Two Contrasting Processes of the Mythologisation of Constitutions in English and Japanese

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英語と日本語における対照的な憲法の神話化の過程

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Abstract

This paper compares and contrasts a process of mythologisation, which has helped make Magna Carta an icon for freedom and democracy, against another process, which led to make Article 9 of the Constitution of Japan becoming an icon for pacifist-leaning nationalism, with reference to Jacques Ellul's theory of propaganda. The purpose of such a comparative enquiry is to show that the latter process in the Japanese language is quite different from the former process in the English language, which has given birth to the modern concept of constitution guaranteeing the legally-enforceable bill of human rights. For reasons which are set out in this paper, the mythologisation of Magna Carta helped establish the rule of law, while that of Article 9 tends to undermine it.

Keywords: propaganda, mythology, constitutional disarmament of Japan, Magna Carta, rule of law

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抄　　録

本稿はジャック・エリュールのプロパガンダの社会学的理論に照らしてマグナ・カルタを自由と民主主義の聖像と化した神話化の過程と日本国憲法九条を平和主義的ナショナリズムの聖像と化した神話化の過程を比較対照し、英語において発生した前者の過程が人権章典の法的強行性を保障する近代憲法の概念を生み出したことに比して、日本語において発生した後者の過程は異質であること、そしてマグナ・カルタの神話化が法の支配の確立につながったのに比し、日本国憲法九条の神話化は逆に法の支配を不安定化させる傾向があることを論じる。

キーワード：プロパガンダ、神話、日本国憲法九条二項、マグナ・カルタ、法の支配

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1. Introduction

This article compares and contrasts the process of mythologisation, which has helped make Magna Carta 'an icon for freedom and democracy' (UNESCO, 2009) against another, which has helped make Article 9 of the Constitution of Japan an icon for pacifist-leaning nationalism (Swenson, 2016, p. 1), with reference to Jacques Ellul's theory of propaganda. The purpose of such a comparative enquiry is to show that the latter process in Japanese is quite different from the former process in English, which has given birth to the modern concept of constitution guaranteeing the legally-enforceable bill of human rights. For reasons which are set out below, the mythologisation of Magna Carta helped establish the rule of law, while that of Article 9 tends to undermine it.

2. Jacques Ellul's *Propaganda* (1965)

Ellul's theory itself views propaganda as a sociological phenomenon, rather than a political one, particularly in a modern technological society (1973/1965, p. ix, p. xviii). That which makes Ellul's observation particularly penetrating seems to be found where he states: 'propaganda tends to make the individual live in a separate world' (Ellul, 1973/1962, p. 17). Propaganda is divided into two phases of sub- or pre-propaganda, and direct or active propaganda. Sub-propaganda takes some time to cause a group of individuals to be ready to be incited to action by direct propaganda (pp. 30-31). Sub-propaganda is comparable to the act of ploughing, where it involves little noticeable aggression, and is limited to creating ambiguities, reducing prejudices, and spreading images, apparently without purpose (p. 15). Direct propaganda is comparable to the sowing of seeds of action or the nudging of a group to 'sprout' into action towards a given purpose (p. 15). Sub-propaganda, which Ellul describes in terms of 'sociological' propaganda (p. 15), takes two routes, namely, conditional reflexes and myth (p. 31). Ellul believes that creating conditional reflexes individually and collectively is possible through a period of training and repetition, and argues that the Soviet Union preferred this route (pp. 31-32). The United States, on the other hand, prefers the other route, that is, to create myths 'by which man will live, which respond to his sense of the sacred' (pp. 31-32). Myth here refers to an 'all-encompassing, activating image: a sort of vision of desirable objectives that have lost their material, practical character, and have become strongly coloured, overwhelming, all-encompassing, and which displace from the conscious all that is not related to it. Such an image pushes man [sic] to action precisely because it includes all that he feels is good, just and true. ... Eventually, the myth takes possession of a man's mind so completely that his life is consecrated to it' (pp. 31-32).

