NOTE

Assessing Aspirations: Factors Influencing Modern Effects of State Aspirational Clauses in the German and Japanese Constitutions

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Constitutions sometimes feature clauses listing abstract national goals with little or vague direction on how the nation should achieve these aims. These so-called "aspirational clauses" present an interesting situation where a text is adopted by drafters, but the specific implementation is left to future generations. This Note will explore how nations carry out the demands of these aspirational clauses. Specifically, analysis will focus on looking at the constitutional interplay between a triad of key actors: the courts, the political parties, and the popular will. These factors and their impact on aspirational clauses will be explored in the context of two case studies focusing on Article 9 of the Japanese Constitution and Article 23(1) of the German Basic Law. The case studies demonstrate that the unique jurisprudential culture of each country combined with the political environment surrounding the content of the clause have led to divergent experiences. Japan's passive high court and divisive opinions between the people who support pacifism, and the government, facing practical and ideological pressures to increase Japan's military capabilities, have led to a bitter stalemate over the meaning of Article 9. Conversely, Germany's strong early constitutional court ruling on the clause's demands and political environment generally in favor of EU integration has made Article 23(1) a mostly uncontroversial foundation for the country's EU participation. So, while the three factors listed above will have an impact no matter what clause or country, how the factors interact with the clause depend entirely on a country's political, national, and jurisprudential character

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INTRODUCTION

Like individual people, countries too can have aspirations. Sometimes leaders will assign aspirations to the countries they lead when beginning their administrations.[1] Countries may also adopt principles from their founding or from influential revolutions, such as France's secularism and embracing of *Liberté, Egalité, Fraternité*.[2] But sometimes a country will want to make their aspirations more concrete or permanent. In these cases, they may actually enshrine national aspirations in their constitutions.

This Note focuses on the aspirations that countries put in their constitutions through an examination of state aspirational clauses. Specifically, the focus will be on how individual countries have taken the textual demands of the clause and translated themes into concrete actions: legislation, policies, and/or official opinions. This Note proposes, and then applies in two case studies, a triad of factors whose interaction amongst each other and the text helps explain how countries interpret and execute the demands of certain aspirational clauses. Through these case studies, this Note aims not only to examine two interesting clauses, Article 9 of the Japanese constitution and Article 23(1) of the German constitution, but also to demonstrate the utility of the triad of factors as an analytical framework for studying aspirational clauses.

Certainly, in many instances, studying state aspirational clauses may invoke questions of what many would consider to be "constitutional interpretation." An ocean of ink has been spilled on interpretational doctrines for constitutions,[3] and—especially in the United States—new decisions of the Supreme Court often provoke a flurry of interpretation-focused articles analyzing the new case and its place in the doctrinal canon.[4] However, this Note does not attempt to fit itself into this U.S.-centric academic tradition. Instead, it will argue that the unique characteristics of aspirational clauses present a complex problem that requires its own unique interpretive framework to understand the impact of these clauses on the countries that adopt them.

Further on this point, this Note is not focused on attempting to distill a "correct" judicial interpretation of the clause or how countries "should"

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1 *See, e.g.*, Joseph Biden, President of the United States, Inaugural Address (Jan. 20, 2021).

2 *See generally* Andreea Ernst-Vintila & Irina Macovei, *«Je suis Charlie», la liberté au-delà de l'égalité et la fraternité? Interprétation collective des attaques terroristes de janvier 2015 en France et expression online d'un nexus*, 38 PSIHOLOGIA SOCIALA 111 (2016) (discussing in part France's national values).

3 *See, e.g.*, Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019).

4 These usually take the form of case commentary articles. *See, e.g.*, Aditya Bamzai, Commentary, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. (2019) (studying the impact of the *Gundy* case on the Non-delegation Doctrine).

translate them into action. To focus solely on this judicial interpretation would miss the critical social and political factors that shape the implementation of aspirational clauses. Instead, this Note goes beyond just textual interpretation and will focus equally on factors such as jurisprudential culture and political structure.[5]

The Note will proceed in three parts. Part I will begin by defining state aspirational clauses and then introduce the interpretive framework this Note will use in analyzing the clauses. Parts II and III will then apply this interpretive framework to Article 9 of the Japanese constitution and Article 23(1) of the German Basic Law.

I. STATE ASPIRATIONAL CLAUSES AND THEIR CHARACTERISTICS

A. State Aspirational Clauses

"State aspirational clauses" usually are not what one imagines when thinking about typical provisions in a modern constitution. Most constitutional clauses can be sorted into two broad categories. One category consists of structural provisions, which focus on enumerating specifications for the functioning or compositions of governmental bodies and institutions.[6] The other category contains both grants of affirmative rights to be provided by the government or "concrete negations," which seek to outright ban certain actions by private citizens or the government.[7] Together, these provisions create a functionalist framework that conveys "manageable expectations of rights within the rule of law" for individuals and institutions.[8]

State aspirational clauses,[9] however, do not fit neatly into either of these categories. These clauses contain broadly-written language that loosely

5 *See infra* Part II.B.

6 An example is Article 1 sections 1-3 of the U.S. Constitution that create the institutions of the House of Representatives and the Senate, vesting them with legislative power and defining their membership. U.S. CONST. art. I, §§ 1-3.

7 Kermit Roosevelt III, *Law's Aspirations,* 2 J. L. & INTERDISC. STUD. 1, 4 (2002). An example of this includes prohibiting certain classes of criminals from voting in the Netherlands. GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [CONSTITUTION] July 7, 2002, art. 54, para. 2 (Neth.). An example of a positive right would be the grant of parliamentary immunity. CONSTITUTION FRANÇAISE DU 4 OCTOBRE 1958 Oct. 4, 1958, art. 26 (Fr.).

8 Richard Albert, *Counterconstitutionalism*, 31 DALHOUSIE L.J. 1, 36 (2008); *see also*, Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT'L L. 115, 116 (2004).

9 The phrase "state aspirational clause" as used in this Note derives from the German word for the concept of "Staatszielbestimmung," as used by Ulrich Scheuner. ULRICH SCHEUNER, STAATSTHEORIE UND STAATSRECHT: GESAMMELTE SCHRIFTEN 232 (1978). This word best translates to "state aspiration provision" or "state objective provision." Several American authors have used the phrase "aspirational" in terms of constitutional interpretation as well. These advocates of "living constitutionalism" argue that later generations should pragmatically adapt the constitution to fit modern needs and fear "dead hand" rule by the founding generation. *See, e.g.*, Andrew Coan, *Living Constitutional Theory*, 66 DUKE L.J. 99, 103-04 (2017); Adam Samaha, *Dead Hand Arguments and*

"establish instructions and guidelines for the actions of state bodies."[10] Often they will outline certain objectives (i.e., the "aspiration") for the state to achieve, such as furthering some abstract ideology or some geopolitical objective, and then either specifically proscribe general policies or otherwise "expect state action" to be taken to further said objective.[11] However, the exact actions demanded by the clause or its "binding effect" can often be unclear, especially when compared to constitutional rules surrounding government structure or clearly enumerated "fundamental rights."[12] This is not to say that state aspirational clauses have no legal effect or are not binding. Indeed, legislatures or executive officers may be compelled to act based on their own belief that they are bound to act in accordance with the provision. The methods they choose to fulfill this obligation are nonetheless unclear or unenumerated.

While the clauses that will be discussed in Parts II and III are (naturally) aspirational as well, a quick example here can concisely demonstrate the puzzle that such clauses present. In the Constitution of Ukraine, Article 116 was amended in 2019 to mandate that the state "ensures the implementation of the strategic course of the state towards full membership of Ukraine in the European Union and the North Atlantic Treaty Organization."[13] This article, along with complementary language regarding Euro-Atlantic integration in Articles 85 and 102, contain no *specific* action to be taken by the government (i.e., there is no demand that the state actually send a certain number of diplomats at certain times to enter into negotiations).[14] Yet, these articles seem to demand action of some sort to achieve their enumerated goal. If not, then the specific textual demands that the government "ensures implementation of the strategic course of the state" would be dead-letter.[15] The details of said measures, however, appear to be left largely to the discretion, or interpretation, of future Ukrainian legislatures and presidents.[16]

Constitutional Interpretations, 108 COLUM. L. REV. 606, 609 (2008). This analysis, however, focuses only on interpretation of individual aspirational clauses, not whole interpretive doctrines that advocate for reading whole constitutions in an aspirational manner. Further, this Note does not focus directly on so-called "positive rights," such as government-guaranteed rights to economic security. *See, e.g.*, Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002) (discussing positive rights in U.S. state constitutions).

10 SCHEUNER, *supra* note 9, at 226 (trans. by author).

11 *Id.* at 234.

12 *Id.* at 237.

13 CONSTITUTION OF UKRAINE June 28, 1996, arts. 116, 85, 102 (Ukr.) (amended by No.2690-VIII (Feb. 7, 2019)).

14 *Id.*

15 *Id.*

16 The uniqueness of the Euro-Atlantic provision here is that the measure *additionally* requires actions to be taken by non-Ukrainian state actors: namely the members of the EU and NATO

This discretion left to the legislature, a non-judicial body, shows just one of the reasons why state aspirational clauses require a deeper analysis than simply studying how judiciaries, with their canons of construction, interpret the text of the clauses. Another factor complicating the analysis is the longer-term timeframe contemplated in their enactment. As seen above, state aspirational clauses contemplate, if not outright demand, action by later generations to fulfill the goals of the clause. This means that state aspirational clauses are more than simply the product of the drafters of a constitution "entrenching [their] aspirations for change in constitutional language."[17] Instead, the text of the state aspirational clause and its enumerated "values only become realized if the later generation decides to make them its own."[18] So the question becomes, what factors influence how countries take the textual demands or guidance of state aspirational clauses and determine what actions, if any, they must take to fulfill them?

B. Interpretive Framework: The Triad

This Note argues that while each country possesses unique factors influencing how it interacts with state aspirational clauses, the effect of these clauses (that is, how they impact state action) is mostly shaped by a triad of influential factors which play a crucial role in sustaining a country's constitutional culture. This triad consists of the country's highest court (or highest judicial authority with right to interpret constitutional measures),[19] the parties or cliques participating in the formal political process, and the popular understandings regarding the underlying principle of the clause.[20] The interaction between the priorities and positions of these factors ultimately determines what actions the country takes in regard to these state aspirational clauses.

But what makes this triad influential in this process of state aspirational clause interpretation? The least controversial inclusion in the triad may be the highest court as an essential player in steering a nation's constitutional culture. Many nations in the wake of World War II or the collapse of Soviet Communism (or in the instance of the United States, well before this) set

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themselves. Thus, in this particular instance, not only are domestic factors important, but so are international ones as well.

