CONSTITUTIONAL CONFLICT WITH THE JAPANESE
IMPERIAL ROLE: ACCESSION, YASUKUNI SHRINE, AND
OBLIGATORY REFORMATION

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Tate no ryōmen o miyo

—Japanese Proverb
“Every medal has two sides”

INTRODUCTION

The Constitution of Japan is inherently flawed, and must be amended to reflect the reality of the Emperor's role. Chapter 1 of the Japanese Constitution, which defines the role of the Emperor, does not in practice harmonize with Article 20, separating religion and state. Though seemingly not in conflict as a textual matter, a closer examination reveals that the relationship between Chapter 1 and Article 20 is not, as it stands today, legally justiciable. The need for Japanese constitutional reform is evidenced by an examination of the role of the Emperor conducted in light of current State practice, and is most notably reflected by a recent Japanese Supreme Court decision questioning the constitutionality of government payments to Yasukuni Shrine.2

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In short, the current Japanese Emperor, by assuming his historical role as chief shaman-priest of the Shinto religion and constitutionally mandated symbol of the State, cannot truly fulfill these roles without violating, at a minimum, Articles 4 and 20 of the Japanese Constitution. In order to accommodate the current role of the Emperor, the constitution must be amended to allow an Imperial exception to the provision that strictly separates religion and State. Although constitutional amendment will not quell the controversy over the “figurehead” status of the Emperor, it will resolve the current incongruity of the constitutional jurisprudence analyzing the modern Imperial role.

The coexistence of the Imperial dynasty and the Constitution of Japan presents an illustrative example, relevant in almost every country in the world today, of the avenues by which democratic principles can collide with religious and political traditions. By examining the nature of the Imperial Monarch through the lens of the Japanese Constitutional system, and consequently understanding the Emperor's unique role in Japanese society, constitutional error can be rectified while at the same time respecting and preserving the dignity, historical background, and realpolitik of the Imperial role.

To demonstrate the conflict between the Emperor's current role and contemporary constitutional jurisprudence, it is first necessary to examine briefly the role of the Emperor in historical context. The postwar role of the Emperor was not created in a vacuum, and it cannot be reckoned without a jaundiced eye. The Imperial dynasty's historical and religious traditions, unparalleled in size and scope, have created the unique constitutional dilemma Japan faces today.

Taihōtei Hanketsu [Judgement of Fundamental Governmental Law # 156 of Apr. 2, 1997].

To access the full content of the <http://wiv.courts.go.jp> website, your Internet browser must first be configured to read Japanese characters. Microsoft Internet Explorer, version 3.02, can be configured to read Japanese characters by installing a Japanese Character Kit, available from the <http://www.microsoft.com> website.

3 Article 4 of the Japanese Constitution provides, in relevant part: “The Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government.” KENPO [CONSTITUTION], ch. 1, art. 4, translated in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, app. at 302 (Dan Fenno Henderson ed., Univ. of Washington Press 1968).

4 Article 20 of the Japanese Constitution provides:

Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise political authority. 2. No person shall be compelled to take part in any religious acts, celebration, rite or practice. 3. The State and its organs shall refrain from religious education or any other religious activity.

Id. at app. 304.

5 The Emperor of Japan is traditionally conceived of as the lineal descendant of the Sun Goddess, Amaterasu Omikami. According to Shinto legend, She gave the sacred sword, jewel, and mirror, to her grandson Ninigi no Mikoto before he descended upon the island of Japan. These three Imperial treasures have been handed down from one Emperor to the next since that time. The sword is kept at Atsuta Grand Shrine, the jewel at the Imperial Palace, and the mirror at Ise Grand Shrine. See STEPHEN S. LARGE, EMPEROR HIROHITO & SHOWA JAPAN: A POLITICAL BIOGRAPHY 5 (1992).
There are several particulars integral to assessing this constitutional conflict.

Section I of this Comment examines the Meiji Constitution of 1889. This document, built around the concept of kokutai, or "national polity," is the foundation of modern Japanese constitutionalism. Section II introduces, in historical terms, the realpolitik role of the Emperor and traces the development of State Shinto. Section III analyzes the origins of the 1947 Showa Constitution through examination of the Japanese surrender to Allied forces at the conclusion of the Second World War and the resultant reformation of the Imperial institution. Section IV explores the creation and adoption of the 1947 Showa Constitution, and deconstructs the dismantling of state religious practice in both practical and constitutional terms. Section V discusses the Emperor's social and religious role following the Second World War, particularly the rites associated with the death of Emperor Hirohito and the accession of Emperor Akihito.

Building upon the historical, sociopolitical, and legal context presented in Sections I through V, Section VI discusses recent constitutional jurisprudence by examining the Yasukuni Shrine and related cases, revealing how Japanese courts have addressed the sharp conflict between Imperial duties and the constitutionally mandated separation of religion and state. Section VI raises the inference that constitutional reformation is necessary. Section VII addresses possible constitutional reforms.

The cumulative analysis presented in this Comment, in summary, attempts to make it eminently clear that the reasons for the enactment of Japan's irreconcilable constitutional articles are the result of grievous misunderstandings of the Emperor's true role and the difficulties in re-democratizing Japan after the Second World War. The best course of action, therefore, is to amend Japan's 1947 Constitution to correct the mischaracterization of the Emperor's role and thus prevent repeated constitutional violations that current jurisprudence has only recently revealed.

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6 The Constitution of 1889 is often referred to as the Meiji Constitution. Meiji, meaning "enlightened rule," is the Japanese name given to the reign of the Emperor Mutsuhito (1868-1912). See DAIRICHII IROKAWA, THE AGE OF HIROHITO: IN SEARCH OF MODERN JAPAN 9 (1995). Each Japanese Emperor's reign is given such a name. For example, Taisho, meaning "great justice," is the Japanese name given to the reign of the Emperor Yoshihito (1912-1926). See LARGE, supra note 5, at 15, 223 n.3; IROKAWA, supra at 9. Showa, meaning "illustrious peace," is the Japanese name given to the reign of the Emperor commonly referred to as Emperor Hirohito (1926-1989). See LARGE, supra at 223 n.2; IROKAWA, supra at 9. Heisei, meaning "achieving peace," is the Japanese name given to the reign of the Emperor commonly referred to as Emperor Akihito (1989-present). See LARGE, supra note 5, at 200. Emperor Hirohito is referred to in this Comment alternatively as the Showa Emperor or Emperor Hirohito.

7 Like the Meiji Constitution, the 1947 Constitution is alternatively referred to in this Comment as the Showa Constitution or the 1947 Showa Constitution.
I. CONSTITUTIONAL FOUNDATION

A. The Meiji Constitution of 1889

On the Eleventh of February 1889, more than twenty years after the restoration of the Emperor Meiji to the Imperial throne,8 the Meiji Constitution was enacted. Its enactment realized years of deliberation and consummated the desire of Japanese Imperial subjects to live by reformist principles within governmental forms forged by public opinion.9 The document is particularly useful because it gives context to the analysis of the present Japanese Constitution.

While the Meiji Constitution contained trappings of western constitutions,10 such as the creation of executive, legislative, and judiciary branches of government, it lacked the checks and balances of, for example, the American Constitution, and the separation of powers evident in the constitutions of many other countries.11 While in theory the Meiji Constitution contained some of the fundamental underpinnings of democracy, in practice it created an absolute monarchy centered around and with all power emanating from the Emperor.12 The Meiji Constitution provided for freedom of speech, religion, assembly, and association, but only insofar as they were “within the limits of the law.”13 Consequently, the government, through the Emperor, could restrict any of these freedoms, so long as the restriction was officially proscribed by law.14 Therefore, in the decades preceding the Second World War, Japan’s militarism and aggressive behavior towards its neighbors did not conflict with the Meiji Constitution be-

8 The Emperor Meiji was restored to the throne on March 14, 1868. This event is commonly referred to as the “Meiji Restoration,” titled as such because of the transfer of power from the neo-feudal Tokugawa Bakufu Shogunate to a group of reformers united under a more nationalized government. See SHIN’ICHI FUJII, THE CONSTITUTION OF JAPAN: A HISTORICAL SURVEY 43 (1965); JANET E. HUNTER, THE EMERGENCE OF MODERN JAPAN: AN INTRODUCTORY HISTORY SINCE 1853, 2-5 (1989).

9 See Fujii, supra note 8, at 266 (discussing the celebratory nature of the enactment of the Meiji Constitution).

10 Extensive studies were made, for example, of the French, Belgian, and American Constitutions. See id. at 189.


12 Although the Emperor had supreme political power, he did not participate in the administration of the government, but instead ruled through the Ministers of State. It has been argued that this linkage created an oligarchic structure of highly placed Ministers, Cabinet members, Privy Council, and Imperial Household Ministers who truly ran the country, giving the emperor more of a puppet status than that of absolute ruler. See GEORGE M. BECKMANN, THE MAKING OF THE MEIJI CONSTITUTION: THE Oligarchs and the Constitutional Development of Japan, 1868-1891, 89-90 (1957). As a result, many were led to believe that the symbol of the emperor could be used to turn Japan into a democracy. See infra notes 49-55 and accompanying text (discussing wartime State Department plans for the emperorship).