It is rather difficult not to ride roughshod over the complexities of Ellul's sociological theory in such a short paper. However, Ellul's definition of myth, as noted above, seems to the present author to match Japan's past imperial myth a good deal better than Japan's post-war myth of being a pacifist nation, precisely because the former myth was powerful enough to have made the whole nation so ready to be mobilised, even for a thoroughly hopeless suicidal war in December 1941; and to remain so obedient to the same emperor, despite his somewhat uncharismatic appearance and catastrophic defeat, whether he ordered his nation to surrender their arms to the Allies, to co-operate with the occupation policies, or to rebuild Japan as a nation of peace. Everything apparently defies logic and reasonable expectation, even though Japan's imperialist myth was very much institutionalised one, in which the person of the emperor constituted only a part. By contrast, the latter myth remains so far only conducive to national resistance to, or inaction in the hearing of calls for either amendment to the disarmament clause of the Japanese constitution, or Japan's military contributions to US-led international enforcement operations. It is worthwhile to mention here that a distinctive feature of Ellul's theory of propaganda seems to interpret modern propaganda as more to do with actions than with ideas, and as such, aims at obtaining not necessarily the adherence to orthodoxy ('correct expectation'), but the compliance with 'orthopraxy' ('correct action') (p. 25, p. 27). Of course, inaction or resistance to action may still be a form of action. In the end, to say that Japan's past warlike imperialist myth makes a better match does not in itself invalidate Dr. Swenson's claim about Japan's post-war myth of being a pacifist nation (NB strictly speaking, she refers to 'peace nation', but the present author believes that the myth of a pacifist nation makes sense, because Japan is armed and by no means a pacifist nation in practice). Indeed, Swenson qualifies that Ellul's use of the term 'myth' is closer to its Greek origin *mythos* (μῦθος), or 'narrative' (Swenson, 2016, p. 1). Rather, it could be argued that Emperor Hirohito, co-operating with MacArthur's insertion of the disarmament clause in the post-war Constitution, was also made part of the post-war propaganda, which ploughed and cultivated the myth of a pacifist nation.

Before turning to the main work of this article, i.e. comparisons between the Japanese myth attached to the disarmament clause of the constitution and the myth attached to Magna Carta, the following observations need to be made, because Jacques Ellul's theory of propaganda is that of a modern sociological phenomenon in a technological society (Ellul, 1973/1962, p. xviii) and by definition, seems to exclude propaganda in periods before the development of mass communication technologies such as radio and television. However, myths surrounding the seventeenth- and eighteenth-century misinterpretations of Magna Carta were the driving forces behind revolutionary movements in the early modern period, as the period concerned. There was admittedly neither radio nor television nor cinema, let alone

the internet. But it should be remembered that those ensconced in the technological age we are experiencing now, attended by a sophisticated scrutiny of its means and methods, tend grossly to underestimate the power and influence of the press in the early modern period. The Reformation, for example, was essentially a product of propaganda involving the press, i.e. printed leaflets, and so were witch hunts, which were still plaguing Europe down to the late seventeenth century (Museum Hexen-Bürgermeisterhaus Lemgo, n.d.). Indeed, the term, *propaganda*, came to bear more-or-less its modern meaning after 1622, when Pope George XV established *Sacra Congregatio de Propaganda Fide*, which is a 'sacred congregation for the faith to be spread'. To parse *propaganda*, it is the gerundive of *propagare*, 'to spread', and therefore, 'to be spread', in the singular, feminine, ablative, corresponding to the number, gender and case of the accompanying noun, where *fides* is translated as 'faith' here. The modern meaning of propaganda comes from the strategic functions of this Papal committee of cardinals. The committee was defending and spreading the Catholic ('universal') faith against the backdrop of the Thirty Years War between Catholics and Protestants. The religious dimension of the war was not quite unlike the ideological warfare of Ellul's time, the Cold War. So, Ellul's use of the term, *propaganda*, i.e. the psychological 'technology' in the sense of τέχνη, i.e. 'art', 'skill', 'cunning' or 'contrivance', of *spreading* myth is fairly close to the original, the Papal strategic committee of masters of the art of *spreading* faith in the war of religions.

3. Myths attached to Magna Carta

In this section, the myths attached to Magna Carta will be discussed according to the following three attributes: (1) sacredness; (2) misinterpretation; and (3) 'out of touch' with reality.

(1) Sacredness

It is often said that Magna Carta became an 'icon' of liberty in England towards the end of the Thirty Years War in continental Europe, i.e. during the 'English' Civil War, when the Levellers got hold of a copy of Magna Carta and said, 'we will be dragged to our execution holding this in our hands; it won't be torn away from us!' (BBC, 2015, Bragg) An essential ingredient of Ellul's myth is present here, where Magna Carta had created myths, by which the Levellers lived, that represented their sense of the sacred (Ellul, 1973/1962, p. 31).