17 Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1634 (2009).

18 *Id.* at 1634.

19 This distinction is necessary, as sometimes countries split the highest constitutional judicial authority from the highest court of general jurisdiction, like Germany which has both a Constitutional Court as well as a Federal Court of Justice (the highest court of general jurisdiction). *See* GRUNDGESETZ [GG] [Constitution] May 23, 1948, arts. 93, 95 (Ger.).

20 At first glance this triad may seem only relevant to the experience of developed democracies and non-applicable to authoritarian regimes. While a defense of why this model could also apply to authoritarian regimes would be beyond the scope of this Note, in short, even if one side of the triad is weak or "captured" by another, that does not make it fully irrelevant in analysis.

up systems of government formally "lodging responsibility for constitutional interpretation in a single institution, the judiciary" headed by the Supreme Court, or in other cases some form of constitutional court.[21] In some instances, the role of the court in constitutional interpretation may be more collaborative, sharing power with other institutions. For example, Great Britain and many nations of the Commonwealth tend to encourage a "deliberative dialogue between courts and legislatures" in regard to fundamental constitutional rights to ensure an "institutional balance" between parliamentary authority and the authority of the courts.[22] But even in countries that limit the practical impact of the judiciary's constitutional interpretation, such as places where the legislature can easily "displace" the court's interpretation via a simple majority, the courts usually still may issue opinions on matters of constitutionality.[23]

For analysis of the court's interaction with state aspirational clauses, the jurisprudential tradition of the country's court plays the lead role. Some countries greatly empower their constitutional courts while others shackle their judiciaries with weaker powers of review.[24] Sometimes courts themselves will restrain their own power of review, developing a conservative jurisprudential culture highly deferential to the legislative or executive powers of the country.[25] In other situations, the court may develop a "deeply collaborative" interpretive nature, taking into account the opinions of other actors in formulating interpretive doctrines.[26] The relative power of the court as well as how it traditionally has wielded such power greatly influences the weight of its interpretation of a state aspirational clause and its impact on the ultimate action taken to fulfill its demands.

The second factor encompasses the formal parties, political cliques, or other organizational units that participate in the formal institutions of government (for simplicity, for the rest of the article this group will simply be referred to as "Parties"). Parties play the lead role in organizing political positions of interest groups in society and translating them into policy by

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21 Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2783-84 (2003); SCHEUNER, *supra* note 9 (on Germany's bifurcation of constitutional and general jurisdiction high courts).

22 Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 710 (2001).

23 Tushnet, *supra* note 21, at 2786.

24 *Id.* at 2784-88.

25 *See, e.g.*, David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. R. 1545 (2009) (describing the conservative culture of the Japanese Supreme Court). More about the Japanese Supreme Court in particular will be discussed *infra* Part III.

26 Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1590 (2001).

forming governments.[27] Specifically, this analysis will focus on the role these parties play either while in power (that is, in control of the legislature or executive) or in opposition.[28]

Parties engage with constitutional structures in two primary ways: through restrictions constitutions put upon their activities (both structural and on their powers when in government[29]) and by their own constitutional actions. The latter is more important for aspirational clauses. The most blunt act of constitutional action occurs when they consolidate enough power to outright amend or change the constitution.[30] However, beyond simply changing the constitution, certain legislative acts[31] engage in constitutional interpretation when "they help forge new understandings" of constitutional powers or challenge judicial or popular understandings of constitutional limitations.[32] At the broadest level, it can be said that "legislative enactment…is, in a sense, an act of constitutional interpretation," as the legislative body would not act if it did not believe "it has constitutional power to do what it is doing."[33] However, sometimes legislatures act specifically to challenge the constitutional interpretation of others. In these situations, the legislatures hope that their acts, which may at the time contravene interpretive doctrines of the court or popular understanding, will be nevertheless upheld by a more accommodating court or because of shifting public sentiments.[34]

The specific acts, or lack thereof, taken by parties will naturally play a key role in analyzing aspirational clauses. Alongside this, the specific governmental history, legislative culture, and political power structure for each country must also be considered as well. Hypothetically, a country with a highly centralized state authority with one dominant party in government would certainly have a different experience with interpreting aspirational

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27 DAVID RYDEN, REPRESENTATION IN CRISIS: THE CONSTITUTION, INTEREST GROUPS, AND POLITICAL PARTIES 69 (1996).

28 Opposition parties also should be considered here as they often play an important role in restraining the ruling party or coalition's actions and can impact political discourse in significant ways. *See generally* C.P. Bhambhri, *The Role of the Opposition in the House of the People (1952-56)*, 18 INDIAN J. OF POL. SCI. 244 (1957) (describing the role of opposition parties in Indian Politics).

29 This regulation usually focuses on how government bodies are structured, which will naturally impact *how* political parties capture these positions. Constitutions themselves rarely directly regulate political parties. *See* Ingrid van Biezen & Gabriela Borz, *Models of Party Democracy: Patterns of Party Regulation in Post-War European Constitutions*, 4 EURO. POL. SCI. REV. 327, 328, 349 (2012).

30 *See, e.g.*, Chris Bryant, *Hungary Approves New Constitution*, FIN. TIMES (Apr. 18, 2011), https://www.ft.com/content/004ac47c-68ed-11e0-9040-00144feab49a.

31 Both countries in this analysis, Japan and Germany, merge legislative and executive functions (i.e., the Chancellor of Germany is elected from the legislative body) and thus this section will focus more on legislative acts. However, the forces discussed here could also apply to a separate executive.

32 JACK BALKIN, LIVING ORIGINALISM 297-300 (2011).

33 Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2731 (2003).

34 *See, e.g.*, Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 287 (2008).

clauses than a decentralized government dependent on loose party coalitions. Thus, identifying country-specific factors will help explain the actions of parties and define their limits, both culturally and structurally.

The final branch of the triad focuses on social understandings of the constitution and how this impacts state aspirational clause interpretation. Unlike the courts and parties, it would be impossible to point to one specific source or institution that contains or communicates the *vox populi*. Indeed, in many situations there may be competing ideas in the public forum regarding the clause and each of these may be influential to the analysis. But despite difficulties pinning it down, popular and cultural understandings of constitutional provisions have a significant impact on their interpretation and translation into action.[35]

In many cases, shifting popular attitudes on a constitutional issue will precipitate change, either in the courts or in the government. For instance, in the United States, increasing popular acceptance of same-sex relationships, starting in the 1990s and growing into a vibrant equal-rights movement, laid the foundation for the Supreme Court's interpretation of the Constitution in ways that support the rights of LGBTQ+ people.[36] Another example would be Ireland, where a growing women's rights advocacy movement forced the government to hold a popular referendum that successfully removed Amendment 8, which had banned abortions prior to repeal.[37] In both of these situations, the underlying popularity or unpopularity of a certain constitutional right or interpretation grew to such point that it became politically impossible to ignore: thus spurring change.

Also important to this analysis is whether or not the underlying issue in the state aspirational clause rises to a level that inflames public passions. It is unlikely that the people will take to the streets for every minor trespass on the constitutional order, especially if such trespass has little practical impact. If a population is ambivalent or expressly neutral about a constitutional provision or right, it can further entrench inaction on the matter.

When looking at popular opinions' impact on state aspirational clauses, most of the evidence will come from sources ranging from scientific opinion polling to specific actions by private interest groups to influence legislative or judicial policy on the issue. There will likely be difficulties determining if

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35 *See, e.g.*, Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154 (2014); Gayatri Chakravorty Spivak, *Constitutions and Cultural Studies*, 2 YALE J.L. & HUMAN. 133 (1990).

36 *See* Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 130-35 (2013).

37 Justin McCarthy, *Landslide Victory for Yes Side in Referendum*, RTÉ (May 26, 2018), https://www.rte.ie/news/eighth-amendment/2018/0526/966152-eighth-amendment-referendum/. For discussion on the social movement that led to this result, see Sinead Kennedy, *"#Repealthe8th": Ireland, Abortion Access and the Movement to Remove the Eight Amendment*, 5 ANNUARIO DI ANTROPOLOGIA 13 (2018).

an opinion truly is widely held or simply the work of an exceedingly vocal or politically motivated minority. However, this distinction ultimately matters little for this analysis. So long as it can be determined that the opinion has some demonstrable impact on either the perception or political calculus of the other two—the courts or the parties—it will play a role in interpretation.

With that, the scene for state aspirational clause analysis is set: the interplay between the triad of the courts, the parties, and the people. While these three factors will always be relevant, no matter what country or context,[38] the *weight* each factor has on the outcome—the interpretation of the clause—depends entirely on the unique character of the nation. Hypothetically, in some countries the Party's will could dominate the courts and the people, asserting its will over constitutional interpretation with minimal pushback.[39] In other cases, the interplay between the three would be more balanced. It is the impact of this push and pull, the interaction between the triad of factors described above, that will be the analytical focal point of the case studies to follow.

The two case studies, Japan's Article 9 and Germany's Article 23(1), were specifically chosen because of their limited scope and the ongoing relevance of the clauses' ambitions.[40] These Articles, unlike the more open-ended Ukrainian example above, are limited in their focus on one major "theme" (for Article 9, pacifism, and for Article 23(1), European Integration) and can be more easily dissected in a comparative essay than other, more expansive or complex, clauses. Secondly, both the question of pacifism in Japan and questions of European integration are active concerns and will likely remain so in the coming years. This choice ensures that there is enough information regarding the positions of the people and the parties on the clauses to make observations on their impact on the clause's interpretation and execution. It also makes analysis of these two clauses relevant to modern political debates in these countries.[41]

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38 Even in heavily autocratic systems, institutions like the parliament and popular opinion still matter. *See, e.g.*, Gandhi et al., *Legislatures and Legislative Politics without Democracy*, 53 COMPAR. POL. STUD. 1359 (2000).

39 While not the subject of this Note, this likely would have been the constitutional context of the early Soviet Union (1920s-circa late 1940s).

40 Japan and Germany also share the unique qualities of having their modern constitutions drafted in the wake of World War II, however, this fact did not impact the decision to choose these two countries as subjects of study in this Note. While Article 9 of Japan was written after WWII and was greatly influenced by the occupation, Germany's Article 23(1) was written in the 1990s after the end of the occupation and after the reunification of Germany. See *infra* Part III.A. This Note is not trying to compare Japan and Germany's post-war constitutionalism experience.