13 BECKMANN, supra note 12, at 7.

14 See id. (“As a result the Constitution provided no limits on the government’s power to restrict any freedom enumerated in it.”).
cause these actions were all proscribed by law that, strictly speaking,\textsuperscript{15} emanated from the Emperor.\textsuperscript{16}

\textbf{B. Kokutai—Centrality of the Emperor in the Meiji Constitution}

The \textit{Meiji} constitutional style is often represented by the Japanese word \textit{kokutai}, or “national polity,”\textsuperscript{17} a term that is said to imply state supremacy and obedience to the Emperor.\textsuperscript{18} The concept of \textit{kokutai}, especially in the decades preceding the Second World War, was so pervasive that it functioned as the dominant paradigm of “Japanese” identity.\textsuperscript{19} As one scholar described the glorification of \textit{kokutai} in Japanese Ministry of Education elementary school textbooks preceding the War:

[Textbook] authors steadily expanded State Shinto and its vague glittering slogans, such as ‘Purifying the \textit{Kokutai},’ More important, from 1910 onward textbook lessons taught ... that loyalty to the emperor and filial piety were one and the same and that the ancestral will was obedience to imperial will. The individual was nothing; the will of the emperor and the \textit{kokutai} were everything.\textsuperscript{20}

The \textit{Meiji} Constitution, constructed around the concept of \textit{kokutai}, has even been referred to as a \textit{kintei kenpo [kenpō]}, or “constitution made by the ruler himself.”\textsuperscript{21} From this characterization of the \textit{Meiji} Constitution, it is evident that the Emperor played a central role in the governance of Japan, serving as the binding agent that holds the \textit{kokutai} together. In essence, the role of the Emperor created by the \textit{Meiji} Constitution vis-à-vis the State—if one accepts the concept of \textit{kokutai}—is one clear indication that separation of religion and state in a framework of Japanese constitutionalism is impossible and, by definition, a contradiction in terms. Certainly, it may be argued that the

\textsuperscript{15} The Emperor did not actually engage in administration of the Japanese government. \textit{See supra} note 12; \textit{see also infra} notes 31-32 and accompanying text (discussing the practical exercise of political power by the Emperor).


\textsuperscript{17} \textit{See THE CONSTITUTION OF JAPAN: ITS FIRST TWENYYEARS, 1947-67, supra} note 3, at 3.

\textsuperscript{18} \textit{See id.; see also} IROKAWA, \textit{supra} note 6, at 25 (“The ideology of national polity enveloped the entire Japanese nation. It had an incredible presence .... There was complete social consensus that those who violated these ideologies should be eliminated or that they inevitably would be eliminated.”).

\textsuperscript{19} \textit{See WILLIAM P. WOODARD, THE ALLIED OCCUPATION OF JAPAN 1945-1952 AND JAPANESE RELIGIONS} 11 (1972) (discussing \textit{kokutai} as the fundamental and defining politico-cultural characteristic of Japan).

\textsuperscript{20} \textit{JAPAN EXAMINED: PERSPECTIVES ON MODERN JAPANESE HISTORY} 286 (Harry Wray & Hilary Conroy eds., 1983).

\textsuperscript{21} FUJI, \textit{supra} note 8, at 279.
constitutional reforms of the Allied Occupation eliminated kokutai, but this only illuminates the more central question of the Imperial role, which, as recent Japanese Supreme Court jurisprudence has shown, even absent the ideological extremism of ultra-right-wing kokutai theory, that the Emperor’s de jure reduction to constitutional figurehead is irreconcilable with the de facto religious role that Japanese societal conventions dictate.

C. The Meiji Constitution: Text and Reality

The Imperial powers were outlined in Chapter I of the Meiji Constitution in seventeen articles that reaffirmed the sacred, inviolable nature of the Emperor, and vested in him powers ranging from supreme command of the army and navy to the determination of civil and military salaries. The Meiji Constitution contemplated Imperial rule under its terms forever. Chapter I, Article I provides: “The Empire of Japan shall be reigned over and governed by a line of Tenno unbroken for ages eternal.”

II. REALPOLITIK Role of the Emperor and the Development of State Shinto

Though “inviolable,” the Emperor was not considered to be a political leader ruling by virtue of his religious authority. Rather, the Emperor was more like a “chief priest” or “shaman king.” Emperor Hirohito, for example, typically conducted approximately thirty Shinto rites a year. While the Emperor’s participation in harvest rituals was believed essential to ensure a good harvest, he rarely, if ever, proffered his opinions on political matters. In instances where the Emperor has ventured his political opinion, he has done so only in extreme circumstances. After the twelfth century, the Imperial
family had little power other than in the performance of ceremonial duties. True power lay with the warrior families and their paternal leaders, who were typically appointed shogun, or "warlord appointee of the Emperor."  

While the Meiji Constitution vested in the Emperor absolute executive power, he did not actually engage in administration of the Japanese government, as might be expected of what was, in structure, a constitutional dictatorship. Rather, under the Meiji Constitution, as one commentator explained,

The cabinet is the organ, through which the Emperor's sovereignty is manifested. In the practical operation of government, the Emperor is not expected to manifest a will of his own, except in so far as he may persuade his ministers to alter what they had decided. The oligarchs were able to point to the historical precedent of an unwritten law more than a thousand years old that . . . politically, [the Emperor] shall be impersonal and let properly constituted authorities act as his responsible ministers.  

What the Emperor lacked in administrative power was more than compensated by the religious ascendency he derived from the Meiji State devotion to kokutai ideology. Freedom of religion, for example, was guaranteed by Article XXVIII of the Meiji Constitution, which read, "Japanese subjects shall, within limits not prejudicial to peace and order, and not antagonistic to their duties as subjects, enjoy freedom of religious belief." The government did allow religious freedom to be exercised, but stressed governmental legitimacy by continually reasserting the religious aspects of the Emperor through the use of kokutai ideology. So as not to violate Article XXVIII, the Japanese government declared Shinto shrine ceremonies to be non-religious activities, placing them outside the protections of Article XXVIII and elevating Shintoism to an extra-legal secular social construct of the state. This Meiji-era fictitious legal separation is extremely instructive in resolving the current constitutional crisis because it neatly compartmentalizes, though fictionally, certain religious aspects as "state rite" exceptions.

While clinging to legal pseudo-separation, the Meiji government

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and accompanying text. For a discussion of the Emperor's influence on the adoption of the present constitution, see infra notes 112-116 and accompanying text.

50 See HUNTER, supra note 8, at 159.
51 See BECKMANN, supra note 12, at 89.
52 Id. at 89 (quoting Asakawa Kanichi, Some Contributions of Feudal Japan to the New Japan, III JOURNAL OF RACE DEVELOPMENT, 30 (1912)).
53 See EARHART, supra note 25, at 238.
54 MEIJI KENPO, ch. II, art. xxviii, translated in FUJI, supra note 8, at 301-02.
55 See EARHART, supra note 25, at 238.
56 See CREEMERS, supra note 25, at 60.
57 See id.
nonetheless employed Shinto priests as State officials, and, especially as militarism grew, Shinto became the de facto state religion. As one post-war dictionary puts it, State Shinto is:

[i]the Shinto which, contrasted to Shinto as a religious corporation, is closely connected with state power through its militaristic and ultra-nationalistic ideas; it regards the Emperor as a kami [deity] in human appearance (arahitogami), and believes that the Japanese people are superior to other people and are a chosen people as descendants of Amaterasu Omikami; it was suppressed in December 1945.

Though this definition is an unfair and overbroad portrayal, heavily biased against State Shinto, it accurately reflects the views which American authorities had of State Shinto during the Second World War. American Occupation authorities viewed State Shinto, especially its ultranationalist aspect, as a danger, and considered its abolition an important objective in rewriting the Meiji Constitution.

Though the Meiji Constitution remained in force for decades, from Japanese victory in the Russo-Japanese war at the end of the nineteenth century to the military conquest of Asia in the 1930's, it was not a document suited to the Allied victors in the Second World War. Indeed, the Meiji Constitution, as it stood, was irreconcilable with the role of the Emperor envisioned by the Allied authorities in postwar Japan. In sum, the Emperor's role under the Meiji Constitution was paradoxical: he was administratively impotent, but at the same time enshrined as the head of government, his power and supremacy reinforced by the kokutai and nationally mandated State Shinto.

III. ORIGINS OF THE SHOWA CONSTITUTION OF 1947

A. Negotiating the Surrender of Japan

The present Constitution of Japan is the product of the Second World War, specifically the consequence of the unconditional surrender of the Japanese forces to the Allied powers on August 15, 1945. The principal issue in brokering the Japanese surrender was

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58 See id.
59 Id. at 7 (quoting Kojien, at 1121 (Shimmura Izuru, comp, Tokyo, Iwanami Shoten, 1960)).
64 See Beckmann, supra note 12, at 95.
the status of the Emperor, a subject that was debated both internally in the United States and on the world stage.56

Although most of the scholars and political scientists who studied Japan recognized that the Emperor had little or no real political power, they understood that his divine status was used as a rallying cry for militarism.47 However, most of these analysts failed to appreciate that the political role of the Emperor was, and still is, inseparable from his religious role as Shinto leader.48 This lack of insight and foresight resulted in a narrow Allied conception of the “Emperor” problem, and produced the flawed constitution that followed.