Magna Carta's mythical force at that time was not exclusively an understanding held by the radicals. For example, in August 1647, when Parliamentary troops were advancing angry and unpaid on the capital, and in a gesture to conciliate the Roundhead soldiery, their commander, Thomas Fairfax, was made the Constable of the Tower of London. His first act on taking up the

office was to call for the greatest treasure in the Tower to be brought before him, which was not a sceptre or a crown, but this old spidery Latin script on a piece of parchment, Magna Carta. As he picked it up, he reverentially said, 'This is that we had fought for, and by God's grace we must maintain!' (BBC, 2015, Hannan).

No doubt, propaganda 'must be built on a foundation already present in the individual' (Ellul, 1973/1962, p. 36). Magna Carta had been regularly recited at the opening of every Parliament since the end of the thirteenth century. Since Magna Carta was first printed in 1508, and first translated into English in 1534, it had been the first document of the Statute Book. In terms of the government under the rule of law, it was the bedrock, and it had been believed to be the recovery of a 'hallowed' tradition 'from time immemorial' (BBC, 2015, Champion).

(2) Misinterpretation

Magna Carta was fundamentally misunderstood in the seventeenth century (BBC, 2015, Vincent). Only a few clauses of the original sixty-odd clauses of Magna Carta 1215 survive to this day in the Statute Book (legislation.gov.uk) in the version of King Edward I's statute of 1297, clause 1, guaranteeing the freedom of the Church; clause 9 guaranteeing the liberties of the City of London and other cities; and clause 29, corresponding to clauses 39 and 40 of King John's Magna Carta 1215, guaranteeing personal liberty and access to speedy justice for all, respectively. Many of the remaining financial stipulations of Magna Carta did not bear much relevance to reality even by the end of the thirteenth century (BBC, 2015, Vincent).

Take the example of clause 39 of King John's Magna Carta, which has come to be known as the 'liberty clause', which reads, 'no free man shall be captured or imprisoned or disseised or outlawed or exiled or in any other way destroyed, ... save by the lawful judgement of his peers or by the law of the land.' Through a statutory rendition of 'save ... by the law of the land (*nisi ... per legem terre*)' into 'save ... by due process of law (*saunz ... par due proces de lei* [Law French]' in 1354, and the following misinterpretations in the seventeenth century, the said clause has come to be believed to have guaranteed to everyone the right to due process of law and the right to trial by jury. The Fifth Amendment to the Constitution of the USA, 'No person shall be deprived of life, liberty or property without due process of law', is one of the streamlined versions of the liberty clause. Such streamlining owes partly to Sir Edward Coke's interpretation that a *villein* (in the sense of a serf) is also a free man (*liber homo*). This interpretation did not take into account the historical context of 'estate' and *desseisin*, i.e. deprivation of 'estate' consisting of both land tenure and status, in medieval feudal society of Europe. 'Free men' in the early thirteenth century were a class of landed aristocrats, who had 'estates' of which they might be deprived. Similarly, the liberty clause did not, in fact, guarantee

the right to trial by jury. There is no word 'jury' in Magna Carta, where it simply reads, 'by the lawful judgment of his peers (*per legale juditium parium suorum*)'. The interpretation that this phrase means 'by the verdict of jury' is often attributed to Sir Francis Bacon. This part of the liberty clause is later combined with clause 40, 'to no one shall we sell or deny or delay right or justice', to produce the Sixth Amendment to the Constitution of the USA, 'the accused shall enjoy the right to a speedy and public trial by an impartial jury'. This interpretation of the liberty clause similarly did not take into account the historical context of 'estate'. One's 'peers' in the thirteenth century meant those who had the same rank of estate, or those who belonged to the same class of people as the accused.

These seventeenth-century interpretations of clause 39, which have made the clause the 'liberty' clause, do not take into account the somewhat tacit historical context of 'estate', or an established convention of the feudal society. The seventeenth-century interpretations are, as such, pieces of sub-propaganda against 'estate' in favour of equality before the law.