41 The fact that both Japan and Germany are healthy liberal democracies also played a minor role in picking these clauses. Both being liberal democracies allows for more streamlined comparison (i.e., the fact that we can assume that the popular opinion can have an impact on the political parties through electoral pressures). Further, while the question of how autocracies and liberal democracies

II. JAPAN AND ARTICLE 9

A. A History of Article 9 and Modern Standing

When Supreme Allied Commander for the Pacific Theater, General Douglas MacArthur, developed the four most essential elements for the drafters of the post-war Japanese constitution, he specifically intended one of them to be the complete and utter outlawing of war as the right of the Japanese nation.[42] The way MacArthur saw it, he wanted the new constitution to completely remove military affairs from the new Japan, even preventing a military for purposes of self-defense.[43] His idea was that the constitution would clearly state that "all armed force was outlawed for all purposes."[44] Instead of using a military, Japan would have to "rely upon the higher ideals now abroad in the world for its defense."[45] The reason for American insistence on this point was clear: Japan had just invaded the entire Pacific and one of the best ways to prevent this from happening again would be to completely remove the Japanese military. Thus, Article 9 of the constitution was born.

The article in question, unchanged since its adoption in 1947, reads:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.[46]

The text of this state aspirational clause is particularly interesting. It combines lofty ideals about pacifism with what seems to be clear language affirmatively banning any maintenance of military forces by the Japanese

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differ in their treatment of aspirational clauses is interesting and worth discussion, it is beyond the space and scope of a note in this format. Comparing two democracies thus avoids this question.

42 The others were for the emperor to remain as head of state, for Japanese feudalism to be abolished, and for Japan to adopt a "British system" for state budgeting. DALE HELLEGERS, WE, THE JAPANESE PEOPLE: WORLD WAR II AND THE ORIGINS OF THE JAPANESE CONSTITUTION 518-19 (2002).

43 *Id.* at 518-19 (2002).

44 James E. Auer, *Article Nine of Japan's Constitution: From Renunciation of Armed Force "Forever" to the Third Largest Defense Budget in the World*, 53 LAW & CONTEMP. PROBS., 171, 174 (1990).

45 HELLEGERS, *supra* note 42, at 519.

46 NIHONKOKU KENPŌ [CONSTITUTION] Nov. 3, 1946, art. 9 (Japan).

government. In fact, someone reading this clause without context could be completely justified in believing that any jet, soldier, or round of ammunition owned by the Japanese government could be unconstitutional.

But anyone remotely familiar with Japanese politics or defense policy already knows that Japan has not interpreted this clause to outright ban any military force. So, either the Japanese are simply ignoring the clear demands of the article, or the demands themselves are not as straightforward as they seem. Returning to the text, is the language really that clear? Textually, it seems as though the ban on the maintenance of force and belligerency of the state is specifically tied to the desire to "accomplish the aim of the preceding paragraph."[47] But these aims are not so clearly defined. Does "war" only refer to offensive action or also to self-defense? Can Japan contribute to peacekeeping missions aimed at supporting "international peace based on justice and order?"[48] Indeed, looking at the historical record, it seems as though in the drafting process, several Japanese politicians encouraged the Americans to add this language specifically to avoid interpretations that would completely ban *all* potential military forces.[49] And it seems like in the end these politicians' plan worked, as we will see in Article 9's history.

A comprehensive history of Article 9 and each government expansion of the Japanese Self-Defense Force (JSDF) cannot fit in such a limited Note.[50] However, broadly speaking, while Article 9's text has remained unchanged, Japan's military capabilities and activities have grown steadily over the years since Article 9's adoption in 1947. The erosion of the article's anti-militarization provision was greatly accelerated when the Korean War demonstrated just how vulnerable an unarmed Japan was to external threats.[51] The response to this threat was the development of the JSDF and a comprehensive security treaty with the United States.[52] The very creation of any armed government body was highly controversial, and opponents both in the Socialist Party[53] and civil society brought suit multiple times challenging the very existence of the force.[54] Some suits, which the courts

47 *Id.*

48 *Id.*

49 The extent of Japanese input into Article 9 and its purpose remains a topic of disagreement. *See, e.g.*, Sandra Madsen, *The Japanese Constitution and Self-Defense Forces: Prospects for a New Japanese Military Role*, 3 TRANSNAT'L L. & CONTEMP. PROBS., 549, 556 (1993).

50 For more comprehensive treatment, see, for example, Lawrence W. Beer, *Peace in Theory and Practice Under Article 9 of Japan's Constitution*, 81 MARQ. L. REV. 815 (1998).

51 Madsen, *supra* note 49, at 557-59.

52 *Id.*; *see also* Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T 1632.

53 This party was later renamed to the Social Democratic Party (社会民主党).

54 For the most famous of these cases, see, for example, Saiko Saibansho [Sup. Ct.] Oct. 8, 1952, 6 Saiko Saibansho Minji Hanreishu [Minshu] 783 (Japan). The court here did not actually decide the constitutionality of an armed national police force (the immediate predecessor to the JSDF) but threw

rejected, even went so far as to argue that any presence of U.S. forces on Japanese soil contravened Article 9.[55] Almost all of the significant legal challenges failed in the courts.[56]

The 1990s saw further expansion of the JSDF's mission and capabilities. In the 1990s, Japan deployed mine sweeper naval assets to the Persian Gulf, marking its first formal military deployment since the Second World War.[57] Japan sent over 600 soldiers to Cambodia as part of an international peacekeeping force in 1992.[58] But despite this expansion, the text of the Article remained unamended. There were many proposals for change over the years, including the proposal by professor Mitsunori Takehana that would have allowed use of force to protect the "human rights" of the Japanese people or the Yatsuhiro draft that would have specifically allowed the creation of a military force in line with international right of self-defense (individual and collective).[59] However, none were adopted.

While many minor revisions to defense policy positions were approved in the interim, the most important modern change came in 2015. With the administration of former Prime Minister Abe Shinzo's[60] push for greater Japanese responsibility in its collective security agreements (specifically with the United States), the Diet approved a new "interpretation" of Article 9 in 2015. This legislative interpretation, which remains in effect without court interference, would allow for the JSDF to use force to assist allies engaged in combat.[61] The JSDF also began making preparations for the development of what is considered to be offensive "strike capabilities" around the same time this interpretation was adopted.[62] In addition to this interpretation, the

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out the case on grounds that it failed to satisfy the controversy requirement for the court to review the question.

55 Saiko Saibansho [Sup. Ct.] Dec. 16, 1959, 13 Keishū 3225, 3232 (Japan).

56 *But see, e.g.*, District Court of Sapporo, Mar. 29, 1967, Hanrei jihō 476 (affirming acquittal of a defendant for cutting JSDF phone lines).

57 Beer, *supra* note 50, at 822 n.26.

58 *Id.* at 823.

59 Christian G. WINKLER, THE QUEST FOR JAPAN'S NEW CONSTITUTION: AN ANALYSIS OF VISIONS AND CONSTITUTIONAL REFORM PROPOSALS 1980-2009 62-65 (2011).

60 This is not a typo. This order for Abe Shinzo's name better reflects naming conventions in Japanese, though many English-language readers may know him better as Shinzo Abe. See the Economist's explanation for their publication guidelines on Japanese names: *Why Japanese Names Have Flipped*, THE ECONOMIST (Jan. 4, 2020), https://www.economist.com/asia/2020/01/02/why-japanese-names-have-flipped. This Note will endeavor to keep with this proper naming convention above the line.

61 Prime Minister of Japan and His Cabinet, Cabinet Decision on Development of Seamless Security Legislation to Ensure Japan's Survival and Protect Its People (2014), https://japan.kantei.go.jp/96_abe/decisions/2014/__icsFiles/afieldfile/2014/07/03/anpohosei_eng.pdf; For the United States' positive response to these developments, see, for example, Joint Statement of the Security Consultative Committee: Toward a More Robust Alliance and Greater Shared Responsibilities, Japan-U.S., Oct. 3, 2013, https://warp.da.ndl.go.jp/info:ndljp/pid/11591426/www.mod.go.jp/e/d_act/us/anpo/pdf/js20131003_e.pdf.

62 Karl Gustafsson et al., *Japan's Pacifism is Dead*, 60 SURVIVAL 137, 147 (2018).

government also pushed for direct constitutional change to the text of Article 9 to formalize the role of the JSDF. However, they lacked votes for an amendment, and after failing to lower procedural requirements for amending the constitution, the government had to pause its amendment efforts.[63]

With that, we can effectively summarize an overview of the contemporary understanding of Article 9. While the text has remained the same, the government has slowly expanded its military capacity via "interpretations" which have been largely untouched by the courts. Attempts to amend the text of Article 9 to clarify the legality of this expansion, however, have largely stalled. Thus, there exists a tension, between the largely pacifist text (which the government seems to be unable to change) and the slow expansion of the JSDF's capabilities through informal government interpretations. To explain this odd tension that has emerged in Article 9 policy, this Note now turns to analyzing the role each part of the triad plays in the current struggle over Article 9.

B. The Role of the High Court: The Non-Combatant

In the struggle around interpretation of Article 9, the Supreme Court of Japan has largely taken on the role of non-combatant. Though confronted with the issue several times, the Supreme Court has never actually ruled on the merits of any case attacking the existential legitimacy of the JSDF under Article 9. Instead, the Court opts to dismiss cases on procedural or mootness grounds.[64] The Court has stated in several cases (in non-binding *dicta*) that nothing in Article 9 denies Japan the right to self-defense and that mutual defense pacts (in this case, the U.S.-Japan Mutual Cooperation Treaty) are not facially unconstitutional under Article 9.[65] However, there does not exist a single "landmark" case where the Supreme Court has given a solid interpretation of Article 9 or unambiguously confirmed the legal status of the JSDF. With the issue of Article 9 being one of such great political and public concern,[66] why has the Court avoided resolving the outstanding tensions around Article 9?

The answer likely lies in the generally conservative jurisprudential culture adopted by the Court, which it has applied to Article 9 cases. While

63 John Hofilena, *PM Abe Set to Prioritize Revision of Japan's Article 96*, JAPAN DAILY PRESS (Apr. 17, 2013), http://japandailypress.com/pm-abe-set-to-prioritize-revision-of-japans-article-96-1727157.

64 Beer, *supra* note 50, at 821; Yuichiro Tsuji, *Article 9 and the History of Japan's Judiciary: Examining Its Likeness to American and German Courts*, 68 TSUKUBA J.L. & POL. 35, 50 (2016).

