-2; LDP, 2012 Amendment draft (n 95) art. 9-2. Currently, the Self Defense Forces are not regarded as armed forces in Japan but a minimum force to defend Japan not reaching to an armed force.

179. Yomiuri Newspaper, ‘Full Text of Draft’ (n 90) art 12; Sankei Newspaper, ‘Constitution’ (n 108) art 16(1).

180. LDP, ‘2005 Draft’ (n 91) art 9-2(3); LDP, ‘2012 Amendment draft’ (n 95) art 9-2(3); Sankei Newspaper, ‘Constitution’ (n 108) art 16(1) (listing contribution to international peace as one of the purposes of holding armed forces).

B. *The Vision of Individual Rights and the Role of the Constitution*

In addition to changing the vision of Japanese society, the proposed amendments would also radically change the vision of individual rights that exists under the current constitution. The Constitution of Japan is based on the notion of the universality of human rights, reflecting the international commitment to the protection of human rights after the end of World War II.¹⁸¹ By denying this universality and replacing it with history and tradition as the basis for human rights protection, it appears that the LDP is committed to a completely different vision of individual rights. While there has of course been on-going debates on the universality of human rights,¹⁸² most people believe that the universality of human rights is the integral foundation of a liberal democracy. Therefore, this amendment would at least radically alter the way individual rights are viewed, and might even undermine the foundation of individual rights protection.

There is also a striking difference between the role of the current Constitution and the role that the LDP-drafted Constitution would play. The Constitution of Japan is designed to place limits on the government. On the other hand, the primary role of the LDP's proposed constitution would be to impose obligations on citizens.¹⁸³ The LDP Q&A insists that there is nothing wrong with imposing some obligations on citizens.¹⁸⁴ The LDP asserts that in order to maintain society and the state, certain obligations must be included in the Constitution.¹⁸⁵

On top of the aforementioned obligations, the 2012 draft also proposes the addition of Article 102(1), which provides that all citizens must respect the Constitution.¹⁸⁶ This is a fundamental change. The current constitution only requires public officials to respect it.¹⁸⁷ As the Constitution was enacted by the people, it was believed that there should not be any obligation for the people themselves to obey it. However, the LDP takes the opposing view that the Constitution must be obeyed by the people just like any other law.¹⁸⁸ Although the LDP's proposed obligation is merely declaratory and carries no legal effect,¹⁸⁹ it is indicative of an entirely different understanding of the

181. See n 40.

182. Declan O' Sullivan, 'Is the Declaration of Human Rights Universal?' (2000) 4(1) *International Journal of Human Rights* 25; Thomas M Franck, 'Are Human Rights Universal?' (2001) 80(1) *Foreign Affairs* 191; Richard Mullender, 'Human Rights: Universalism and Cultural Relativism' (2003) 6(3) *Critical Review of International Social and Political Philosophy* 70; Nhina Le, 'Are Human Rights Universal or Culturally Relative?' (2016) 28 *Peace Review: A Journal of Social Justice* 203.

183. The LDP draft 'is totally at odds with the very purpose for which Japan's Constitution is supposed to exist. Any constitution that is based on the principle of constitutionalism is essentially a set of rules for keeping the state power in check to protect the rights of citizens. But the LDP's draft constitutional amendment clearly aims to impose various duties on the people and force a specific set of values on the people. In other words, it is meant to control the people, rather than to keep the state in check.' Editorial, 'LDP Amendment Draft Is a Flawed Perception of the Constitution' *Asahi Shimbun* (Tokyo, 19 October 2016) <www.asahi.com/ajw/articles/AJ201610190032.html> accessed 30 September 2017.

184. LDP, 'Q&A on Amendment Drafts' (n 104) 6.

185. *ibid.*

186. LDP, '2012 Amendment draft' (n 95) art 102(1).

187. Constitution of Japan, art 97.

188. LDP, 'Q&A on Amendment Drafts' (n 104) 37.

189. *ibid.* 38.

Constitution. Other conservative proposals are consistent in imposing an obligation on the people to observe the Constitution.¹⁹⁰

Based on the LDP's focus on including so many new obligations on the people and mandating the people to obey the constitution, it is clear that the LDP's proposed constitution would not be a law enacted by the people to restrain the power of the government.¹⁹¹ Rather, it would be a law to bind the people and ensure that they perform their obligations.

C. Reflections on 'Traditional Japanese Values'

The LDP and other conservative people rely heavily upon history and tradition, which can essentially be seen as relying on 'traditional Japanese values'. It is, after all, the values cherished in traditional Japanese society – 'traditional Japanese values' – that they want to preserve and restore.