(2) (a) 'Literal' Misinterpretation

These misinterpretations of Magna Carta in the seventeenth century involve rather 'literal' interpretation; for example, interpreting that 'free man' refers to everyone, by overlooking the historical context of 'estate', that 'judgement of his peers' means 'verdict of jury', by overlooking again the tacit historical context of 'estate'. The more recent overlooking of gender may not be particularly 'literal'. Yet, the point to be made here is that the seventeenth-century interpretations of Magna Carta are not quite unlike the interpretation of a contractual term in *The Merchant of Venice*, which entitled the creditor, Shylock, to 'a pound of flesh of chest' of the debt guarantor, Antonio, in default. The young Doctor of Law, Portia in disguise, to whom the case was referred by the Judge (Duke of Venice), interprets that 'flesh' is not 'blood' so that no blood ought to be shed. The point is that the Doctor of Law's literal interpretation defeated the intention of the drafter (*contra proferentem*). Similarly, by placing the liberty clause (clause 29 of Magna Carta 1225) out of increasingly tacit historical context, the seventeenth-century interpretations of Magna Carta involve the art of propaganda.

(2) (b) Misinterpretation and Identity Crisis

The misinterpretations of Magna Carta in the seventeenth century occurred against the backdrop of challenges to the identity of England. This point, too, can be contrasted with the Japanese myth of a pacifist nation later on. In 1603, the death of Queen Elizabeth signified that the survival of England as a Protestant kingdom, which Elizabeth had successfully defended, was under threat through the succession to the English throne by James, a first cousin twice removed of Elizabeth. James's ascendancy was triply threatening to the English Protestants,

firstly, because he was the King of the Scots; secondly, because he was the son of Mary, the Queen of the Scots, who tended to be seen as a potential queen of the Catholics of England and Scotland; and thirdly, because James espoused absolutism. James was succeeded by Charles, who inadvertently married Mary, a French princess, to confirm the existing suspicion and fear among the Protestants of England and Scotland that he was a secret Catholic. The fear eventually helped bring about not only the Civil Wars of England, Scotland and Ireland, but also the killing of Charles in 1649. The fear turned out to be a self-fulfilling prophecy after the Restoration in 1660. Charles's two sons, Charles II and James II, proved themselves to be Catholics. Charles II converted on his death-bed and James II did not hesitate to let his faith be ascertained, and went on to marry a Catholic princess who gave birth to a son tending to establish a Catholic dynasty, which was quickly thwarted by the Revolution of 1688.

Unlike the construct of Japanese identity, which tended to revolve around the allegedly unbroken imperial lineage from the goddess of the Sun, the English construct of identity had to find an alternative continuity, because their royal lineage was broken from time to time by conquests in 1066, 1485 and 1689. The myth attached to Magna Carta, which was believed to have reclaimed the 'hallowed' tradition of the kingdom 'from time immemorial', is precisely such an alternative. The 'hallowed' tradition, therefore, tends to be reinvented so as to reinforce the myth whenever there is a challenge to it. The Petition of Right 1628 and the Bill of Rights 1689 are just such examples.

(2) (c) Misinterpretations in North America

At that time, the colonists in North America believed that they had also inherited the same English 'liberties, franchises and immunities' by virtue of clause xv of the Charter of the Virginia Company of 1606. When they felt that their identity as Englishmen was threatened by British Parliament taxing them without representation during and following the French-Indian War, they first invoked their inheritance of the English liberties. Their slogan, 'no taxation without representation', was effectively a piece of propaganda, trying to win the compliance of those who were supposedly sharing the myth attached to Magna Carta. In fact, nowhere does Magna Carta find 'no taxation without representation'. The nearest is clause 12 which reads, 'no scutage nor aid shall be imposed on our kingdom, unless by common counsel of our kingdom.' There was as yet no concept of 'tax' as such. Instead, some archaic charges which may retrospectively be categorised as forms of tax were mentioned: 'scutage (*scutagium*)', which was 'shield' money and 'aid (*auxilium*)' which was some form of financial assistance to the King's army. The colonial slogan was derived more directly from the preamble of the Petition of Right 1628, which declared that 'the King's subjects should not be taxed but by consent in Parliament'. The preamble was only able to invoke somewhat obscure authorities

of the so-called 'statute for no tallage to be conceded' (*statutum de tallagio non concedendo*) in either the 25th or the 34th year of Edward I, and the unspecified 'authority of Parliament' of the 25th year of Edward III, to support the declaration. When that colonial propaganda did not procure the desired outcome in London, they resorted to establishing a new republic, which would better protect their rights.