65 *Id.*

66 *See infra* Parts III.C. and III.D.

the Court has the power of judicial review over constitutional questions,[67] it generally expresses a "reluctance to accept constitutional cases" and has adopted high procedural hurdles to keep divisive constitutional issues off its docket.[68] For instance, the Court has used these hurdles to hold that private citizens lacked standing to challenge JSDF deployment of minesweepers to the Persian Gulf.[69] Further the Court has held that salient political questions, such as issues of national defense, are outside the reviewable actions of the Court unless a political action clearly violates the constitution.[70] The Court has previously been able to avoid cases challenging government action under Article 9, refusing to reach the merits by dismissing for any of the above reasons.[71]

General procedural hesitancy to reach conclusions on the merits in constitutional cases does not clarify the whole picture. The *reasons* underlying the Court's adoption and maintenance of these procedural hurdles are just as important and help explain why the Court's conservatism is likely here to stay. While there are many theories about factors contributing to the court's conservatism,[72] one of the most relevant for this analysis is the Court's likely fear of backlash by the political parties or government in response to "landmark" decisions.[73] For instance, conservative politicians became enraged at the Court when it limited the ability of the government to ban workers' strikes and other social control statutes.[74] In response, some politicians called for greater judicial restraint, with some even openly musing that the government should more carefully screen justices before appointment to avoid such future decisions.[75] The Court came to realize that the only way it could "maintain its independence" was "through keeping distance from politics."[76] Thus, the Court avoided conflict with the political branches as often as possible.

The fact that post-war Japanese politics have been largely dominated by a single party, the Liberal Democratic Party (LDP)[77] also likely plays a role. The reason for dominance is structural, relating to the appointment of

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67 This is granted by Article 81 of the constitution. NIHONKOKU KENPO [Constitution], Nov. 3, 1946 (Japan).

68 Shigenori Matsui, *Why is the Japanese Supreme Court so Conservative?*, 68 WASH. U. L. REV. 1375, 1382-87 (2011).

69 *Id.* at 1384-85.

70 *Id.* at 1387.

71 *Id.*

72 For instance, some Japanese jurists have argued that the conservatism is a product of a cultural bias among the Japanese towards harmony. *Id.* at 1400.

73 *Id.* at 1403.

74 *Id.* at 1403-04.

75 *Id.* at 1403.

76 *Id.* at 1403-04.

77 *See infra* Part III.C.

justices. As a majority of the justices of the Court have been appointed under the careful eye of the LDP, it is no wonder that the Court is full of justices supporting the "highly conservative, noninterventionist constitutional jurisprudence" which suits the interests of the LDP.[78] By maintaining political power, the LDP has been able to ensure, in general, a Court with ideological preferences aligning, or at the least not outright contradicting, the governing party's ideology. Now that it has been established that the jurisprudential culture of the Court leads it to avoid confrontation with the government (under control of the LDP), the natural next step is to understand the LDP's position on Article 9.

C. The Parties: The Limits on the LDP's Offensive

Politically, post-war Japan has mostly been under the leadership of the LDP. Though generally conservative in its policies, the LDP has maintained power for such long periods through strategic alignment with Japan's influential business interests as well as key interest groups with influence over significant voting blocs (e.g., rural voters).[79] The LDP has also been exceptionally politically agile, moving to undercut the positions of their political rivals (for example, in the '50s and '60s, undercutting the Socialists' policies by implementing egalitarian economic reforms).[80] However, over the years, the outright majorities of the LDP began to wane, and after briefly losing power to their main rivals, the Democratic Party of Japan (DPJ, now the Constitutional Democratic Party (CDP)), Japanese politics has become much more competitive and much less subject to the unilateral whims of the LDP.[81] In fact, currently, the LDP governs in a coalition with its junior partner, the conservative Komeito party, in both houses of the National Diet.

But just because the LDP now must govern in a coalition does not imply that the opposition poses a great political threat. Currently, there does not exist any constellation of parties that could form a coalition ready to challenge the LDP for power.[82] The top two opposition parties,

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78 Matsui, *supra* note 68, at 1405. Matsui also makes a good point that while the LDP has been the primary political beneficiary of this system, as it has been the ruling party for so long, that this structural appointment advantage would benefit any ruling party in the future, even if the LDP eventually loses and goes into opposition.

79 Jose Antonio Crespo, *The Liberal Democratic Party in Japan: Conservative Domination*, 16 INT'L POL. SCI. REV. 199, 200-05 (1995).

80 *Id.* at 204.

81 *See* Steven R. Reed et al., *The End of LDP Dominance and the Rise of Party-Oriented Politics in Japan*, 38 J. JAPANESE STUD. 353, 374 (2012).

82 The splintering and diversification of opposition parties was a hallmark of the 2017 elections. *See* Robert J. Pekkanen & Stephen R. Reed, *The Opposition: From Third Party Back to Third Force*, *in* JAPAN

the Constitutional Democratic Party (CDP) and the Japanese Communist Party (JCP) (with Ishin a third power here), neither have a history of cooperation in federal politics nor have many true policy overlaps. With a weakened opposition, the power of the government to push its policy should (in theory) be strong.

Despite having a coalition partner, the LDP clearly occupies the strongest position in government, and its ideological positions most drive governmental policy on Article 9. But while the LDP historically has bristled at the pacifism of Article 9 (with former Prime Minister Abe even claiming that "Constitutional reform has been the goal and dream of the LDP since it was created"),[83] the LDP has recently pushed for a constitutional amendment proposal that largely keeps Article 9's pacifism intact. The LDP's proposal, on the table since 2018, would simply add the following language as a third paragraph to Article 9:

> The provisions of the preceding clause shall not preclude the implementation of necessary self-defense measures to defend our country's peace and independence and ensure the safety of the country and the people, and for that purpose, the Self-Defense Forces, with its supreme commander being the Prime Minister who is the head of the Cabinet, shall be maintained as an armed organization, as provided by law.[84]

This proposal affirms the constitutionality of the JSDF and allows for the army to engage in self-defense operations. However, even this proposal has the LDP's coalition partner worried and Komeito has yet to endorse this change. The opposition parties retain their emphatic rejection of any changes to Article 9.[85] Thus, until the LDP can muster more votes to pass this amendment, further constitutional change from the government is deadlocked. Even if the LDP manages to scrap together the votes, the months of debate, coverage, and pressure would extract a heavy political toll.[86]

DECIDES 2017 77-92 (2018). Further, when the DPJ unexpectedly surged to power in 2009, it was through an outright majority, not a coalition.

83 Jake Adelstein, *In Japan, a Plan to Expand Military's Powers Faces Growing Resistance*, L.A. TIMES (June 30, 2015), https://www.latimes.com/world/asia/la-fg-japan-military-20150630-story.html; Beer *supra* note 50, at 815.

84 Translated Text from Mirna Galic, *How the Coronavirus impacts Japan's Prospects for Constitutional Reform*, THE ATLANTIC COUNCIL (May 20, 2020), https://www.atlanticcouncil.org/blogs/new-atlanticist/how-the-coronavirus-impacts-japans-prospects-for-constitutional-revision/.

85 *Id.*

86 *Id.*

But the ideology of the LDP and restraints from their coalition partners and the opposition only reveal part of the picture. The practical pressures of geopolitics have constantly pushed the governing party to expand Japanese military capabilities and reaffirm its defensive posture. Two factors have principally contributed to this in the early 2020s: increasing regional threats to Japan combined with increasing doubts regarding the strength of the United States' security guarantee. In terms of threats, the People's Republic of China (PRC) and North Korea have become increasingly assertive over the past decade. The PRC has been developing its naval capabilities and has taken an increasingly aggressive posture in terms in the East China Sea, sparking fears that the PRC is "coming to take the Senkaku Islands."[87] North Korea has continued to conduct missile tests around the Sea of Japan.[88] In terms of the United States, the aggressive "America First" foreign policy of Donald Trump's administration led to the deterioration of relations with Japan in some areas, and some Japanese experts welcomed U.S. friction with China.[89] Overall the trend has been clear: threats against Japan remain a pressing concern for the LDP, and there are no signs that this pressure will abate soon.

Such defense concerns are not new, nor is the perception of these threats limited to the LDP. For example, when the DPJ took control of the government briefly in 2009, it quietly dropped any plans for constitutional revision, as renewed PRC aggression in the dispute over the Senkaku Islands combined with domestic natural disasters necessitated strong responses by the JSDF.[90] Thus, these external pressures would, theoretically, be present for any governing party, not just the LDP or an LDP-led coalition.[91]

So, despite having strong ideological and geopolitical incentives to push for aggressive change to Article 9, the analysis has shown that the LDP's dependence on a coalition partner to govern has worked to

87 Thisanka Siripala, *US and Japan Name China as Threat to the International Order*, THE DIPLOMAT (Mar. 17, 2021), https://thediplomat.com/2021/03/us-and-japan-name-china-as-threat-to-international-order/.

88 Steve Holland & David Brunnstrom, *U.S., Japan and South Korea Agree to Keep Up Pressure on North Korea*, REUTERS (Apr. 1, 2021), https://www.reuters.com/article/us-northkorea-usa-allies/u-s-japan-and-south-korea-agree-to-keep-up-pressure-on-north-korea-idUSKBN2BP046.

89 *See* Abraham M. Denmark & Shihoko Goto, *The Asia Inheritance: Trump and US Alliances*, THE DIPLOMAT (Oct 1, 2020), https://thediplomat.com/2020/10/the-asia-inheritance-trump-and-us-alliances/. The effect of Joseph Biden's presidency and events such as the American withdrawal from Afghanistan in August of 2021 are yet unclear.

90 *Politics of Revision*, COUNCIL ON FOREIGN RELATIONS, https://www.cfr.org/japan-constitution/politics-of-revision (last visited April 6, 2021).

91 The only exception could be with the Japanese Communist Party, but discussion of why this would be is beyond the scope of this paper.

restrain aggressive action. The presence of a hesitant coalition partner also prevents the government from proceeding with the traditional method of how it has pushed the envelope of Article 9: issuing new "interpretations." In the most recent reinterpretations of 2015, the LDP (which at the time held an outright majority in parliament) simply passed a series of laws which codified its preference that Japan be able to contribute to collective security and self-defense operations.[92] Despite the LDP's outright majority prior to the 2017 elections, this legislation was highly controversial and subject to significant debate in the Diet.[93] Thus, without its outright majority and with a hesitant coalition partner, practically there is little chance that the LDP could make even further adaptions via legislative "interpretations."

Together, this analysis has shown that while the LDP holds considerable power to direct the government's preferences on Article 9 policy, this power is not limitless. The loss of its electoral majority in 2017 both blocked further legislative "interpretations" and has stalled efforts to directly amend the text of the constitution. However, as will be explained in the next Section, even if the LDP had the requisite majority to push its view through government, the popular will presents a formidable counterbalance.