The focus on 'traditional Japanese values' is reminiscent of the concept of 'Asian values' emphasized by Mahathir Mohamad, Prime Minister of Malaysia from 1981–2003, and by Lee Kuan Yew, Prime Minister of Singapore from 1959–1990.¹⁹² 'Asian values' are often advocated as a justification to place limits on the protection of individual rights in order to pursue the promotion of economic development or the preservation of public order.¹⁹³ However, such arguments have been subject to various criticisms in the past.¹⁹⁴

Although no one in Japan talks about 'Asian values', the LDP's idea of 'tradition' sounds similar to 'Asian values'. Even though they were not primarily invoked to promote economic development, 'traditional Japanese values' are seemingly intended to place limits on the protection of individual rights and to secure public order. The LDP appears to be ensuring that the public interest could outweigh individual rights through a revision of the fundamental rights provisions.¹⁹⁵ As both theories have similar effects and objectives, it seems likely that there are also certain similarities in the justifications for them.

190. Yomiuri Newspaper, 'Full Text of Draft' (n 90) preamble; Sankei Newspaper, 'Constitution' (n 108) art 112(2).

191. Goodman (n 98) 51.

192. Fareed Zakaria, 'Culture Is Destiny: A Conversation with Lee Kuan Yew' (1994) 73(2) *Foreign Affairs* 109; Michal D Barr, 'Lee Kuan Yew and the "Asian Values" Debate' (2000) 24 *Asian Studies Review* 309; Yvonne Tew, 'Beyond "Asian Values": Rethinking Rights,' (CGHR Working Paper 5, University of Cambridge Centre for Governance and Human Rights November 2012), <www.repository.cam.ac.uk/bitstream/handle/1810/245115/CGHR_WP_5_2012_Tew.pdf> accessed 30 September 2017.

193. Amartya Sen, 'Human Rights and Asian Values,' (*Carnegie Council on Ethics and International Affairs*, 25 May 1996) <www.carnegiecouncil.org/publications/archive/morgenthau/254.html> accessed 30 September 2017; Surain Subramaniam, 'The Asian Values Debate: Implications for the Spread of Liberal Democracy' (2000) 27(1) *Asian Affairs* 19; Chang Yau Hoon, 'Revisiting the Asian Values Argument Used by Asian Political Leaders and Its Validity' (2004) 32(2) *Indonesian Quarterly* 154.

194. Christian Welzel, 'The Asian Values Thesis Revisited: Evidence from the World Values Survey' (2011) 12(1) *Japanese Journal Political Science* 1; International Federation for Human Rights (FIDH) 'Demystifying Human Rights Protection in Asia' (Background Paper No 669a, FIDH November 2015) <www.fidh.org/IMG/pdf/asie669anglaisbassdef.pdf> accessed 30 September 2017.

195. Editorial (n 183) ('Underlying the LDP draft Constitution and running through it like a basso continuo is the philosophy that the interests of the state and groups supersede the human rights of individual citizens that are highly valued under the current Constitution.').

On the other hand, the fact that Japanese society is headed by the Emperor (whether symbolically or as the actual head of state) is a significant difference from other Asian countries. Moreover, the fact that the LDP wants to provide special support to Shinto may be another significant difference from other Asian countries. After all, although the LDP wishes to revise the principle of separation of religion and state in the constitution, the LDP expects the amendments to give Shinto, and Shinto alone, a closer connection with the government. Furthermore, the primary emphasis on 'harmony' – which stems from Prince Shotoku's *Seventeen-Article Constitution* – as the most significant characteristic of Japanese society, could be viewed as a unique Japanese manifestation. These may be some of the main reasons why the LDP and other conservatives emphasize 'traditional Japanese values' and not 'Asian values'.

In light of the LDP's plan to revise Article 11, abolish Article 97, and omit the reference to individuals in Article 13, there can be no question that the strongest motivation for the LDP may indeed lie in its deep dissatisfaction with the concept of fundamental human rights itself and the idea that every human being must be respected as an individual. Both ideas are central to the protection of fundamental human rights. The LDP wants to repudiate the universality of the human rights protection and reject individualism as a primary principle, while emphasizing that every citizen, as a member of society, has responsibilities towards society. To the LDP, society is more important than the individual. This is perhaps the most apparent similarity between the 'Asian values' theory and the LDP's argument for 'traditional Japanese values'.

Having devoted so much focus to traditional Japanese values, however, it seems odd that no one has defined what exactly these 'traditional Japanese values' are. The LDP's 2012 draft, for instance, never defines what is meant by the 'inherent culture' of Japan, or what qualifies as the 'good tradition' that should be followed. As a result, we are forced to speculate on what these 'traditional Japanese values' might be. This uncertainty can also be found in the proposals of other conservative groups. There is, however, at least one thing that we know. As we already saw, conservative people assume that the Meiji era was the period where these traditions were formulated. It is the tradition of this era that the LDP and other conservative politicians want to restore. What we can therefore see is that the call for 'traditional Japanese values' is nothing but an anachronistic nostalgia for the Meiji era.