The modern concept of a constitution, i.e. the supreme statute guaranteeing a bill of legally enforceable human rights over and above the other rights, has crystallised over years in the United States of America and its colonial precursors. It would not be an exaggeration to say that this concept is a product of a series of efforts to bring the myths attached to *Magna Carta Liberatum*, the 'Great Charter of Liberties', to positivist fruition. The Declaration of the Independence of the United States of America (1776), State Constitutions declaring the Rights of Inhabitants (1776-1780 except for Connecticut [1639] and Rhode Island [1843]), the first Ten Amendments to the Constitution of the United States (1791), the Supreme Court ruling in the case of Marbury v Madison 5 US 137 (1803), and the post-Civil War Reconstruction Amendments (1865-1868) are earlier examples of such efforts. Efforts are ever ongoing, as the Federal Government may send armed forces to enforce the ruling of the Federal Court against a non-compliant State (Little Rock Central High School Crisis of 1957); the Bill of Rights (The Ten Amendments) are not exclusive, and the Court may find new ones in the 'penumbras' and 'emanations' of other listed rights (e.g. Griswold v Connecticut 381 US 479 (1965)); and the Court may require specific procedure to be followed to ensure existing rights (e.g. Miranda v Arizona 384 US 436 (1966)).

In the words of Lord Judge, a former Lord Chief Justice of England and Wales, these developments are 'in direct lineage from Magna Carta' (Library of Congress, 2014, Judge). Without these developments in the USA, there would be neither constitution nor legally enforceable human rights today. The force which had set these developments in motion was undoubtedly the force of 'myths, by which man lives, which respond to his sense of the sacred' (Ellul, 1973/1962, p. 31). Patrick Henry's cry, 'Give me liberty or give me death', echoes not only that of the Levellers in the English Civil War but also the revolutionary fervour of the English barons, who forced King John to seal Magna Carta at Runnymede on 15 June, 1215.

(3) Out of touch

The last comparison required with the Japanese pacifist mythology is that Magna Carta is rarely cited in court proceedings today in both the United Kingdom and the United States. As Chief Justice Roberts (Library of Congress, 2014) points out, Magna Carta has little relevance to the United States from its outset, because human rights were not 'conceded' by the King

as in Magna Carta, but 'endowed' by Creator as in the Declaration of Independence. A slight difference in wording between the royal 'we' as in 'We concede all the underwritten liberties' (Magna Carta, cl. 1), and 'We, the People' (US Constitution) makes all the difference. As such, Magna Carta retains only 'symbolic' relevance today (Library of Congress, 2014). Justin Champion would find the word 'symbolic' slightly weak and instead he would call it 'iconic', more in tune with the mythical force attached to it (BBC, 2015, Champion). Similarly, Nicholas Vincent would call it 'totemic' (BBC, 2015, Vincent). But that which makes a difference with the Japanese myth would be that, as Lord Judge puts it, 'many of the arguments which are well-founded [in today's courts] stem originally from the thought process that has developed over the last 800 years [since Magna Carta]' (Library of Congress, 2014).

4. The Japanese Myth of being a Pacifist Nation

To begin with, the precise wording of the two paragraphs of Article 9 of the Constitution of Japan should be quoted here in full:

(1) 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.

(2) 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 recognised.

In the immediate aftermath of the war, it made sense that Japan was disarmed, deprived of its capacity to invade, conquer and enslave other countries. Unlike the Americans, the British never believed it possible to pacify the fiercely aggressive Japanese military ethos (Sansom, 1945), but that the ethos was deeply rooted in the history of the Japanese warrior-class, bearing a couple of swords. The British believed the pacification should be impossible in a relatively short space of time of occupation between the ceasefire and the conclusion of peace, and particularly by the very US method of changing the constitution (Sansom, 1945). Therefore, the British strategy of containing Japan's threat of revenge like Germany's after the First World War — which the British believed to be substantive — was to deny and eventually to regulate Japan's access to raw materials in international market (Sansom, 1945). Such a strategy was reflected in clause 11 of the Potsdam Declaration of 26 July, 1945, stipulating conditions on which the Allies accept Japan's offer of surrender. It reads, 'Japan shall not be permitted to maintain those industries which would enable her to re-arm for war. Eventual Japanese participation in world trade relations shall be permitted.'