D. Society: Defending Pacifism

To say that the issue of Article 9 produces impassioned responses by Japan's public would be an understatement. Just take, for example, responses to the Abe administration's reinterpretations of Article 9 in 2015. This action led to massive public backlash. Around 100,000 people protested the bills outside the National Diet, and the Abe administration's approval rating (albeit in total, not just about this issue) dropped drastically.[94] One person even lit himself on fire in the middle of one of Tokyo's busiest intersections to draw attention to the issue.[95]

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92 The exact nature of this legislation is so complicated that "even expert practitioners cannot understand the whole picture easily," so this Note intentionally paints these reforms in broad strokes to avoid confusion. Atsuhiko Fujishige, *New Japan Self-Defense Force Missions under the "Proactive Contribution to Peace" Policy: Significance of the 2015 Legislation for Peace and Security*, CTR. FOR STRATEGIC & INT'L. STUD. (July 21, 2016), https://www.csis.org/analysis/new-japan-self-defense-force-missions-under-"proactive-contribution-peace"-policy.

93 *Id.*

94 Johnathan Soble, *Japan Moves to Allow Military Combat for First Time in 70 Years*, N.Y. TIMES (July 16, 2015), https://www.nytimes.com/2015/07/17/world/asia/japans-lower-house-passes-bills-giving-military-freer-hand-to-fight.html.

95 See Minami Funakoshi, *Thousands Denounce Japanese PM Abe's Security Shift*, REUTERS (June 30, 2014), https://www.reuters.com/article/uk-japan-defense/thousands-denounce-japanese-pm-abes-

Legal experts also came out in force against the legislation, arguing that the bills were unconstitutional and "should be immediately withdrawn" in public statements and testimony before the National Diet.[96] So while the legislation eventually passed, the combination of the unpopularity of the bills with the perceived "heavy handed" political pressure employed by the Abe administration demonstrated the wide gulf between the LDP and popular will on the Article 9 issue.[97]

The government, even before the 2015 bills and backlash, has also fully recognized the potential danger of provoking public outcry in terms of defense policy and will sometimes factor it into policymaking. For example, the government likely delayed the deployment of a support ship during the Persian Gulf War due to fears over public backlash, and the cabinet specifically tried to frame the deployment in a way that was "designed to minimize public opposition."[98] Thus, the general public's pacifist streak seems to be so well understood that it will sometimes even pre-emptively restrain the hand of the government.

But outside of general "popular will" there is a structural reason why public opinion plays such a critical role in Japanese constitutional culture. According to the constitution, any amendments, after being adopted by a super-majority of votes in the legislature, must be approved by a simple majority referendum.[99] Thus, unless a majority of the public would support adopting an Article 9 amendment, the initiative would be practically dead-on-arrival when put to a popular vote.

Thus, key to analyzing the politics of Article 9 is an understanding of the people's opinion of the Article. Many authors have generally noted Japan's post-war pacifist culture, but luckily there are better and more up-to-date sources on the matter which greatly ease analysis here.[100] This is because the Japanese media conducts yearly surveys specifically on the question of Article 9. The most recent poll (from June 2020) suggests an overwhelming majority of citizens (69%) oppose any revision to Article

security-shift-idUKKBN0F519A20140630; Maan Pamintuan-Lamorena, *3,000 Protest in Tokyo Against Revision of Japan's Pacifist Constitution*, JAPAN DAILY PRESS (Apr. 9, 2014), http://japandailypress.com/3000-protest-in-tokyo-against-revision-of-japans-pacifist-constitution-0947015.

96 Adelstein, *supra* note 83.

97 *Id.*

98 PAUL MIDFORD, RETHINKING JAPANESE PUBLIC OPINION AND SECURITY: FROM PACIFISM TO REALISM? 120 (2011).

99 NIHONKOKU KENPO [CONSTITUTION], Nov. 3, 1946, art. 96 (Japan).

100 *See generally* Rikki Kersten, *The Social Imperative of Pacifism in Postwar Japan: Shimizu Ikutarō and the Uchinada Movement*, 38 CRITICAL ASIAN STUD. 303 (2006); Andrew L. Oros, *International and Domestic Challenges to Japan's Postwar Security Identity: 'Norm Constructivism' and Japan's New 'Proactive Pacifism,'* 28 PAC. REV. 139 (2014); *Cf.* Gustafsson et al., *supra* note 62.

9 of the constitution while only 22% actively support amendment.[101] This opinion also holds a majority among active supports of the LDP, 56.8% of which oppose amendment with only 41.9% in support.[102] When asked to give their reasons for opposing the amendment, 76% of respondents cited the "peace and stability after the end of World War II" that the Article has provided.[103]

Are there forces that are likely to change this public opinion any time soon? Likely no, however, two such forces have some potential: youth nationalism and external threats from Japan's geopolitical rivals. In terms of youth nationalism, scholarship has noted a rise in predominantly male adolescents embracing more nationalistic viewpoints (including calling for "stronger military capabilities.") especially in the '90s and early 2000s.[104] However, while these trends merit observation and study, the statistics cited above show that these movements clearly have yet to up-end the majority pacifist view of society.

But what about the external threats from the PRC and North Korea described in the previous section? One may think that growing militancy by hostile nations would perhaps influence the populace to embrace a more militant position in the name of self defense. However, even this threat has not upended the pacifist nature of society. The issue here may be one of differing perceptions. The Japanese public's perception of foreign threats, especially those from North Korea, has been described as being "out of sync with the way that realists would frame threats."[105] For example, when looking at the threat posed by North Korea, the Japanese people seem to view the threat of kidnapping as much more of a risk than nuclear war or the missile program.[106] Unless the public's perception of threats better aligns with the government's geopolitical focus, disagreement over the greatest threats to the nation and the proper response likely will remain.

In sum, it appears that there is little likelihood that the population will drop its hostility to proposed transgressions on the pacifism of Article 9. Public opinion polls, civic activism around issues of Article 9, and lack of counterforce pushing for militarization all seem to create a

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101 Jiji Press, *69% Oppose Change to Japanese Constitution's War-Renouncing Article 9, Poll Shows*, THE JAPAN TIMES (June 22, 2020), https://www.japantimes.co.jp/news/2020/06/22/national/japan-oppose-change-article-9-constitution/.

102 *Id.*

103 *Id.*

104 Kazuya Fukuoaka, *Between Banality and Effervescence?: A Study of Japanese Youth Nationalism*, 23 NATIONS & NATIONALISM 346, 347-48 (2017).

105 Gustafsson et al., *supra* note 62, at 151.

106 *Id.*

strong public force against any aggressive government expansion. Further, the procedural requirements of passing a constitutional amendment practically give the popular will a "veto" in terms of Article 9 change so long as popular opinion remains as it is. The political risk to the LDP is compounded given that it seems that a majority of their own supporters stand behind the pacifism of Article 9.[107] The factor of popular will, therefore, clearly operates as a counterbalance to the policy preferences of the current government.

E. Conclusion on the Japanese Case

Exploring the triad factors above has painted a picture of significant tension between the people and the government with the Court largely playing the role of passive observer, unwilling to make a significant ruling on the important questions of Article 9 interpretation. While the government has made significant changes to Japan's defense apparatus despite Article 9's largely pacifist aspirations, the existence of strong public opposition has served as a hard barrier to its ultimate goal: constitutional amendment. But even if the government regained its majority or could muster the votes to pass an amendment in the Diet, the measure would surely fail in an amendment referendum. The idea of moving forward with additional legislative interpretations seems excessively risky, as such action could not only reinflame public opposition but also potentially cause an irreconcilable break with its coalition partner.

This environment has led directly to the state of Article 9 deadlock today, and absent some kind of paradigm shift in one of the three factors, this tension is unlikely to abate.[108] The text and spirit of the aspirational clause has produced two distinct and confrontational interpretations: the idea of a pacifist Japan (that seems to be adopted by the public) and the notion of a normalized Japan with functioning military power (the desired position of the government). Unless the Supreme Court intervenes as a third force to tip the balance, this analysis has shown that the current and future frontlines of Japan's obligation under Article 9 will turn on which side gives first: the people agreeing with the ideological and practical assessment of the government or the LDP abandoning its aggressive reform ideology. The Japanese example of Article 9 proved to be a complicated web of competing interests resulting in confrontation

107 Jiji Press, *supra* note 101.

108 It will be interesting to note the impact that the war waged by the Russian Federation in Ukraine beginning in February will have on this debate.

between the factors of the triad. However, what happens when the aspirational clause at issue proves far less confrontational than the one described above?

III. GERMANY: BINDING THEMSELVES TO THE FUTURE

A. A History of Article 23(1)

Unlike the last case study, the history of Article 23(1) starts not at the end of the Second World War, but in 1992 when the German government adopted the current iteration of Article 23. Article 23 of the German Basic Law has not always been about European Cooperation like it is today. In fact, before the reunification of Germany, the text was primarily about providing a legal mechanism for the East German state to integrate into the West German state.[109] When West Germany annexed the East, the treaty of unification repealed this Article, which remained empty until the Bundestag (parliament) added the current language.[110] While Article 23 contains several subsections, most importantly some sections enumerating (or have been read by the Constitutional Court to enumerate) specific procedural requirements for approving legislation or transferring power, this Note will focus more specifically on the aspirational first part of the Article.[111] The operative part of Article 23(1) reads:

> With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by law…[112]

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109 Donald Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 838 n.5 (1991).

110 *Id.*

111 Gunnar Beck, *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor*, 17 EUR. L.J. 470, 474 (2011).

112 GRUNDGESETZ [GG] [Basic Law], Article 23, translation at http://www.gesetze -im-internet.de/englisch_gg/index.html. The last sentence of Article 23(1) is not included as it is a technical provision with little impact on the analysis here nor are the other subsections of the article. The technical demands and procedural requirements of Article 23 are important and constitute a significant part of Article 23's legal force. However, as to prevent an unwieldy and overly long explanation of German lawmaking procedure and to focus more on the aspirational parts of Article 23, the above text will be the essential focus here.

> Textually, this provision seems to require federal cooperation[113] generally with the European Union unless such an action would violate certain principles (democratic, subsidiarity,[114] etc.). This reading generally fits with the enumerated purpose for this amendment. The language of Article 23 was primarily enacted to synchronize the Basic Law with the Maastricht Treaty of 1992, which significantly promoted deeper integration at the EU level, including political cooperation and introduction of the EU's single currency, the Euro.[115] Over the last almost 30 years, Germany has continued to integrate deeper with its European partners, and all this time Article 23 has remained unamended. However, unlike analysis of Japan's Article 9, it would be impossible to outline Article 23's modern interpretive ecosystem without specifically discussing several key rulings by the German Constitutional Court.