The American State Department initially recognized the Emperor issue on March 10, 1943, in a policy paper on Japan that first asked the question, “Should the continuance of the imperial household be favored?”49 The internal debate on the issue began formally on May 25, 1943, when the State Department wrote its first assessment of the problem, entitled “Status of the Japanese Emperor.”50 This assessment presented two primary policy options open to the United States; either preserve the emperorship, or eliminate it. Arguments in favor of termination urged that doing so would curb Japanese nationalism and aggression behind the veil of Imperial authority; without the Emperor, Japan would merely be a polity rather than a divinely governed polity. Arguments in favor of preserving the Imperial dynasty recognized that, legally, the Emperor alone could amend the Meiji Constitution.51 Accordingly, those supporting the preservation of the emperorship believed that any large-scale changes would be more effective if initiated under the political and quasi-religious authority of the Emperor.52 The two opposing views show that the Emperor was clearly an important figure in the Japanese consciousness. The incongruous constitutional role he eventually assumed ultimately derives from the unresolved difficulties encountered in balancing Imperial survival and American constitutional principles of separation of religion and state in the Allied powers’ conception of postwar Japan’s political evolution.

47 See WOODARD, supra note 19, at 9-13 (explaining the Allied belief that the concept of a divine Emperor was used to indoctrinate the people of Japan into supporting ultranationalism and accession).
48 See id. (noting that the Allied perception of the problem included mistaken beliefs about the teachings of Shinto, State Shinto, and the divine status of the Emperor).
49 Ward, supra note 46, at 3 (citing “Agenda for the Meeting of March 13, 1943,” National Archives, Notter Files, Box 57, P-213, Appendix, p.2) (noting that while this policy paper from the Subcommittee on Political Problems of the Advisory Committee on Postwar Foreign Policy did not purport to do more than pose the question, it did open the door to formal debate).
51 See id. at 4.
52 See id.
As the War progressed, the Emperor issue continued to be a controversial one in the State Department and within the governments of the other Allied powers.\textsuperscript{53} It is said that as many as nine-tenths of State Department Japan specialists, led by Under Secretary of State Joseph C. Grew, favored preservation of the emperorship, but that many of the departmental committees and higher-ups who reviewed the specialists' papers were opposed to its continuation.\textsuperscript{54} Most notable of those opposed to the preservation of the emperorship was Assistant Secretary of State Dean Acheson, but this group also included other high-ranking officials such as Office of War Information director Elmer Davis.\textsuperscript{55}

Outside the halls of government, the debate also raged in the academic world, with even more extreme arguments pressed forward by both sides.\textsuperscript{56} One commentator believed that democracy in Japan would be incompatible with the presence of an Emperor. He wrote in October of 1944:

Democracy lies in the will of the people to rule themselves. Its source cannot be the will of a Mikado [Emperor], whether or not he is thought to be a god . . . . To destroy the present generation of militarists is not enough; the whole political, educational, and military machinery which enabled the militarists to hypnotize the masses of the people must be destroyed also. That can only be done by puncturing the myth of the divinity of the Mikado [Emperor].\textsuperscript{57}

A second argument espoused by Imperial naysayers was that the cult of so-called "emperor-worship" was too strong.\textsuperscript{58} They claimed that the Japanese people were too easily led to act in the name of the Emperor, even to the point of serving as "human bombs"\textsuperscript{59} during

\textsuperscript{53} See id. at 4-5
\textsuperscript{54} See id. at 4; see also JUSTIN WILLIAMS, SR., JAPAN'S POLITICAL REVOLUTION UNDER MACARTHUR: A PARTICIPANT'S ACCOUNT 15 (1979) (describing the debate over the future of the Japanese Emperor).
\textsuperscript{55} See Ward, supra note 46, at 4.
\textsuperscript{57} See Sun Fo, supra note 56, at 24.
\textsuperscript{58} See Woodard, supra note 19, at 12 (stating that the kokutai "cult" included "[v]eneration bordering on worship of the spirits of the imperial ancestors, of the imperial rescripts, especially the Imperial Rescript on Education (for civilians) and the Imperial Rescript for Soldiers and Sailors (for the armed forces); and of the writings of Emperor Meiji, notably his poems . . . [and] [u]nquestioned acceptance of the myths taught in the official histories of the country").
\textsuperscript{59} The "human bombs" referred to were Japanese soldiers who tied grenades to their belts and attacked Chinese barbed-wire fences even though they faced certain death. See Colgrove, supra note 56, at 377. The same principle would be carried out later in the war by the kamikaze pilots who hurled themselves at the Allied fleet. See DAVID REES, THE DEFEAT OF JAPAN 51 (1997) ("The men in the kamikaze aircraft were only too eager to die for their admiral and their Emperor.").
Some of those who supported the termination of the emperorship advised that the Imperial Palace and the Ise Grand Shrine, both focal points of Imperial power, should be destroyed in order to deliver a psychological blow against the Imperial system. The decision not to do so is indicative of the Allied desire to keep the Imperial system alive, albeit in a severely reduced capacity. The Allies' inherent misjudgment regarding the nature of the Imperial role in carrying out their reforms was memorialized in the construction of a constitution that aspired to properly balance the need to maintain the Imperial system to democratize Japan and the need to eliminate ultranationalist kokutai ideology. Given the time constraints and the duress of the postwar reconstruction setting in which the constitutional drafters worked, it is hardly surprising that issues such as analyzing the religious context of Imperial succession rituals or Shinto mourning practices did not appear pressing, or even cognizable as issues with any constitutional import.

As the end of the war became more imminent, postwar planners contemplated new ideas, among which was the possibility that the Japanese would seek to abolish the Imperial dynasty on their own. This seemed unlikely, but, nevertheless, postwar planners presumed that the Japanese would be receptive to the American desire to establish a strong democratic constitutional framework.

One of the most novel and practical ideas conceived by postwar planners was the covert forced abdication of the Emperor Hirohito, a plan which intended to exploit the lack of a personal relationship between the Japanese people and any one particular emperor. Some planners believed that Emperor Hirohito would accept responsibility for the war by voluntary abdication. Either abdication option would...
have put Crown Prince Akihito, who is now Emperor, on the throne in 1946 at age fourteen.67 There is some historical evidence that Emperor Hirohito might have voluntarily abdicated. The Emperor was quoted on June 8, 1948 as saying, "I, too, think that if it were possible for me to abdicate, personally I would be happy. I have a strong sense that this would help the realization of democracy in Japan, which I would like to see happen."68 The Emperor’s voluntary abdication never materialized, due in large part to the intervention of General MacArthur, who is said to have dissuaded the Emperor from doing so.69

In addition to the resolution of the “Emperor question,” other legal guidelines governed the establishment of Japan’s 1947 Constitution. Negotiations for surrender drew heavily on the terms of the Potsdam Declaration,70 which committed the Allies to withdraw their forces from Japan when several objectives had been achieved. Among these objectives was the establishment “in accordance with the freely expressed will of the Japanese people [of] a peacefully inclined and responsible government.”71

The Japanese, intent on protecting the Imperial throne, agreed to the terms of the Potsdam Declaration in their surrender, but only “with the understanding that the said Declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a sovereign ruler.”72 Before accepting these Japanese terms of surrender, the Americans in turn requested that “[f]rom the moment of surrender the authority of the Emperor and the Japanese government to rule the state shall be subject to the Supreme Commander of the Allied Powers who will take such steps as he deems necessary to effectuate the surrender terms.”73

67 See LARGE, supra note 5, at 141 (relating the Emperor’s consideration of whether or not to abdicate).
66 Id.
69 See id.
70 The Potsdam Declaration was signed on July 26, 1945. See WILLIAMS, supra note 54, at 98 (discussing which aspects of the Japanese Constitution derived from American involvement).
71 Id. (quoting Article 12 of the Potsdam Declaration of July 26, 1945). Critics of the 1947 Showa Constitution maintain, with a strong degree of accuracy, that the 1947 Constitution was imposed by the Allies and, though promulgated officially by the Japanese government, was not reflective of the “freely expressed will of the Japanese people.” Seemingly, the "freely expressed will of the Japanese people" is more likely reflected in the Matsumoto draft which the Allies found unacceptable. See infra notes 109-110 and accompanying text (discussing MacArthur’s expectations for constitutional revision).
72 MANNING, supra note 22, at 157. The decision was made in a heated discussion of the Supreme Council on the night of August 9, 1945. At approximately 2:00 a.m., on August 10, the Emperor, according to the diary of Togo, himself, requested that the war be stopped, with the “sovereign” condition. All those present acceded to the Emperor’s request. At this time, the Japanese Prime Minister and two top military Ministers agreed that if the Allies did not retain the Imperial dynasty, they would continue the war to the death. See HERBERT FEIS, JAPAN subdued: THE ATOMIC BOMB AND THE END OF THE WAR IN THE PACIFIC 118-120 (1961) (describing the events of August 9-10, 1945).
73 MANNING, supra note 22, at 158.
The Japanese, faced with the prospect of more atomic bomb attacks like those carried out on Hiroshima and Nagasaki, consented to the Allied terms, and at noon on August 15, the Emperor made his historical surrender broadcast to the Japanese people. As the *New York Times* captioned a report on Allied troop reaction to the Allied plan to preserve the emperorship, “GI’s in Pacific Go Wild With Joy; ‘Let ‘Em Keep Emperor,’ They Say.” Thus, the Japanese secured the Imperial dynasty to some degree, but subject to the discretion of the Supreme Commander for the Allied Forces, General Douglas MacArthur. MacArthur’s discretion, as it turned out, set the stage for the constitutional conflict that exists today.