The Potsdam Declaration gave the Allies the power of control through the regulation of Japan's access to international market. By contrast, the imposition of a blanket ban on Japanese armament under the terms of Japan's own constitution removed that power from the Allies, and gave it to the Japanese people. The prudence of such a change in the implementation of the Allied terms by the Supreme Commander of Allied Powers, came to be challenged through the subsequent international strategic developments, in particular, the communists' conquest of China's mainland, their attempted conquest of Korea, the eventual communist conquest of former French Indochina in precarious circumstances surrounding the Vietnamese resistance to colonialism, and the Japanese conservative government's and people's almost unanimous resistance to being armed and fighting for US causes.

It is this paper's case that the disarmament clause (paragraph 2) survives for the following reasons, not all of which are particularly mythological. First, Japan's post-war constitutional amendment procedure under Article 96 is rigorous. A constitutional amendment bill requires the approval of no less than two thirds of the members of each House of Diet, as distinct from those who are present, and of no less than half of those eligible voters who cast their ballots in a referendum. Second, the Japanese government avoided acting on US advice to try to amend the disarmament clause in the wake of North Korean aggression on 25 June 1950, following their Chinese comrades' conquest of China's mainland by force by October 1949. Prime Minister Yoshida had a chance to get an amendment bill through Diet and via referendum at that time, but the opportune moment was lost by his inaction at the constitutional level. Third, the Japanese rules of interpretation of legal instrument have never been as rigorous as those of the Common Law countries. These are three non-mythological reasons.

There are three further reasons. Fourth, the only Japanese official who occupied the same position throughout the time jurisdiction of the Tokyo War Crimes Trials, 1928-1945, that is, Emperor Hirohito, actively co-operated with the occupation authorities in the making of the new constitution, including the disarmament clause, for the purpose of personally remaining in the same position after the defeat, against the advice of one of his brothers, Prince Takamatsu, and his close advisors including Konoye and Kido. This led to the mythical ascriptions the emperor retained among the Japanese people even after defeat in the Second World War. Fifth, the relevant individuals avoided for many decades to disclose the precise details surrounding the initiation of the process of the fashioning a new constitution in early 1946 (Sirota-Gordon, 1995, p. 191). It may be conceded that silence is also a part of propaganda. Sixth, Douglas MacArthur, the author of the disarmament clause, played with the ambiguity surrounding the authorship of the two paragraphs of Article 9, one of which is the renunciation of war, and the other is blanket disarmament. Douglas MacArthur tactfully revealed that Prime Minister

Shidehara had proposed the inclusion in the Japanese constitution of the renunciation-of-war provision of the Kellogg-Briand Pact, which he had personally signed in Paris in his capacity as the Foreign Minister of Japan as of 1928 (paragraph 1). But this was not the whole truth. None of the original parties to the Kellogg-Briand Pact, the United States, the British Empire, France, Italy, Germany, Poland, Czechoslovakia, China and Japan, had ever agreed to disarm themselves this thoroughly since 1928. The Kellogg-Briand Pact had no disarmament provision, pure and simple. But MacArthur's partial disclosure and partial silence generated a myth, which has been widely believed among the Japanese population, that Shidehara was the author of Article 9, without distinguishing between its two heterogeneous paragraphs. The disclosure of MacArthur's note of 3 February 1946 instructing the preservation of the monarchy, the thorough disarmament renouncing the right to self-defence and all rights under the laws of war (international humanitarian law) as the price for the first, and the adoption of British budgetary proceedings, cannot displace the widespread popular belief in the Shidehara authorship of Article 9. Shidehara's authorship of Article 9, as opposed to MacArthur's, gives solace to nationalist pride among the Japanese population.