B. The Role of the Constitutional Court

Since its establishment in the wake of World War II, the German Constitutional Court has prided itself on being the "guardian of the constitution" and gained both power and legitimacy as a stabilizing institutional force during the most turbulent post-war years.[116] Unlike many other high courts (for instance, the Supreme Court of Japan), the Constitutional Court's singular role is to answer questions of constitutional law.[117] It alone enjoys a monopoly to make these judgements (lower courts may not, for instance, invalidate a statute) and it may adjudicate a constitutional dispute without a substantive controversy (meaning the Japanese Supreme Court tactic of throwing suits based on this procedural factor does not exist for the Courts).[118]

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113 Germany has a federal system, and thus all references to the national government will be referred to as "federal" to differentiate from requirements on the state (Länder) governments.

114 The subsidiary principle means that the EU should not act in areas within the competence of the member states unless the states are unable to act. *See* Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - Protocol on the application of the principles of subsidiarity and proportionality, 10 Nov. 1997, O.J.C. 340.

115 DONALD P. KOMMERS & RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 333 (2012). The Preamble of the Basic Law was also changed to mention a "united Europe" as this process was occurring. GRUNDGESETZ [GG] [Basic Law], Preamble, translation at http://www.gesetze -im-internet.de/englisch_gg/index.html.

116 JUSTIN COLLINGS, DEMOCRACY'S GUARDIANS: A HISTORY OF THE GERMAN FEDERAL CONSTITUTIONAL COURT xxxvi (2015).

117 PHILIP M. BLAIR, FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY 27 (1981).

118 *Id.*; GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 80 (2004).

The way the Court has wielded this great power over time, however, has not been consistent.

While the Court had employed its constitutional review as a tool for implementing counter-majoritarian change in the post-war era, it began to abandon this approach after some high-profile conflicts with the ruling political parties during the turbulence of the 1970s.[119] This is not to say the Court radically switched from aggressively undermining the Bundestag's agenda to judicial conservatism. The Court had always shown restraint, with the number of laws and protocols it has declared unconstitutional being "dwarfed" by the amount it has upheld.[120] Instead, the Court attempted "to establish itself firmly as a legal body charged with the task of legal interpretation, and no more."[121] Part of what helps the Court maintain this character, and avoid stumbling into the wrath of the political branches of government, stems from its interpretive principles and behaviors. The Court will often "soften the political impact of its decisions" by declaring statutes "unconstitutional but not void," by issuing warnings to the legislature to amend statutes before the Court strikes them down, or by attaching "advice" to decisions to signal to the legislature how to correct problems.[122]

As a result of this intentional positioning, the Court largely enjoys the respect and popularity of both the general populace as well as the political parties. This seems to focus around both a respect for the Court's interpretive monopoly on constitutional issues as well as a generalized trust in the concept of "legal science" and expertise.[123] In terms of the parties, scholars have noted that political party elites express a general acceptance of this monopoly and rarely publicly decry decisions with which they disagree.[124] The justices are also selected in a largely non-

119 Michaela Hailbronner, *Rethinking the Rise of the German Constitutional Court: From Anti- Nazism to Value Formalism*, 12 INT'L J. CON. L. 626, 644 (2014). An example of the tension between the Court (even trial courts) and the government can be found in the experience of dealing with the left-wing terrorism of the Red Army Faction. *See, e.g.*, STEFAN AUST, DER BAADER MEINHOF KOMPLEX (1985) (recounting the history of the early RAF and its fight against the West German government); ULF G. STUBERGER, IN DER STRAFSACHE GEGEN ANDREAS BAADER, ULRIKE MEINHOF, JAN-CARL RASPE, GUDRUN ENSSLIN WEGEN MORDES U.A. (2007) (providing excerpts and commentary about the legal proceedings against several RAF terrorists).

120 KOMMERS & MILLER, *supra* note 115, at 35-36.

121 Hailbronner, *supra* note 119, at 644. Naturally, this description is a generalization. This is not to say that some decisions of the Court have not been politically unpopular or confrontational. For example, rulings regarding party financing in the 80s and 90s caused significant controversy. *See* VANBERG, *supra* note 118, at chapter 6.

122 KOMMERS & MILLER, *supra* note 115, at 36-37.

123 Hailbronner, *supra* note 119, at 648.

124 *Id.*

partisan manner in a way that is "acceptable to the established parties."[125] In terms of the public, while some media outlets will criticize court doctrines or decisions, the public lists the Court as one of the most trusted public institutions, even among the sometimes skeptical members of the former-East German states.[126] Thus, the Court enjoys a widespread prestige and respect in terms of constitutional matters and interpretation.

With this background,[127] we now get to the interpretation of Article 23(1). While there is no single case that focuses solely on the text of 23(1), the decisive interpretations of the Court can be stitched together from decisions in the *Maastricht* and *Lisbon* treaty cases. But even in these cases, the Court seemed unwilling to fully "grapple substantively with the single most important provision on the subject [of the treaty]: Basic Law Article 23."[128] The interpretation of Article 23(1) that we do get in these cases can be broken down into positive (demands on the German state) and negative (limitations on integration) aspects.[129]

In terms of a positive reading of Article 23, *Lisbon* seems to have the strongest language on the matter, where the Court reaffirmed the text of 23(1) when it says that the clause (in conjunction with the preamble) expresses to "German constitutional bodies that it is not left to their political discretion whether or not they participate in European integration."[130] The *Maastricht* case seems to add to this (though, ironically, it was decided before *Lisbon*) when it implied that the federal government had a "duty" to support a strict interpretation of subsidiarity[131] in the EU treaty (to maximize democratic accountability, also mentioned in Article 23(1)'s text) and "exercise German influence"

125 KOMMER & MILLER, *supra* note 115, at 39.

126 *Id.* at 39-40.

127 Naturally, in a longer and more comprehensive treatment of Article 23, there would also be a history of Article 24, the tool used for European integration prior to Article 23's modern adoption, and a discussion of some of its key cases (e.g., *Solange II*). Such a full discussion, however, is beyond the ambit of this Note. For a more comprehensive discussion, see *id.* at 325-40.

128 Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland!"*, 10 GERMAN L.J. 1241, 1253 (2019).

129 Some scholars have referred to this instead as a conflict between the "European Offensive" and "Basic Law Defensive" readings. *See* Christian Calliess, *70 Jahre Grundgesetz und europäische Integration: „Take back control" oder „Mehr Demokratie wagen"?*, 10 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 684, 686 (2019).

130 Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 225, available at [official English translation]: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

131 For more on the application of subsidiary principle, see ANTONIO ESTELLA DE NORIEGA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE (2002). For the purpose of this Note, the focus should not be on the individual policy of subsidiarity, but on the fact that the Court has prescribed a constitutionally mandated policy path for the Bundestag.

in the European Council.[132] Taking these cases together, it seems that Article 23(1) both expresses a "general norm requiring that Germany participate in European integration according to 'democratic standards'"[133] and requires some kind of government action in furtherance of these policies (whether it be to participate in a process or support a policy).

But the second part of the first sentence of Article 23 has become a critical limitation on the positive reading of the clause. The "safeguarding clause" of Article 23(1) presents a body of exceptions from the integration requirement.[134] This clause outright prevents German participation in EU initiatives that lack proper support for "democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law."[135] The *Lisbon* case makes it clear that the role of this clause is specifically to "limit[] the state aspiration's[136] enumerated aim for participation in the European Union."[137] In practice, the Court has actually used these strict standards to strike down and prevent some German interactions with Europe in a way that has been described as an "exceedingly defensive and limiting approach."[138] Some scholars have even noted that language in cases like Lisbon feature the court expressing "massive Euro-skeptic reservations."[139]

When looking at the Court's Article 23 docket, it becomes clear that almost all of the 533 decisions involving Article 23 seem to focus on challenges under the limitations of the safeguarding clause.[140] Challenges

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132 Maastricht Case, BVerfG, 2 BvR 2134/92 u. 2159/92 from Oct. 12, 1993, republished in 22 *Juristen Zeitung* 1100, 1111 (1993) (translation by author).

133 Halberstam & Möllers, *supra* note 128, at 1253.

134 Calliess, *supra* note 129, at 686.

135 GRUNDGESETZ [GG] [Basic Law], art. 23, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

136 The Court here actually uses the word "Staatzielbestimmung," which directly addresses the aspirational nature of the clause. Lisbon Case, BVerfG, 2 BvE/08 from 30 June 2009, para. 261, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/06/es20090630_2bve000208.html [translation by author].

137 *Id.*

138 Calliess, *supra* note 129, at 689.

139 Halberstam & Möllers, *supra* note 128, at 1253.

140 The author has not done a comprehensive study, nor have any scholars it seems, of all 533 cases. But simply surveying the titles of the decisions shows that many seem to try and invalidate EU action or German transfer of sovereignty. Some prominent examples include challenges to the EU trade treaty with Canada (BVerfG, 2 be 4/16 from Mar. 2, 2021, available at https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BVerfG&Datum=02.03.2021&Aktenzeichen=2%20BvE%204/16) and challenges to German participation in the Greek bailout (BVerfG, 2 BvR 987/10 u. 2 BvR 1485/10 from Sept. 7, 2011, available at https://dejure.org/dienste/vernetzung/recht

involving the safeguarding clause often get quite complicated, involving the clause's interaction with other constitutional provisions (for example, looking back at the *Maastricht* case, the issue at hand was actually an Article 23 question intersecting with Article 79(3) and Article 20 jurisprudence).[141] Why has the negative aspect of Article 23 seemed to produce so much more litigation than the positive? One key reason is likely structural. Unlike a statute or act that the Court could strike down, the Court really could not enforce a decision in which the Bundestag rejected a policy or law that it technically had to adopt or pass under Article 23.[142] This is because the Court, under the Basic Law's separation of powers provisions, cannot force through legislation against the will of the Bundestag or file an order (such as an injunction) with a similar effect.[143]

The other reasons, however, likely have less to do with the Court and more with how the political parties and private individuals interact with Article 23. As the above discussion has demonstrated, the Court has laid out two key aspects of Article 23(1), a positive demand for integration with a negative limitation as per the safeguarding clause. The next Section will explore in depth how the political parties have utilized and interacted with the Constitutional Court's decisions and interpretations.