B. Reforming the Imperial Institution: Emperor in Transition

As Supreme Commander of the Allied Powers, General Douglas MacArthur wielded absolute authority over postwar Japan. When he arrived in Japan from Manila on August 30, 1945, the United States Government, despite having researched the matter thoroughly, had not yet developed its position on the Emperor’s postwar status.

Whether out of self-interest or in furtherance of the interest in the Japanese people, Emperor Hirohito cooperated with MacArthur to the utmost. When the Emperor and General MacArthur met face-to-face for the first time on September 27, 1945, the Emperor is quoted as saying, “I come to you General MacArthur, to offer myself to the judgement of the powers you represent as the one to bear sole responsibility for every political and military decision made and action taken by my people in the conduct of the war.” General MacArthur was apparently pleased by the Emperor’s solemn oath of responsibility, and is later reported as saying about that moment, “He was an Emperor by inherent birth, but in that instant I knew I faced the First Gentleman of Japan in his own right.”

In conversations with General MacArthur, Emperor Hirohito pleaded his constitutional case for not ending the war sooner. He claimed, “[b]ut I’m a constitutional monarch. If I am advised by my prime minister and the other ministers that [an action] must be done, I must do it, even if I don’t like it.” This explanation proffered by Emperor Hirohito supports the assertion made by many

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74 See REES, *supra* note 59, at 182-83.
75 FEIS, *supra* note 72, at 126.
76 See REES, *supra* note 59, at 198.
77 See INOUE, *supra* note 42, at 160.
79 Id.
80 Id.
scholars that Japan’s oligarchic structure under the Meiji Constitution left the Emperor devoid of any substantive political power. Thus, the Emperor’s candid characterization of the nature of his political power provided some insights into postwar reform of his role in the Japanese political system. The question of his religious power and influence became a separate question that was not fully resolved.

It is reported that when the suggestion was put to the Emperor that he renounce his divinity, he thought it would be embarrassing to publicly take something away from himself which he never claimed to possess. General MacArthur never personally commanded the Emperor to renounce his divinity, and the truth of how the Emperor decided to make a public announcement to this effect is somewhat speculative. Keeping in line with his thoughts on abdication for the sake of democracy, and without going as far as abdication, on New Year’s Day, 1946, the Emperor read the now famous Imperial Rescript in which he denied his own divinity:

We stand by the people and we wish always to share with them in their moments of joy and sorrow. The ties between us and our people have always stood upon mutual trust and affection. They do not depend on mere legends and myths. They are not predicated on the false conception that the Emperor is divine and that the Japanese people are superior to other races, and fated to rule the world. Emperor Hirohito’s announcement had the effect of renouncing his status as the arahitogami, or “divine present emperor.”

Following Japan’s surrender, there was considerable worldwide pressure to try the Emperor as a war criminal. On September 18, 1945, a democratic senator from Georgia, Richard B. Russell, introduced just such a resolution in Congress. General MacArthur is

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82 See Beckmann, supra note 12, at 89-90.
84 See Woodard, supra note 19, at 253-55 (examining the circumstances surrounding the announcement).
85 See supra notes 65-69 and accompanying text (discussing the possibility of Emperor Hirohito’s abdication).
86 Manning, supra note 22, at 195.
87 The divine status of the Emperor is still a matter of dispute. See Crump, supra note 28, at 157 (“It cannot be said that the Japanese were ever completely convinced by the emperor’s disclaimer.”); see also Irokawa, supra note 6, at 126-27 (discussing interpretations of the Emperor’s renunciation of his divine status).
88 Countries which supported the trial of Hirohito included the United States, Australia, Great Britain, China, New Zealand, and the Soviet Union. See Inoue, supra note 42, at 161 (describing a congressional resolution introduced by Richard B. Russell, a Senator from Georgia); see also Manning, supra note 22, at 211 (describing Australia’s official request that Hirohito be tried as a war criminal); see also Crump, supra note 28, at 177 (listing countries that wanted the Emperor listed as a war criminal).
89 See Inoue, supra note 42, at 161 (describing Senator Russell’s resolution).
credited with convincing President Truman, as well as the Senator from Georgia, to spare the Emperor from a trial before a war crimes tribunal by emphasizing the necessity, if such a course of action was pursued, of Occupation reinforcements. As MacArthur wrote:

Realizing the tragic consequences that would follow from such an unjust action, I had stoutly resisted such efforts. When Washington seemed to be veering toward the British point of view [supporting a trial], I had advised that I would need at least one million reinforcements should such action be taken. I believed that if the emperor was indicted, and perhaps hanged, as a war criminal, military government would have to be instituted throughout all Japan, and guerilla warfare would probably break out.

As for the Allied Forces' reconfiguration of the Emperor's postwar role, the most relevant report, entitled "209/1," was prepared by the Subcommittee on the Far East for the State-War-Navy Coordinating Committee (SWNCC). Report 209/1 envisioned three principal reforms for the Imperial line. First, it intended to revise the Meiji Constitution to erase any references to the Emperor's divinity. Second, it proposed to eliminate "emperor-worship" from the school system, and third, it planned to end procedures that kept the emperor separated from the general public. Each of these policy directives were followed by MacArthur, producing an Emperor who seemed more like the head of a European royal family rather than a Shinto head priest and descendant of the Sun Goddess. And yet, the new Showa Constitution, which codified reforms proposed by 209/1 and implemented by General MacArthur, when taken in concert with the Emperor's postwar status—stripped of political power—did not resolve the conflict inherent in the combination of the Japanese Imperial tradition with American-style constitutionalized separation of religion and state as envisioned by the Allies.

93 See MANNING, supra note 22, at 219-221 (quoting MacArthur's response to Washington's desire to try Hirohito).
91 CRUMP, supra note 28, at 177.
90 See Ward, supra note 46, at 13 (describing the Subcommittee's report).
92 See id.
94 See id.; see also supra note 20 and accompanying text (discussing kentutai ideology expressed in elementary school textbooks).
95 See Ward, supra note 46, at 13; see, e.g., FUJITANI, supra note 65, at 232 (discussing "the emperor as a cultural concept [bunka gainen toshi no tenno] [and] . . . a symbol that could not be seen or objectified in its wholeness").
96 See supra notes 27-29 and accompanying text (discussing the Emperor's role as a "chief priest" or "shaman king").
97 See Ward, supra note 46, at 13; see also LARGE, supra note 5, at 5 (discussing the legend of the Emperor's divine lineage).
IV. THE SHOWA CONSTITUTION OF 1947

*Tada yori takai mono wa nai.*

—Japanese proverb

"Nothing costs so much as what is given us."

A. Creation and Adoption

At several points during the month of October, 1945, General MacArthur and others within the General Headquarters of the Allied Powers (GHQ) contacted the Japanese Deputy Prime Minister and Prime Minister, intimating that revision of the still-extant Meiji Constitution was necessary, and that the Japanese Diet (Parliament) was expected to produce a draft. GHQ waited until late January, 1946 for the Japanese revision.

It became apparent on February 1, when the *Mainichi Shinbun* published a tentative draft constitution prepared by the Cabinet Constitutional Revision Committee ("Matsumoto Committee") that the revision conceived by the Japanese parliamentarians would be unacceptable to MacArthur. For example, regarding the Emperor, the Matsumoto Committee’s first draft changed only one of the Meiji Constitution provisions. Where Article III of the Meiji Constitution had provided, "[t]he person of the Emperor is sacred and inviolable," the revision read, "[t]he person of the Emperor is supreme and inviolable." No changes were made at all to the sovereignty of the Emperor.

*Japanese Proverbs, supra note 1, at 270-71.*

*See* Tanaka Hideo, *The Conflict Between Two Legal Traditions in Making the Constitution of Japan, in DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION 107, 108-09 (Robert E. Ward & Sakamoto Yoshikazu eds., 1987) ("When Konoe Fuminaro, deputy prime minister in the Higashi-kuni cabinet, visited General Douglas MacArthur on October 4, 1945, the latter made a suggestion about constitutional revision.").

*See id.* ("GHQ continued to wait for a Japanese draft, however, until the end of January 1946.").

*The Mainichi Shinbun is one of Japan’s largest daily newspapers.*

*Chaired by Dr. Joji Matsumoto, one of the top legal minds of his generation, the Committee was extremely distinguished and contained almost every expert on Constitutional law in Japan. See TETSUYA supra note 45, at 33; Hideo, supra note 100, at 112-14 ("The committee members were also a very distinguished group.").