What conservative people fail to see in this respect, is that Japan has a history spanning over two millennia filled with significant changes in society and government. The Meiji era is not the only source of Japanese tradition. While the Meiji Restoration brought significant changes in law, politics and culture, Japan's rich culture and traditions clearly predated the Meiji Restoration. As a result, the Meiji tradition is naturally quite different from the traditions that existed before the Meiji Restoration. It is difficult to understand why only traditions after the Meiji Restoration should be defended, and not the older traditions. The logic of the LDP therefore seems to lack internal consistency, and it remains unclear whether the LDP and other conservative people would be able to explain why only the traditions from the Meiji era should be restored, and not traditions that existed prior to the Meiji Restoration.

Another point to consider is that the values that are being called ‘traditional Japanese values’ are actually quite modern since the Meiji Restoration occurred only roughly one hundred and fifty years ago. It is a tradition created by government elites rather than a tradition naturally developed by society over time. The image of Japanese society being governed by the Emperor, as envisioned by conservative people, is actually an image created by the Meiji government to justify the Emperor’s power after the Meiji Restoration. Prior to that, it is doubtful whether the Emperor actually governed Japan.¹⁹⁶ Additionally, while many conservative people claim that the public has a responsibility to defend the country, such an obligation was only introduced by the Meiji government in connection to mandatory conscription. There was no such obligation before that time.¹⁹⁷ This tradition, like many others, is not a long-standing tradition of Japan. It is simply a modern one.

Moreover, the LDP and other conservative people have failed to explain why such traditions deserve to be followed in the first place. For instance, as we already saw, the Meiji government established the family law system based on the supremacy of the *ie*, and with the *ie* being the most foundational building block of society. This *ie* system led to serious discrimination against women. In the 21st century, it should almost go without saying that there is no reason to follow such a tradition.

Finally, one must question whether the LDP’s understanding of ‘traditional Japanese values’ is consistent with *true* ‘traditional Japanese values’. True ‘traditional Japanese values’ respect diversity and minority groups within Japanese society, and emphasize harmony. While the LDP’s proposal also acknowledges the concept of harmony, the concept of harmony was not used to force minority groups to assimilate, or to silence them.¹⁹⁸ However, this is precisely what the LDP government wants to accomplish under the revised constitution. Therefore, the LDP’s insistence on ‘traditional Japanese values’ might actually destroy the true and long-standing ‘traditional Japanese values’.

Based on all of the aforementioned reasons, constitutional amendments based on ‘traditional Japanese values’ are unjustifiable. They would very likely undermine the

196. Kunaichō [Imperial House Agency], ‘Tennō kōgō ryō heika gokekkan man 50nen ni saishite [On the 50th Anniversary of the Marriage of the Emperor and Empress]’ (Kunaichō 8 April 2009) <www.kunaicho.go.jp/okotoba/01/kaiken/kaiken-h21-gokekkan50.html> accessed 30 September 2017 (statement of the current Emperor of his belief that the status of the Emperor under the Constitution of Japan is more in line with the long history of the Emperor system). See also Yoshio Yasumaru, *Kindai tennōzō no keisei [Creation of the Image of the Modern Emperor]* (Iwanami Shoten 2007).

197. During the Tokugawa era ranging roughly three centuries before the Meiji Restoration, it was only the samurai warriors who were retained by the local lords that were required to defend the lord under feudal relationship. There was no mandatory military service for the public. The Meiji government introduced mandatory military service and conscription in 1873 and the Meiji Constitution stipulated that the Japanese subjects had an obligation for military service as provided by the law. Meiji Constitution, art 20.

198. The original Japanese word for ‘harmony’ in the Prince Shotoku’s Seventeen-Article Constitution was *wa*, which also meant peace and comfort. It mandated everyone to lose his or her sharp edges and is meant to teach everyone to fit oneself into the society. The concept also promoted kindness, mutual help, and caring for others. It is not an authorization for the government to suppress different opinions and different cultures. Yutaka Sakisaka, *Wa no Kōzō [Structure of Harmony]* (Hokuju Shuppan 1979); Takeshi Umehara, *Shōtoku taishi 2 [Prince Shotoku 2]* (Shūeisha 1993); Takeru Umehara, *Nihon no dentō towa nanika [What is Japanese Tradition]* (Minerva Shobō 2010).

very foundation of individual rights protection in Japan. These problems are the same ones which could be found in 'Asian values' theory. The LDP's 'traditional Japanese values' theory, just like the 'Asian values' theory, would hardly justify what they are hoping to accomplish.