C. The Role of the Parties: Fractured but United

The political party system in Germany has undergone significant transformation in recent years. Before reunification with East Germany, the German political party scene was dominated by two large *Volksparteien* ("people's parties"), the center-right Christian Democrats (CDU) with their Bavarian sister-party Christian Social Union (CSU) facing off against the center-left Social Democratic Party (SPD).[144] The

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sprechung?Gericht=BVerfG&Datum=07.09.2011&Aktenzeichen=2%20BvR%20987/10). This also makes sense given the Court's inability to force parliament action under the positive reading of Article 23. *See infra* note 135. A list of the 533 cases (as of April 13, 2021) can be found here: *Rechtsprechung zu Art. 23 GG*, dejure.org (last accessed, April 13, 2021), https://dejure.org/dienste/lex/GG/23/1.html.

141 Manfred H. Wiegandt, *Germany's International Integration: The Rulings of the German Federal Constitutional Court on the Maastricht Treaty and the Out-of-Area Deployment of German Troops*, 10 AM. INT'L L. REV. 889, 891 (1995).

142 While the Basic Law contains many separation of powers provisions, the most relevant here are Articles 76-78 and 96. GRUNDGESETZ [GG] [Basic Law], arts. 76-78, 96, translation at http://www.gesetze-im-internet.de/englisch_gg/index.html. These provisions discuss the procedure for passing legislation and the powers of the Constitutional Court respectively. Note that there is no affirmative constitutional grant of the court to enact legislation to enforce its rulings beyond the enumerated provisions on passing laws in Articles 76-78. *Id.*

143 *Id.*

144 Russel J. Dalton & Willy Jou, *Is there a Single German Party System?*, 28 GERMAN POL. & SOC'Y, 34, 35-36 (2010).

liberal Free Democrats (FDP), usually came in a distant third, with no other party entering into parliament until the emergence of the Greens in the 80s and the Left Party in the 90s.[145] However, things began to change following the annexation of East Germany, with the *Volksparteien* losing dominance. This trend kept accelerating through the 2000s.[146] The two *Volksparteien*'s fall from dominance can perhaps be best reflected in their "grand coalitions," where the former bitter rivals CDU/CSU and SPD have been forced to work together in government for the first time since the crises of the 60s and 70s.[147]

The current political scene has devolved into a diffuse spread of parties with no party able to boast anything close to an absolute majority.[148] Coalitions outside of the "grand coalition" have proved difficult, but not impossible, to form, with the three "left" parties hesitant to enter national coalitions and the CDU categorically ruling out cooperation with the far-right and Eurosceptic *Alternative für Deutschland* (Alternative for Germany or AfD).[149] The AfD's shocking rise to prominence on a wave of anti-immigrant sentiment among the German right in 2014 is particularly important for this analysis, as the AfD has come to represent the face of German Euroscepticism, coming to occupy a new anti-EU/globalism/modernization niche in German politics.[150] With such a diffused political scene, with fragmented parties and unclear lines of coalition cooperation, how do the aspirations of Article 23(1) interact with this German political reality?

Though the German political scene may be fragmented, the parties' views on integration with the EU and support of the European project are not. Even if issues like the Greek Bailout and the EU financial crisis caused Germany (especially the more fiscally conservative parties) to bristle at the EU and its partners, integration with the EU remains a focal point of the foreign policy of both the German government and the major parties.[151] Election coverage in 2017 put it best when it asserted

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145 *Id.*

146 *Id.*

147 For a look at the politics and history of this Coalition arrangement, see Ludger Helms, *The Grand Coalition*, 24 GERMAN POL. & SOC'Y, 47-66 (2006).

148 See recent electoral polling, where no party has been able to reach over 30% at *Sonntagsfrage Bundestagswahl*, Wahlrecht.de (last visited Mar. 20, 2022), https://www.wahlrecht.de/umfragen/.

149 Frank Decker & Philip Adorf, *Coalition Politics in Crisis?*, 36 GERMAN POL. & SOC'Y, 6, 7-14 (2018). A proposed FDP/Green/CDU-CSU "Jamaica" coalition was attempted in 2017 but fell apart in negotiations. *Id.* at 18-20. The current government elected in November of 2021 has seen the first instance of a coalition between the SPD, Green party, and FDP.

150 *Id.* at 11.

151 Christiane Lemke, *Germany's EU Policy: The Domestic Discourse*, 33 GERMAN STUD. REV. 503, 504 (2010).

that "[a]ll mainstream parties run on pro-European tickets but disagree on the details."[152] The (arguably) two minor parties with Eurosceptic tendencies, the AfD and Left party (the AfD being the primary Eurosceptic party and the Left much less so)[153], do not command enough votes nor are popular enough to push forward their positions.[154] More practically, neither party currently is or ever has been in any national governing coalition.[155] Thus, it can be said that when it comes to the positive reading of Article 23(1), the European integration command, that an overwhelming majority of the political scene supports this aspiration.

In terms of the actual governing coalition (SPD-led coalition with the Greens and the FDP) the government has not only generally adopted a pro-EU approach, but has made a specific point in prioritizing EU integration and EU politics.[156] Looking at the coalition agreement between the parties, the agreement dedicates a whole subsection to "Germany's responsibility to Europe and the World," in which the coalition describes the EU as the "foundation for our [Germany's] peace, welfare and freedom."[157] Beyond the agreement, the former Chancellor of Germany, Angela Merkel, had taken it upon herself the last fifteen years to become an indispensable leader at the EU level.[158] Many EU member states saw Merkel as "the designated leader to guide Europe" in times of significant crises, most notably the financial "Eurocrisis" as well as the refugee crises in the wake of the Syrian Civil War.[159]

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152 Janosch Delcker, *Where German Parties Stand on Europe*, POLITICO (Aug. 28, 2017), https://www.politico.eu/article/germany-parties-plan-for-eu-in-election-campaign/.

153 Likely the Left would object to characterizing themselves as "Eurosceptic" and would instead say they want a reformed EU that focuses less on capitalism (i.e., trade deals, etc.) and more on social welfare and other "solidarity" policies. *See, e.g.*, DIE LINKE, *Leitantrag zum Wahlprogramm zur Bundestagswahl 2021*, DIE LINKE (June 20, 2021), https://www.die-linke.de/fileadmin/download/wahlen2021/leitantrag/2021-04-13_leitantrag_neu.pdf (explaining the Left's official EU and foreign policy positions). However, resistance to many of these policies would potentially hamper integration efforts, especially in the economic space. *See infra* note 163 and accompanying text.

154 *See Sonntagsfrage*, *supra* note 148. These two parties tend to poll at less than 12% for the AfD and less than 10% for the Left.

155 At the state level, however, this is not the case as the Left currently leads the governing coalition of Thuringia.

156 MEHR FORTSCHRITT WAGEN: BÜNDNIS FÜR FREIHEIT, GERECHTIGKEIT UND NACHHALTIGKEIT: KOALITIONSVERTRAG 2021-2025 ZWISCHEN DER SOZIALDEMOKRATISCHE PARTEI DEUTSCHLANDS (SPD), BÜNDNIS 90/DIE GRÜNEN UND DEN FREIEN DEMOKRATEN (FDP) (2021).

157 *Id.* at 104.

158 *Cf.* F.A.W.J. Van Esch, *The Paradoxes of Legitimate EU Leadership. An Analysis of the Multi-Level Leadership of Angela Merkel and Alexis Tsipras During the Euro Crisis*, 39 J. EUR. INTEGRATION 223, 227-28 (2017).

159 *Id.* at 229. For discussion on Merkel's role in the refugee crisis, see Joyce Marie Mushaben, *Wir schaffen das! Angela Merkel and the European Refugee Crisis*, 26 GERMAN POL. 516 (2017).

Thus, in terms of the positive command of Article 23(1) that the Court has interpreted, it seems as if there is little conflict between the Courts and the Parties as the latter have largely adopted the EU-friendly approach as their own. The government has even embraced the EU approach to the extent that it has become a priority both for the coalition and personally for the Chancellor. This agreement, along with the practical limitations on the Courts to command government action to adopt certain policies,[160] can help in explaining why the Court's docket does not see many cases attempting to enforce (or seek declaratory judgement) pursuant to the positive EU integration demands of Article 23(1).

But the actions of the parties also help explain the prevalence of the negative reading of Article 23(1) and safeguarding clause suits on the Court dockets. As mentioned earlier, the Left and the AfD often disagree with the EU policy of the governing parties.[161] Part of their strategy in resisting the government's actions in terms of the EU involves filing direct lawsuits to the Constitutional Court alleging that certain treaties, policies, or legislation violate the safeguard clause of Article 23(1) or other procedural protections.[162] Article 93(1) of the Basic Law allows for these *Organstreit* suits[163] where a political party (or other governmental "Organ", like a State) can directly call on the Court to determine the constitutionality of a provision.[164] An example of such a suit can be found in the recently-decided CETA case.[165] Here, the socialist Left Party, in an attempt to undermine or invalidate the Free Trade Agreement between the EU and Canada, launched one of these suits alleging that Germany's assent to the deal bypassed procedural demands under Article 23.[166] Through these suits, the parties that disagree with the policy or procedure the government took can, through appealing to the Court, check the government's actions through invocation of the safeguard clause and other procedural demands of Article 23(1).

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160 *See supra* notes 142 and 143 and accompanying text.

161 *See* Delcker, *supra* note 152.

162 *See*, *e.g.*, Benedikt Riedl, *Es braucht nicht immer ein Gesetz: Das BVerfG konkretisiert im CETA-Urteil die Integrationsverantwortung des Bundestags*, VERFBLOG (Mar. 10, 2021), https://verfassungsblog.de/organstreitverfahren-ceta/, DOI: 10.17176/20210310-154046-0; *see also* BVerfG Mar. 2, 2021, 157 BVERFGE 1 (Ger.) (the opinion of the Court in the case referenced in the article above).

163 "Organstreit" (or *Organstreitverfahren* when referring to the proceeding) literally translates to "organ dispute" and refers to the cause of action. GRUNDGESETZ [GG] [Basic Law] art. 93(1) (Ger.), translation at http://www.gesetze -im-internet.de/englisch_gg/index.html.