*MacArthur’s Supreme Commander for Allied Powers (SCAP) did not plan on offering its own revision until the Matsumoto Committee Draft was leaked to the Japanese Press. See Hideo, supra note 100, at 110.

*The second draft (Draft B) contained a few additional, though slight, revisions. See id.*

*See id. at 111.

*Id; see also BECKMANN, supra note 12, at 151 app. X (quoting Article III of the Meiji Constitution: “The Emperor is sacred and inviolable.”).

Matsumoto hoped, somewhat myopically, that the Allied reply to the Japanese offer of surrender was a literal offer. The offer stated that "[t]he ultimate form of government shall, in accordance with the Potsdam Declaration, be established by the freely expressed will of the
The Matsumoto Committee Draft was clearly inconsistent with MacArthur's conviction that the Emperor's power should be severely curtailed in Japan's postwar constitution. According to the official GHQ record, MacArthur "finally came to the conclusion that the most effective method of instructing the Japanese Government on the nature and application of... principles he considered basic would be to prepare a draft constitution embodying those principles." Upon review of the unacceptable Matsumoto committee draft, MacArthur ordered his staff at the office the Supreme Commander for the Allied Powers ("SCAP"), to create a constitution that he believed would fulfill his interpretation of the requirements of the Potsdam Declaration, particularly regarding Sections 10 and 12:

10. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese People...
12. The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished and there has been established in accordance with the freely expressed will of the Japanese people a peacefully inclined and responsible government.

MacArthur's staff was charged with the task of creating a working constitution embodying these ideals quickly because the first postwar general elections were only two months away. The possibility remained that if a draft was not prepared and submitted in time, the newly-elected Japanese Diet would be left to debate the merits of the ultraconservative Matsumoto draft. MacArthur gave Major General Courtney Whitney the task of creating the model constitution, and Whitney and several other SCAP officials spent a week debating and preparing their draft. When the draft was presented to the Japanese officials and cabinet members, they were understandably shocked by its enormous substantive variance from the Meiji Constitution. Nonetheless, about half of the cabinet members supported the SCAP draft. Finally, in an effort to break the deadlock, the Emperor was
consulted.115 The Emperor supported the SCAP draft, and his support settled the matter in favor of its adoption.116

When the SCAP draft was given to Matsumoto's team for translation and revision, they made several changes unwelcome to the SCAP drafters.117 The draft was finalized on March 4, 1946 after fierce negotiations between the Matsumoto and SCAP teams.118 Popular press reaction upon publication of the new draft was overwhelmingly positive.119

On the Emperor Meiji's birthday, November 3, 1947, an estimated 100,000 people gathered at the Palace Plaza to celebrate the first national Imperial Ceremony after the war.120 At the ceremony, Emperor Hirohito reported the promulgation of the new Constitution—a Constitution purportedly devoid of Imperial trappings and anchored in democratic principles—to the "national gods" in the Imperial Palace's Inner Sanctuary (kyuchu sanden).121 Ironically, the Showa Emperor performed the very same ritual that his father, in enacting the vastly different Meiji Constitution, had performed. As one apt commentator noted, "in terms of the modern ritual idiom that had been constructed and routinized since Meiji, it was as if little had changed in the divide across 1945."122

B. Textual Revolution

The present Constitution of Japan, as enacted May 3, 1947,123 begins with a preamble, followed by eleven chapters containing a total of 103 articles.124 For purposes of this Comment, the relevant por-

115 See id. ("Messrs. Shidehara and Yoshida . . . consulted the emperor.")
116 See id. ("The emperor resolved the matter by supporting SCAP . . ."). This is one of the rare occasions in which the Emperor was consulted on political matters. See supra note 29 and accompanying text (discussing the Emperor's limited role in political matters).
117 See id. ("They substituted a bicameral for a unicameral legislative system and authorized the cabinet to legislate by cabinet order in emergency situations when the Diet could not be convoked.").
118 See id.
119 See id. at 133 ("Press reaction on 7 March to the cabinet's late afternoon announcement the day before of its draft constitution was "definitely and unanimously favorable.".""). But cf. Hideo, supra note 100, at 125 ("[T]he news media and public discussion were subject to GHQ censorship; militaristic or extremely nationalistic views were banned. Under these circumstances, many opportunistic and servile statements were made. To say that the draft constitution was well received is not to ignore this expediency. Nevertheless, it is wrong to regard the enthusiasm for the new constitution as merely a mindless popular fad.").
120 See FUJITANI, supra note 65, at 238 ("An estimated 100,000 people gathered together on the Palace Plaza on this day 3 November 1946 [1947], on none other than Emperor Meiji's birthday, to participate in the festivities.").
121 See id. ("The emperor then reported the Constitution's promulgation to the national gods in the palace's Inner Sanctuary.").
122 Id.
124 See generally KENPO, translated in THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES 3-18
tions are all contained in Chapter I, entitled "The Emperor," Chapter III, Article 20, separating religion and state, and Chapter VII, Article 89, forbidding public expenditures supporting religious institutions. Chapter I outlines the Emperor's symbolic position as a "symbol of the State," and its eight Articles are relatively detailed in outlining the limits of the Emperor's power and responsibilities. Of special note is Article 4, which prevents the Emperor from violating any other part of the constitution.

Chapter III, Article 20 is rather clear-cut. It bars the State from engaging in any religious activity, and provides for absolute religious freedom. This Article is supplemented by Chapter VII, Article 89, which provides: "No public money or other property shall be expended or appropriated for the use, benefit, or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority." Interpretive difficulties in the text of the Showa Constitution were a problem from the very beginning, first arising during the constant interchanges between Matsumoto and SCAP drafters in refining and translating the Constitution from its original English to Japanese. Translation of the text in Chapter I has been viewed by one critic as a series of misunderstandings and misinterpretation to the extent that each side drew very different views from what was intended to be identical language. Special interpretative problems revolve around the status and role of the Emperor and the function of such phrases as "advise and consent," "popular sovereignty," and the "people."

An example of the type of controversy that arose was a heated debate stemming from Article 3, which describes one small, but important, aspect of the Emperor's new role under the Constitution. Article

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(The Ministry of Justice comp., 1957).

125 See id., see also THE CONSTITUTION OF JAPAN, translated and reprinted in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, supra note 3, app. at 301-04, 313.

126 See KENPO, ch. 1, supra note 124, at 3-5.

127 See id., ch. 3, art. 20; see also THE CONSTITUTION OF JAPAN, translated and reprinted in THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67, supra note 3, app. at 304 ("1. Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the state nor exercise any political authority. 2. No person shall be compelled to take part in any religious acts, celebration, rite or practice. 3. The State and its organs shall refrain from religious education or any other religious activity.").

128 KENPO, ch. 8, art. 89, translated in THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES, supra note 124, at 18.

129 See INOUE, supra note 42, at 266-67 ("In the end, the negotiators created and approved two versions of the Constitution, one in English, and the other in Japanese, which were congenial in their respective cultural and political traditions. But neither side realized the differences in meaning between the two versions."); see also supra notes 114-118 and accompanying text (discussing "fierce negotiations" between the SCAP and Matsumoto teams).

130 See INOUE, supra note 42, at 4-5.

3 provides: "The advice and approval of the Cabinet shall be required for all acts of the Emperor in matters of state, and the Cabinet shall be responsible therefor." SCAP drafters wanted to place a check on the Emperor's power in the American constitutional tradition, by adding "advise and consent" language, and insisted upon its accurate translation into Japanese.

The Matsumoto team, coming from a tradition where the Emperor, though invested with absolute power by the Meiji Constitution, had only really exercised executive power in the American presidential sense on one occasion, preferred to use the Meiji Constitution translation of "advise and consent" found in Article LV. Under the Meiji translation applied by the Japanese drafters, the term "advising" (hohitsu-shi), was defined as a type communication between the Ministers of State and the Emperor, rather than a literal translation of the words "advise" (jogen) and "consent" (shōnin). The translative desire to rely on the Meiji understanding of "advise and consent" is reflected in numerous Cabinet discussions which repeatedly stress that, aside from the lone exception of the Emperor's decision to end the war, there had always been agreement between the Emperor and the Cabinet. The idea that changing the word hohitsu-shi implicitly marked a change in the Emperor's relation to the Cabinet, however, was a view considered so strange and at odds with history that most of the Japanese debaters simply decided that when the terms jogen and shōnin were finally used no substantive change had really occurred.

In sum, the arguments which took place over the language, meaning, and phraseology used in the 1947 Showa Constitution are indicative of the Japanese goal of retaining the fundamental character of the Emperor's position within the confines of an imposed constitution. These arguments also show explicitly how the Japanese were willing to accept the changes imposed on them in part because the Japanese language is flexible and vague enough to draw reasonably divergent conclusions from identical language.