V. CONCLUSION

It is not certain whether the amendments that the LDP supports could be enacted as the draft presently stands. The LDP's coalition partner, Kōmei Party, supports the addition of new rights such as environmental rights, but is not enthusiastic about a revision of the fundamental principles of the Constitution.¹⁹⁹ Other minority parties such as Ōsaka Ishin, which also supports constitutional amendment, is much more concerned with local government issues, and thus have not proposed any amendments affecting fundamental human rights except for the addition of a provision mandating free higher education.²⁰⁰ Since a proposal for a constitutional amendment requires a two-thirds majority in both houses of the Diet, further negotiations are required before the government can introduce a specific amendment proposal that will receive the required support.²⁰¹

Even more significant is the fact that constitutional amendments need to receive majority support in a referendum. Because the referendum addresses each individual amendment as a separate proposal rather than a package,²⁰² it is uncertain whether all of the proposals will be accepted even if the Diet gains the necessary support to propose an amendment. Public support for a constitutional amendment varies depending upon the polls.²⁰³ It is completely unpredictable whether there is majority support for any or all of the proposals the LDP announced in 2012. In this sense, the LDP's goal of replacing the human rights provisions of the current constitution with their revised provisions may still be just a dream. However, their proposals give us a glimpse into the LDP's vision regarding the protection of individual rights and the role of society in Japan.

199. Kōmeitō, Kenpō [Constitution], (*Kōmeitō*) <www.komei.or.jp/more/understand/constitution.html> accessed 30 September 2017.

200. Ōsaka ishin no kai [Osaka Restoration Association], 'Kenpō kaisei gen-an [Constitutional Amendment Proposals]' (Ōsaka Ishin no kai 24 March 2016) <<https://o-ishin.jp/news/2017/images/90da581ba24723f77027257436ab13c1ccca1ed.pdf>> accessed 30 September 2017. Currently, only 'compulsory education,' public elementary and junior-high school education, is free. Constitution of Japan, art 26(2).

201. Even among the coalition parties, the opinion is split on whether the right to know and the environment right should be added as constitutional rights, since the LDP is more willing to provide them as a matter of government responsibility and not as constitutional rights. nn 134–140.

202. Constitution of Japan, art 96; Referendum Act (n 92) art 47 (a voter has one vote for each of the constitutional amendment proposal).

203. According to the Asahi Newspaper, 41% would support the constitutional amendment, while 50% would oppose it. 'Genkō kenpō nihon nitotte yokatta 89% [89% welcomed the Current Constitution]' *Asahi Shimbun* (Tokyo, 2 May 2017), <www.asahi.com/articles/ASK4L528LK4LUZPS004.html> accessed 30 September 2017. On the other hand, according to the Yomiuri Newspaper, 49% would support the constitutional amendment, while the same 49% would oppose it. 'Sekō 7onen, kenpō no yakuwai hyōka 89% [70 Years after Taking Effect, 89% Values the Role of the Constitution]' *Yomiuri Shimbun* (Tokyo, 28 April 2017) <www.yomiuri.co.jp/feature/TO000302/20170428-OYT1T50166.html> accessed 30 September 2017.

On 3 May 2017, Prime Minister Shinzo Abe declared that he wished to have a new constitution by 2020 by amending Article 9.²⁰⁴ It is not clear whether he also wished to propose amendments for the fundamental human rights provisions.²⁰⁵ Nonetheless, it is extremely important to follow this issue. Japan's development has reached a watershed moment, and events in the near future could determine whether the constitutional protections for fundamental human rights can endure.²⁰⁶

204. 'Kenpō kaisei 2020nen ni sekō shitai: Shushō ga message [Wishing to Have a New Constitution by 2020: Message from Prime Minister]' *Asahi Shimbun* (Tokyo, 3 May 2017) <www.asahi.com/articles/ASK534KFoK53UTFK002.html> accessed 30 September 2017.

205. *ibid.* At least he added that he also wishes to add a clause mandating access to a free higher education for everyone. Apparently, this proposal was suggested to attract the support of the Ōsaka Ishin no kai. However, this proposal was never included in the LDP's 2005 or 2012 draft. Together with his proposal to add a third clause to art 9 to constitutionalize the Self Defense Forces while leaving both the first and second clauses intact, which was never proposed in the 2005 draft or 2012 draft, his actions left everybody wondering whether he was still committed to the 2012 draft.

206. As a result of the un-expected general election in October 2017, the LDP obtained 284 seats and the LDP and Kōmei coalition obtained 313 seats out of 465 in the House of Representatives, more than two-thirds necessary to propose constitutional amendment. This landslide victory for Abe would surely clear the way for possible constitutional amendment.