164 *Id.*

165 BVerfGE Mar. 2, 2021, 157 BVERFGE 1 (Ger.).

166 Riedl, *supra* note 162.

Lastly, it does not appear as if the limits imposed by the safeguard clause of Article 23(1) have proven to be an unacceptable burden on the government or the pro-EU parties. While the parties have not explicitly said this, it can be inferred as the pro-EU parties have not amended Article 23(1) or any other provision to eliminate this reading of the clause. In Germany, amending the Basic Law requires a two thirds majority of the Bundestag and the Bundesrat[167] to pass.[168] As the pro-EU parties command a 2/3 majority in both houses, they would have the votes to hypothetically readjust Article 23(1) if they saw fit to do so.[169] The fact that they have left the clause alone means that, either due to acceptance, apathy, or out of respect for the Court's interpretation, they accept the Court's say on the subject.

In sum, the political parties seem to embrace the overall framework offered by the Court in its interpretation of Article 23(1). The governing parties seem largely to have adapted the pro-EU integration demands of Article 23(1)'s positive reading and thus tend to comply with its demands as a matter of ideological and political agreement. The parties opposing the government's EU policy, conversely, take advantage of the Court's safeguard clause jurisprudence to keep the government and the EU in check. With both sides of the argument having something to work with via the Court's interpretation, it is no wonder that there appears to be little conflict between these two factors in the case of Article 23(1).

D. The Role of Society: A Familiar Story

While the positions of the Courts and the Parties seem to complement each other in terms of Article 23(1), the question remains what role the popular will plays in this analysis. Unlike the Japan example, there is no public opinion survey that asks specifically about the European provision of Article 23(1). However, there does exist survey data on how German citizens view the European Union generally. 2020 polling found that 73% of Germans held a favorable view of the EU

167 The Bundesrat (Federal Council) represents the interests of the 16 federal states and plays a role in adopting legislation. GG art. 50-51 (Ger.).

168 GG art. 79(2) (Ger.). This amendment right is not unlimited, however. "Basic Rights" covered under arts. 1 and 20 may not be amended. *Id.* at art. 79(3).

169 As of the 2021 election, the unquestionably pro-EU parties (CDU-CSU/SPD/Greens/FDP/SSW) comprised approximately 83% of seats in the Bundestag (far over 2/3) and control all but one State in the Bundesrat. *See* (for results) *Bundestagswahl 2021*, DER BUNDESWAHLLEITER (2021), https://www.bundeswahlleiter.de/bundestagswahlen/2021/ergebnisse/bund-99.html.

while only 25% held a negative view.[170] This 2020 data does not present some new-found love for the EU either. In fact, from 2004 to 2020, the German approval of the EU rose from only 58% in 2004 to 73% in 2020.[171] This long-term trend of EU approval seems to signal rather clearly that, like in the case of the political parties, the vast majority of Germans tend to support the EU, and thus in general seem to align with the goals of the Article 23(1) integration clause.

Again, like with the political parties,[172] this is not to say that the public does not have differing opinions on exactly how best to cooperate with the EU nor does it agree completely with every aspect of the government's EU policy. For example, during the Eurocrisis, the German people heavily protested, on the streets and the media, the bailout of Greece.[173] In this particular case, a "'them' and 'us' discourse was fueled by a widespread negative media campaign" that criticized the government-supported bailout as supporting the fiscal profligacy of the Greek financial system.[174] And while opinion polls on support for the EU dipped around this point in 2014, they never went below 50% and support quickly recovered as the crisis abated.[175] Differences between the public and government seem to be issue by issue, and as can be seen by the opinion polling, have not derailed the overall positive trajectory of support for the EU among the German public.[176]

The 25% of the public who are against the EU are not without societal influence nor are they irrelevant in public discourse. Especially influential have been Eurosceptic academics who, especially during the debates around the Eurocrisis, published open letters and opinion pieces heavily criticizing the European Central Bank's bond-buying scheme and Germany's role in it.[177] In fact, the vocal criticism of the EU during this time by credible academics (especially economists) was one of the leading

170 LAURA SILVER, MOIRA FAGAN & NICHOLAS O. KENT, MAJORITIES IN THE EUROPEAN UNION HAVE FAVORABLE VIEWS OF THE BLOC: TOPLINE QUESTIONNAIRE 16 (Pew Research Center 2020), https://www.pewresearch.org/global/2020/11/17/member-nations-had-broadly-favorable-views-of-the-eu/.

171 *Id.* at 7.

172 *See* Delcker, *supra* note 152 (explaining that the main parties are pro-EU but disagree on the details).

173 Robert Grimm, *The Rise of the German and Eurosceptic Party Alternative für Deutschland, Between Ordoliberal Critique and Popular Anxiety*, 36 INT'L POL. REV. 264, 269 (2015).

174 *Id.*

175 SILVER, FAGAN & KENT, *supra* note 170, at 7.

176 *Id.*

177 Grimm, *supra* note 173, at 270-71.

factors behind the creation of the eurosceptic AfD.[178] Further, private individuals can invoke the safeguard clause of Article 23(1) in their own suits at the Constitutional Court and individuals or public interest groups will sometimes challenge government action (like the AfD and Left party) in the Court.[179] Most of the major litigation against adoption of the major EU treaties, such as the *Maastricht* and *Lisbon* cases, were originally filed or led by a coalition of private parties and academics.[180] So, like with the AfD and Left,[181] those opposed to the government's EU activities can always use the Constitutional Court to object under the negative requirements of Article 23(1).

In many ways, the analysis of the popular will has matched closely with that of the preceding section dealing with the political parties. This is because, unlike the fundamental conflict between the Japanese public and government regarding Article 9, the German case in terms of Article 23(1) involves far less discrepancy between popular opinion and the position of the parties/ruling government. The differences between the two, as exemplified in the Greek bailout case, tend to be issue by issue political questions and not fundamental disagreements about the underlying constitutional interpretation of 23(1). Thus, as was the case with the preceding section, it appears as if the popular will generally supports the Court's interpretation of the pro-EU demands of Article 23(1) while the anti-EU minority utilizes the safeguard clause in the Courts as a counterbalance and check on government action.

E. Conclusion on the German Case and Comparison

Article 23(1)'s interpretation seems to revolve around the precedent of the Court, with the Parties and the People generally accepting this interpretive environment established by the *Lisbon* and *Maastricht* decisions. Whether it be because of the institutional respect or deference afforded to the Constitutional Court's interpretation,[182] the fact that the People and Parties tend to affirmatively support the Court's position

178 *Id.* at 269-71. Some at this time even referred to the AfD as the "party of professors" because of how many public economic intellectuals supported the fiscal-driven Euroscepticism of the early AfD. *Id.*

179 Grimm, *supra* note 173, at 266. This is not to say that all Article 23(1) safeguard clause cases are filed for political reasons. Sometimes Article 23(1) appears at issue in cases where a prisoner is fighting extradition to another EU country. *See, e.g.*, BVerfG Dec. 1, 2020, 156 BVERFGE 182 (Ger.).

180 Grimm, *supra* note 173, at 266.

181 Except, naturally, the details and causes of action are different, especially as *Organstreit* is generally unavailable as a private cause of action. *See* GG art. 93(1) (Ger.).

182 *See supra* Part III.B.

anyway,[183] or some combination of the two, there seems to be no real fight over the interpretation of the state aspirational clause *itself*. The fights surrounding article 23(1) seem, instead, to be issue by issue questions of application, especially regarding the safeguarding clause. Through allowing challenges to government actions taken in fulfillment of the first part of Article 23(1)—which demands the government participate in EU integration—via the safeguarding clause and other constitutional objections, the courts not only give themselves an active role in policing government policy in the EU realm, but also allow for the political minorities who do not support integration a legal valve to challenge government policy.

Again, this analysis is not trying to claim that German jurisprudence surrounding EU integration or other supranational cooperation can be boiled down to a relatively short case study regarding Article 23(1). The volume and depth of scholarship on Germany's relationship with the EU alone would rebut this point.[184] However, what this analysis has shown is how the triad of factors, by largely coalescing and accepting the environment created by the Court's interpretation of Article 23(1), have created part of a stable foundation upon which democratic debate and disagreement on an issue-by-issue basis can proceed. This is not to say that these debates may not be bitter or divisive. But, Kommers and Miller likely put it best when they summarized that: "Negotiating these opposing demands [of Article 23 and EU integration] . . . will remain the heroic, if often messy, work of the Constitutional Court."[185]

Lastly, as a point of comparison with the Japanese case, it seems as though this Note concludes that while the dynamics surrounding interpretation of these state aspirational clauses differ drastically, both cases have ended with "stable" conclusions. After all, like with Article 23(1), it seems that interpretation of Japan's Article 9 also seems unlikely to change in the near future.[186] But, while both interpretations may be unlikely to change, the political foundation created by interpretation of Article 23(1) provides stability allowing for dynamism around the edges. While not everyone may agree on government policy taken (at least partially) in response to Article 23(1)'s integration requirement, the Court

183 *See supra* Parts III.C and III.D.

184 *See, e.g.*, Thomas Banchoff, *German Identity and European Integration*, 5 EUROPEAN J. INT'L RELS. 259 (1999); Mehrdad Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice*, 48 COMMON MKT. L.R. 9 (2011).

185 KOMMERS & MILLER, *supra* note 115, at 352.

186 *See supra* Part II.D.

serves as arbiter of these questions at a constitutional level. Disagreements over details and policy do not lead to existential fights regarding 23(1)'s existence or open defiance of the Court's *Lisbon* interpretation. Article 9, on the other hand, features bitter fights about its very existence when any action is taken, with the Supreme Court refusing to arbitrate or strongly impact the debate. Thus, while both are "stable," Article 23(1) plays a foundational role in the ever-changing policy debates surrounding the EU while Article 9 haunts Japanese defense policy debates, threatening a bitter constitutional fight at every step.

CONCLUSION

The triad of factors proposed in this Note not only gives specific insight into the mechanics of Article 9 and 23(1), but also provides a wider framework with utility beyond Germany and Japan. Researchers can take a state aspirational clause, no matter the country or political system,[187] and study it within the framework of the triad to understand the critical factors influencing the clause's interpretation and enactment. The triad's utility is not limited to academia. For example, practitioners can use the triad as a diagnostic tool. If there are state aspirational clauses failing to produce a certain intended or expected result, the reason why can be ascertained through analysis of the clause through the triad's factors.

Beyond the framework, this Note has also demonstrated that state aspirational clauses are defined by factors beyond their text and cannot be understood outside their specific contexts. National jurisprudential and political cultures eschew generalization, and potential attempts to generalize how these clauses operate without factoring in specific national characteristics would be doomed to fail. Only by recognizing the critical role of political and jurisprudential culture can we better understand how nations turn their state aspirations into reality.

187 Again, while not specifically studied here, this triad likely could be used even in systems without characteristics of advanced democracies (i.e., free elections, political parties, or judicial oversight). *See supra* note 20 and accompanying text.