C. Dismantling of State Shinto

On December 15, 1945, SCAP issued what has come to be called
the "Shinto Directive."\[140\] The Directive was issued before the promulgation of the new Constitution,\[141\] and it arguably laid the foundation for Articles 20 and 89 of the 1947 Showa Constitution. The intention of the Shinto Directive was to eliminate all state-sponsored Shinto and, in theory, completely separate religion and state.\[142\] The over-arching goal of the Directive and its derivative constitutional provisions was to destroy any elements of ultranationalism and militarism that had been built up through the use of State Shinto.\[143\] In carrying out the Shinto Directive, however, the Occupation authorities allowed the existing Shinto shrines to become recognized as an "organized" religion, which was called "Shrine Shinto."\[144\]

Unfortunately, the Occupation authorities never anticipated or fully addressed the issue of war-dead shrines, such as Tokyo's Yasukuni Shrine, or the role the Emperor occupied as the head of the Shinto religion.\[145\] Questions about war-dead Shinto shrines began to emerge just after the war, but the larger question of the Emperor's role did not emerge fully until the death of Emperor Hirohito in 1989.\[146\] Japan has recently been forced to face these constitutional questions by test cases in High Court and Supreme Court Grand Bench challenges.\[147\]

V. THE EMPEROR'S PRESENT ROLE

A. Death of Hirohito and Ascension of Akihito

Recently, one reporter queried whether the Japanese Emperor had been transformed from "the 'living god' of a fanatical religious-military cult" into an "ordinary human and the head of a sedate model family?"\[148\]

The question of the Emperor's divinity remains valid, and is crucial in recognizing the conflict of the Emperor's role with Article 20.

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140 See CREEMERS, supra note 25, at 43 (discussing the Shinto Directive and the removal of restrictions on political, civil, and religious liberties).
141 See INOUE, supra note 42, at 122-23.
142 See CREEMERS, supra note 25, at 44.
143 See EARHART, supra note 25, at 38-39.
144 See CREEMERS, supra note 25, at 44.
146 See id.
147 See Yoko Hani, Offerings 'Unconstitutional', 37 JAPAN TIMES WEEKLY INTERNATIONAL EDITION 15, April 14-20, 1997, at 1, 5 (discussing a Supreme Court decision regarding whether the use of public funds for Shinto cash offerings violates the Constitution); Court Says Imperial Rites Might Violate Constitution, KYODO NEWS INTERNATIONAL, INC., Japan Policy & Politics, Mar. 13, 1995, available in LEXIS, Nexis Library, IAC Japan File (reporting that the Osaka High Court stated that rites commemorating Emperor Akihito's enthronement might have violated the Constitution's rules separating religion and state).
Emperor Hirohito, the Showa Emperor, underwent a long and intricate ritual process to actually accede to the Imperial throne in 1926. The process of accession is intended to cement the temporal powers of the Emperor and bestow upon him the powers of the arahitogami, the living god. Accession is a three-stage process, called in Japanese sensō, sokui-rei, and daijōsai, terms which, translated roughly, mean “accession,” “ascending the throne,” and “the great thanksgiving,” respectively. Daijōsai, the final consummation of the accession, is the Shinto rite of transfiguration signifying the end of the ascension process. According to one commentator, the daijōsai has the effect of turning the Emperor from an ordinary person into “a supernatural being, whose person embraces the entire welfare of the people, and has the power to represent them before all the kami [gods].” The verifiability of this occurrence is of course impossible, but proof of the Emperor’s divinity was and still continues to be a highly controversial matter.

In sharp contrast to the Emperor’s participation in his accession rituals in the late 1920’s, the popular acceptance of the Emperor as “less than divine” was a process that began with his denial of divinity in 1946, and continued gradually over a long span of years. Following MacArthur’s policy directives, the Emperor visited numerous parts of Japan and made a point to meet with everyday Japanese. One commentator described the postwar transformation of Hirohito: “Instead of the militarized, dynamic, and masculinized figure riding on his white horse, the monarch became a civilian dressed in Western-style suits and soft hat who engaged in such peaceful pursuits as marine biology, poetry, sports viewing, and, in 1975, even visiting Disneyland.” The Emperor’s “descent into mortality” is considered to have crystallized upon the marriage of his son Crown Prince Aki-
hito (presently Emperor) to a commoner, Michiko Shoda, in a story-
book “tennis court romance” in 1958.158

On the other hand, several events in recent decades brought into
question the legitimacy of a non-religious Imperial role and strength-
ened the trend toward reactionary politics.159 For instance, in 1974,
the Emperor and Empress made a pilgrimage to Ise Shrine and re-
vived the practice of kenji doza, a ritual using two of the three imperial
symbols, the sword and jewel.160 This ritual had been abolished after
the war.161 In August, 1977, at a summer resort in Nasu, Tochigi Pre-
fecture, the Emperor made a public statement denying that he had
actually forsaken his divine character in 1946.162 These pro-Imperial
actions were exacerbated in the 1980’s by Prime Minister Yasuhiro
Nakasone, who heralded in a conservative neo-nationalist govern-
ment which sponsored educational reform including mandatory flag-
hoisting ceremonies and the singing of the national anthem (Kimi ga
yo) at school ceremonies.163 These policies are still extremely conten-
tious.164

Prime Minister Nakasone also generated controversy by his public
association with Yasukuni Shrine in Tokyo, the home of many of Ja-
pan’s war dead, including several notorious Class 1 War criminals,
such as Hideki Tojo.165 Other State-related Shinto events which have
seemingly trampled constitutional guarantees of separation of relig-
ion and state have led to the constitutional challenges to Article 20
and Article 89 which have emerged in the last twenty-five years.166

B. Emperor Akihito and the Daijōsai

Crown Prince Akihito ascended to the throne on January 7, 1989,
upon the death of Emperor Hirohito.167 Emperor Akihito vowed to
respect the Constitution, “together with all the citizens.”168 On his
fifty-seventh birthday in 1990, he reaffirmed this desire when he said,
“I hope to perform the duties of the Emperor in a manner appropri-

158 See Moosa, supra note 148.
159 See Earhart, supra note 25, at 296 (discussing the impact on Japanese society of major
social changes in the 1960’s and 1970’s).
160 See id. See also Large, supra note 5, at 5 (discussing the legend of the Emperor’s sacred
lineage)
161 See id.
162 See id.
163 See Bailey, supra note 154, at 154-55.
164 See id. at 154 (“In 1985 the Ministry of Education caused uproar amongst teachers when it
instructed all school heads to ensure that the national flag was hoisted and the anthem sung at
school ceremonies.”)
165 Hideki Tojo, Japan’s wartime Prime Minister, was sentenced to death for crimes against
humanity and conspiracy to wage aggressive war. See id. at 32-33.
166 See, e.g., Yasukuni Shrine case, supra note 2.
167 See Moosa, supra note 148.
168 Id.
ate to the present age, as a symbol of the state and the unity of the people in accordance with the provisions of the Constitution.”

At that time, in late 1989, the question put forth by academics and the popular media was whether Crown Prince Akihito would undergo the daijōsai ceremony, whether it would be constitutional, and more importantly, whether the Crown Prince would be, in a sense, reclaiming the divinity which his father had renounced on New Year’s Day, 1946?

Shortly after Emperor Hirohito’s death in 1989, then Prime Minister Noboru Takeshita, in response to a parliamentary question, said that the daijōsai ceremony had been ruled out of the Emperor’s accession by the 1947 Showa Constitution. Ultimately, however, Crown Prince Akihito did perform the daijōsai ceremony, causing Japanese critics to claim that the “act violated the constitutional separation of church and state.”

A coalition of Christians, Buddhists, and anti-monarchists who opposed the daijōsai claimed that the ceremony would make the Emperor a living Shinto kami [god] and make Shinto a de facto state religion once again, a practice outlawed by the 1947 Showa Constitution’s guarantees of religious freedom.

Article 20 of the Showa Constitution reads:

Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the State nor exercise any political authority.

2. No person shall be compelled to take part in any religious acts, celebration, rite or practice.

3. The State and its organs shall refrain from religious education or any other religious activity.

The second part of the anti-daijōsai coalition’s argument was based on Article 89, which provides: “No public money or other property shall be expended or appropriated for the use, benefit or maintenance of any religious institution or association, or for any charitable, educational or benevolent enterprises not under the control of public authority.” Critics of the daijōsai were especially inflamed because the Japanese government spent almost 17 million

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169 Id.
170 See supra notes 83-87 and accompanying text (discussing the Imperial Rescript in which Emperor Hirohito renounced his divinity).
171 Takeshita resigned in disgrace after the Recruit Cosmos Scandal. See CRUMP, supra note 28, at 213.
172 See CRUMP, supra note 28, at 213.
173 Moosa, supra note 148.
176 KENPÔ, art. 89, translated in THE CONSTITUTION OF JAPAN AND CRIMINAL STATUTES, supra note 124, at 18.
dollars in public funds for the event. Even though the ceremony could not be seen by the public except for the Emperor’s entrance, it was designated by the government as an “Imperial Family Event” and a public ceremony. Tensions surrounding the event were evidenced by thirty-four terrorist attacks which occurred during the weeks of Akihito’s enthronement.

Several minority religious groups brought lawsuits against the use of taxpayer money for religious purposes, with notable results. While none of the plaintiffs recovered monetary damages, the decision handed down by the Osaka High Court was noteworthy and truly groundbreaking, especially when viewed in the context of the Yasukuni Shrine case which followed two years later. In denying the plaintiffs damages of 10,000 yen per plaintiff, presiding Judge Noriyuki Yamanaka said, “[i]t cannot absolutely be denied that there is suspicion (the rites) violated the (Constitutional) rules of separation of religion and state.” As to their Shinto context, Judge Yamanaka conceded that “[i]t is obvious that (they) held the characteristics of a Shinto ceremony.” Regarding damages for “mental anguish,” the court, applying somewhat vague reasoning, saw that the “disbursement of the public funds had been finalized,” and did not feel that the government had affected the plaintiff’s thinking or had in fact dealt them any obligation or burden. The plaintiffs, pleased with their moral victory, did not appeal the case because they felt that the court “announced what we wanted to say.” The High Court admitted that the daijōsai “may have violated the Constitution.”

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178 See, Interpretations of Daijōsai, THE DAILY YOMIURI, Nov. 24, 1990, at 6 (“[T]his appropriation . . . was defended with the argument that because . . . the enthronement ceremony . . . is stipulated in the Constitution, and because the Constitution is a public document, Daijōsai is to some degree a public ceremony.”); Steven A. Weisman, Akihito Performs His Solitary Rite, N.Y. TIMES, Nov. 23, 1990, at A7 (“[S]pectators . . . could only see glimmerings of the ceremony in the dark.”).
180 See High Court Decision on Enthronement Rites to Be Fixed, KYODO NEWS SERVICE, Mar. 23, 1995, available in LEXIS, Nexis Library, Japan Economic News File (explaining how plaintiffs “practically won the suit in gaining the High Court’s admission that the government’s funding of the ritual may have violated the Constitution”).
181 Converted into U.S. currency, 10,000 yen is the equivalent of about 90 dollars.
182 Court says Imperial Rites Might Violate Constitution, supra note 147.
183 Id.
184 Id.
185 Id.
186 High Court Decision on Enthronement Rites to Be Fixed, supra note 180, (explaining the Court’s reasoning that the daijōsai may have violated the Constitution’s rule of separation of religion and state).
VI. RECENT ARTICLE 20 JURISPRUDENCE: THE YASUKUNI SHRINE CASE

The Supreme Court Grand Bench, an arm of the Japanese Supreme Court, is used to review the constitutionality of statutes and official acts. Most recently, on April 2, 1997, the Grand Bench ruled that Ehime Prefecture's contributions of public funds as tamagushi-ryō, or Shinto cash offerings, to Yasukuni Shrine in Tokyo violated Article 20 of the Constitution. This landmark Yasukuni Shrine ruling overturned a 1992 Takamatsu High Court decision and reaffirmed the “significance and effect” standard. The “significance and effect” standard was initially developed in a 1977 case in which the Japanese Supreme Court ruled that a local government’s use of public funds to pay for a Shinto ceremony at the opening of a municipal gymnasium in Tsu, Mie Prefecture was constitutional. In the Mie Prefecture case, the Court said that it was impossible for the State, including both local and central government, to be free of all contacts with religion, and considered the ceremony, as “social protocol,” to pass the “significance and effect” test.

The “significance and effect” test employed in the Yasukuni Shrine ruling uses a two-part requisite formula to determine whether state-supported activities that are questionably religious in nature are unconstitutional pursuant to Article 20. In a ruling supported by thirteen of the Court’s fifteen Justices, the Court wrote:

(1) If the authorities’ transaction’s goal has a religious significance and (2) that effect is a payment to religion, a fostering, promotion, coercion, interference, or so forth, it becomes like a transaction that’s part 1) and part 2) requisites have been sufficient on that occasion to become unconstitutional by way of Constitution Article 20, Clause 3 [Religious Significance Clause] (if there is a case where just one of the requisite factors is lacking, it does not become unconstitu-

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187 See Suit on Separation of State and Religion Goes to Grand Bench, MAINICHI DAILY NEWS, Apr. 4, 1996, at 12 (“[T]he top court usually refers cases to its grand bench... to review the established interpretation of laws or to determine the[ir] constitutionality.”).

188 See Hani, supra note 147, at 1, 5 (“[T]he Supreme Court proclaimed... offering of public funds to shinto shrine violates the Constitution.”).


190 See Hani, supra note 147, at 1, 5 (reporting that “the Shinto rite was not prohibited under the Constitution because it could not lead to the extension of support, promotion, oppression or interference of a religion”).

191 See id. (reporting that the ceremony was considered to be “in the realm of social protocol.”).

192 See Ruling on Shrine Donations Puts Religious Freedom to Test Prefecture's Gifts Unconstitutional, supra note 189, at Pol. & Soc'y 4 (“Standards used by the Supreme Court in its decision were set forth by the Grand Bench in a 1977 ruling.”). Article 20 becomes meaningful in determining the permissibility of state-supported religious activities when read in conjunction with Article 89.
The impermissible "effects" are distinguishable under the formula from "social protocol," a broad term of art that the lower court had believed to encompass Ehime Prefecture's cash offerings to Yasukuni Shrine. By deciding that the cash offerings by local government officials to Yasukuni Shrine could not pass the "significance and effect" test, these payments were held unconstitutional by this standard. Through the Yasukuni Shrine ruling, the Court demarcated a narrower interpretation of "social protocol" and paved the way for a restructuring of the Japanese Constitution.

The application of the "significance and effect" test to the role of the Emperor as defined by Chapter 1 of the Showa Constitution reveals the fatal flaw in the Japanese Constitution's construction. In particular, Article 4 of the Showa Constitution specifies that "[t]he Emperor shall perform only such acts in matters of state as are provided for in this Constitution and he shall not have powers related to government." As the Osaka High Court case revealed, the daijōsai component, and presumably other facets of the Emperor's accession ceremony, violated the religious separation principles of Article 20 and in turn, implicitly violated Article 4. Presumably, the daijōsai would easily fail Yasukuni Shrine's "significance and effect" test as well, because enshrining the Emperor has a clear religious "significance," and the "effect" promotes religion in a State ceremony. If the daijōsai and the public funding of Yasukuni Shrine are unconstitutional, it follows that the entirety of the Japanese Constitution's Chapter 1, especially Article 4, is untenable as it reads today. The Osaka High Court and Yasukuni Shrine cases show that the fiction of a non-religious Emperor cannot function, as explicitly stated in Article 4, consistently with the rest of the Constitution, especially Articles 20

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195 See Yasukuni Shrine case, supra note 2.

As for its application, this detail, look at the American Federal case law precedent of the Lemon test which disallows: a) Action against common custom, b) Fostering an assistance of religious activity, c) and excessive entanglement of nation and religion. In the Lemon test, if just one of the three parts is lacking, it becomes constitutional and this difference between the Lemon test and the two-part [significance and effect] test, to begin with, should be pointed out.

Id. (as translated by this author) (contrasting the instant test with the Lemon Test).

The Lemon Test provides: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster "an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted). See also Hani, supra note 147, at 3.

194 See Lemon; 403 U.S. at 612-13 see also Hani, supra note 147, at 1, 5.


196 See Hani, supra note 147, at 1.


198 See supra note 195 and accompanying text (describing the "significance and effect" test).
and 89.

In order to avoid the conclusion that the role of the Emperor today does not violate Articles 4, 20, and 89 of the Showa Constitution, one must argue that the *kokutai* is defunct, and the Emperor has truly been reduced to a non-religious, political figurehead. The defects in this argument are easily identified. First, Emperor Akihito did perform the *daijōsai*, an act which immediately calls into question his divinity, and a fact which trumps any claim that the Emperor is nothing more than a private non-religious figure. Second, though the Emperor is a “symbol of the state” and derives his power from the people, he derives his religious power from his lineal descent and role, as cemented by the *daijōsai*, as chief shaman-priest of the Shrine Shinto religion.

If Japan were to elect, for example, a religiously non-invested Emperor to serve as the symbol of the state, no constitutional dilemma would exist. As it stands now, though, the Emperor is the functional equivalent of an American religious figure elected as President, with the federal government funding all of his or her “state” religious activities. If America were to pursue such an unlikely course, it would be faced with a choice between amending the U.S. Constitution to reflect either a change in the constitutional role of the “religious” President or a change in the strict separation of church and state. This is the choice that Japan faces today, and this is why the Showa Constitution must be amended to reflect the reality of the Emperor’s position.

VII. CONSTITUTIONAL REFORM: POSSIBLE SOLUTIONS

The present Constitution of Japan is indeed a unique historical document. Unlike the Constitution of the United States, which was amended numerous times during its first fifty years, the Japanese Constitution has remained unchanged since its promulgation on May 3, 1947. Any public discussion about revising the Constitution had been somewhat of a social taboo for many years. Nonetheless, proposals to revise the Constitution have been discussed abundantly in Japanese academia and government, to little effect. The Commis-

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199 See supra notes 17-22, 35-37 and accompanying text (discussing the concept of *kokutai* as a "paradigm of Japanese identity," and a concept from which the Emperor derives influence).
200 See supra notes 173-174 and accompanying text (discussing Emperor Akihito’s *daijōsai* ceremony and the controversy it caused).
202 See supra note 5 and accompanying text (discussing the lineage of the Emperor).
203 See *Japan: Revisionism Revived*, THE ECONOMIST, May 3, 1997, at 28 (“Unlike the American constitution, which was amended and reinterpreted extensively even during its first 50 years, the Japanese constitution . . . has remained sacrosanct.”).
204 See id.
205 JAPAN’S COMMISSION ON THE CONSTITUTION: A FINAL REPORT, supra note 123, at 3.
sion on the Constitution, a seven-year project that began in 1957, culminated in a report 1161 pages long, culled from 40,000 pages of minutes from meetings, committee reports, hearings and other discussions of any and all problems relating to the Japanese Constitution. No definitive conclusions were reached. In the early 1990's, with the eruption of the Gulf War, talk revived in Japan of revising the Constitution, with most of the discussion revolving around the role of Article 9, the anti-war provision. In one survey of Diet members, sixty percent came out in favor of constitutional amendments. Aside from revising Article 9, many wanted amendments addressing environmental or privacy concerns. Few Diet members have, however, publicly called for revision of the articles regarding the role of the Emperor.

On November 3, 1994, the Daily Yomiuri, Japan's largest daily newspaper, broke the forty-seven-year-old social taboo against calling for change of the Constitution by publishing a revised draft constitution which called for very specific changes in several areas of the Constitution. This populist revisionist draft called for four main points of Imperial reform:

1. Stipulating in separate chapters national sovereignty and the status of the Emperor as the symbol of the state, which are both stipulated currently in Article 1 of the Constitution;
2. Transferring the article on "limits to the Emperor's functions" to just before the article on "advice and approval of the Cabinet on the Emperor's acts in matters of state;"
3. Making the roles of the Emperor more ceremonial in matters of state that can be regarded as matters of state policy, such as dissolution of the House of Representatives and convening of the

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206 See id. at 4.
207 See id.
208 See Japan: Revisionism Revived, supra note 203, at 28.

The Gulf War of 1991, however, marked a watershed. The Japanese were left as bystanders while American and allied soldiers shed blood, partly on oil-dependent Japan's behalf. The talk ever since has revolved around amending the constitution, so Japan can become an "ordinary nation", able to do its share of the dirty work around the world. The debate has taken on added urgency since Bill Clinton's visit to Tokyo last year [1996], when it was agreed that Japan would play a more active role in the long-standing security alliance between the two countries.

Id.
209 See id.
210 See id.
211 See id. ("Any open discussion of actually revising the constitution was until recently taboo for politicians.") Curiously, it has been argued that Japan has no official head of state or official national flag. The Emperor is not the official head of state because the government considers it too "provocative" to declare him as the official head of state, and thereby perhaps violate the 1947 Constitution. Likewise, the flag, a symbol of wartime aggression, is not officially adopted, though it is in relatively common use. See Nicholas D. Kristof, Japan's State Symbols: Now You See Them... N.Y. TIMES, Nov. 12, 1995, § 4 (Week in Review), at 3.
(4) Giving the Emperor nominal functions as head of state in relation to external relations.\textsuperscript{119}

Though the \textit{Yomiuri} draft adequately addresses some pressing issues, particularly the Emperor’s status as head of state, it is woefully inadequate when read in the context of the verdicts of the Osaka High Court and the \textit{Yasukuni Shrine} cases. While the \textit{Yomiuri} draft engages some practical political issues, seemingly clarifies the relationship between the Emperor and the people, and solves some of the clumsy Japanese used in the \textit{Showa} Constitution, it fails to address the real problems inherent in the Emperor’s role and the conflict between that role and Articles 20 and 89.

It appears that the best solution for Japan’s constitutional dilemma is a revised Constitution with “a clearly defined position for Shrine Shinto and its ceremonies, especially those ceremonies which connect Shrine Shinto with the Imperial House.”\textsuperscript{214} In 1962, Japanese scholar Satomi Kishio unsuccessfully proposed a possible solution to this constitutional conundrum.\textsuperscript{215} His visionary proposal now appears partially vindicated by the holdings of the Osaka High Court and \textit{Yasukuni Shrine} cases. Satomi’s version of Article 20 reads as follows:

The state affirms the importance of religion in the spiritual lives of the people; it equally protects all religious sects that have a proper religious value. The Emperor and the state transcend all religious sects; they do not belong to any religious sect or religious organization, and they do not give special protection to any specified religious sect or religious organization.

The state may not interfere with any of the religious sects, religious organizations, or their believers, as long as their faith, teachings, rituals and meetings, or their internal system are not against the constitution. The state can control, as determined by law, superstition, evil worship, and false religions.\textsuperscript{216}

To fully tackle the \textit{daijōsai} and \textit{Yasukuni Shrine} problems, Satomi’s draft constitution adds constitutional regulation which neatly compartmentalizes these religious manifestations as a special type of ac-

\textsuperscript{119} \textit{Id.}

\textsuperscript{214} CREEMERS, \textit{supra} note 25, at 96.

\textsuperscript{215} See \textit{id.} (quoting SATOMI KISHIO, \textit{NIHONKOKU NO KENPÔ [THE CONSTITUTION OF JAPAN]} 430 (1962)).

\textsuperscript{216} Satomi’s draft is highly problematic in many respects, particularly when he speaks of State control of “superstition, evil worship, and false religions.” Conceivably, under Satomi’s model, constitutional or statutory authority could dictate what religions might be considered “false” or “evil.” This is clearly far too totalitarian a regime, and contradicts the democratic principle embodied in freedom of religion. Aside from this dangerous structure, Satomi’s draft is quite practical and revolutionary.
ceptable "state rites."\textsuperscript{217}

—The grand coronation ceremony and the ceremonies transmitted in the Imperial House, are ancient rites of the state; they are different from the activities of religious sects.

—The Ise grand shrine and other shrines designated by law are establishments where the ancient rites of the state are performed. The grand shrine and the shrines of the previous paragraph are subject to the free respect and worship of the people. Their sole task is the promotion of the unity of the popular spirit. They are not to propagate or enforce a specific religious teaching or faith, or criticize or reject the articles of faith, the teachings, and the rituals of other religions. The functions based on the characteristic traditions of each shrine are recognized so far as they preserve the time-honored customs of the people. Particulars are determined by the Grand Shrine and Shrine Laws.\textsuperscript{218}

Applying the formula of the Japanese Supreme Court Grand Bench in the Yasukuni Shrine case to Satomi's model, contributions to Yasukuni Shrine, endowed by "free respect and worship of the people," would be considered \textit{de jure} "social protocol" rather than the fostering of religion. Though Satomi's model assumes the same legal fiction the Supreme Court ruled against in the Yasukuni Shrine case, it would solve the \textit{realpolitik} of the \textit{daijōsai}, and allow for donations to the particular Imperially-related shrines. In essence, Satomi's model codifies the Imperial throne as constitutionally acceptable "social protocol." A critic of Satomi's proposal could justifiably say that it strengthens the Emperor's symbolic role too much, explicitly revives \textit{kokutai} and State Shinto, and remythologizes the Imperial role, all of which led Japan down the dark path of the Second World War. In this sense, Satomi's proposal could be considered dangerous in the same manner that the Occupation Authorities considered these elements dangerous when it ordered the Shinto Directive.\textsuperscript{219} Japan must at the same time, however, constitutionally recognize the fact that the Emperor is, historically and traditionally, a religiously-vested figure whose behavior and public support should not repeatedly violate the Constitution.

CONCLUSION

The Emperor's role is a unique example of the conflict inherent in coexisting religions and democratic principles. Constitutional reform is necessary to reconcile the Emperor's role with Articles 20 and 89 so that the integrity of Article 4's separation of religion and state is

\textsuperscript{217} Id.

\textsuperscript{218} See id.

\textsuperscript{219} See supra notes 140-44 and accompanying text (discussing the Shinto Directive).
not compromised.

The necessity of this change will surely be challenged by supporters of the status quo. After all, Imperial roles, though evident in the national anthem *Kimi ga yo*, and symbolized by the Japanese flag, only force themselves upon the Japanese public when extraordinary Imperial events occur, such as upon the death of an emperor, or when an emperor comments on sensitive issues of foreign policy. Perhaps the Japanese consciousness has internalized its Emperor and routinized its constitutional jurisprudence beyond change. This might explain why an angered Yukio Mishima[^220] stated that, “without the Emperor the Japanese people have no identification.”[^221]

Only Constitutional Amendment can rectify the inherent flaws in order to keep pace with the dynamic and complex reality that is the Imperial role at the dawn of the twenty-first century.

[^220]: Mishima, a popular novelist, shocked Japan on November 26, 1970 by committing ritual suicide at the headquarters of the Self-Defense Forces in Tokyo as a protest against the “decadent” Allied-imposed Constitution and what he viewed as the delegitimization of the military. See LARGE, supra note 5, at 170; FUJITANI, supra note 65, at 232 (describing Mishima’s view of the Emperor).

[^221]: See LARGE, supra note 5, at 171.