The following are some influential arguments in support of the disarmament clause. First, George Kennan, at US State Department, believed that the disarmament and pro-US neutrality of Germany and Japan would free the Soviet Union from their security paranoia and persuade the Red Army to withdraw from the zones of their military occupation in Europe and Asia (Kennan, 1948). Second, MacArthur believed that it was pointless to maintain conventional armament in the age of nuclear weapons (e.g. MacArthur, 1945). To challenge or resist a nuclear power with conventional weapons is as hopeless as to fight machine-gunners with bamboo spears. Third, it is the case that imperfect, i.e. conventional, rearmament of Japan cannot defend the country, but not only tends to invite the Soviet Union and other powers to invade Japan, but also cripples Japan's economic development (e.g. MacArthur, 1949). Fourth, it is honorable to take risks and to lead the world by example, towards establishing a perpetual peace through disarmament. Under the threat of mutually assured destruction (MAD) by a nuclear war, which may well be triggered accidentally, mankind must start somewhere, and it is certainly noble for the country which had sustained the mankind's first round of nuclear attacks to stand precedent. Fifth, the Japanese marshal art of fencing (*kendo*) includes the art of fending off sword attacks with one's bare hands (*shinken-shiraha-dori*). Sixth, the very first article of the first Japanese 'Constitution' (in the sense of the highest edict) of Seventeen Articles of Prince Regent Shotoku in 604 reads, 'peace shall be valued first and foremost', or something similar.

These arguments are a form of propaganda in conventional sense, employing a wide

swathe of claims ranging from utilitarianism to half realism, often appealing to the deeply wounded nationalist pride of the Japanese, and not necessarily making recourse to myth. An example of half realism is MacArthur's view that nuclear weapons had rendered conventional weapons outdated. Experience shows that the development of nuclear weapons has not wiped out conventional weapons. On the contrary, small fire-arms have turned out to be practically more important in numerous low-intensity conflicts in the post-1945 world. The USA decided neither to resort to nuclear weapons in the wake of the Chinese communists' aggression in overwhelming numbers in Korea, nor to repel them with far superior conventional weapons of the USA, partly for mountainous terrain near Korea's borders with China and the Soviet Union, and partly for political reasons related to the honest yet far-fetched British fear of another European war. Superbly mechanised US troops nonetheless fell prey to traps equipped with bamboo spears in the Vietnam jungle, where the usefulness of nuclear attacks remained doubtful.

(1) Sacredness

Peace may embody sacredness for some, most especially those who are fatigued by war, and a great majority of the Japanese were so after the catastrophic outcome of their last war. In the above example, the invocation of the first article of the Constitution of Seventeen Articles of Prince Regent Shotoku as of 604, as well as Showa Emperor's sermons of the new year day of 1946 exhorting his subjects, among other things, to rebuild Japan as a 'nation of peace' as opposed to a 'militaristic nation', seem to have carried religious force as sermons. These sermons formed a backdrop against which the disarmament clause of the new Constitution was presented to the people, along with the war renunciation clause. Also, quite a large majority of the members of Japanese Diet believed that their emperor, who could be better called 'His Holiness' rather than 'His Majesty' for them, was taken hostage for the success of the occupation, because the Diet discussed the constitutional amendment bill, while the Tokyo War Crimes Trials were ongoing. Normally, the Ellulian process of mythologisation takes a long time. But the popular sickness of wars, coups and terrors, and the ready availability of easy scapegoats of war liabilities for their emperor, namely, army officers, could together trigger the sudden crystallisation of the myth of pacifist nationalism, of which the disarmament clause served as an icon.

The long survival of the myth thereafter cannot be explained without the following couple of factors: firstly, the provision of security by US armed forces, some of them stationing in Japan under the terms of the Security Treaties 1951-1960 paralleling the San Francisco Peace Treaty 1951; and secondly, the separation of spiritual domain and secular domain, more specifically, the mythologisation of the *de jure* disarmament clause in the spiritual domain of constitution

in contrast to the *de facto* three-step rearmament of Japan in the temporal/secular domain of statute law in force. In this respect, Japan had a long-standing historical precedent of the separation of powers between *Mikado* and *Shogun*, which was compared with the medieval separation of Church and State in Latin Christendom (Kaempfer, 1727). *Mikado* reigned and *Shogun* governed. Japan has an even older precedent, namely that *Izumo* was made the capital of gods of all the dominions of Japan, which had been conquered by *Yamato*, making itself the seat of the practical government of Japan in the legend of *kuni-yuzuri* ('cession of state').

The mythologisation of the constitutional disarmament clause is as if 'kicking upstairs', an expression originally describing a political situation in the United Kingdom where a Prime Minister is forced to retire from her office, and moves from the Lower House (Commons) to the Upper House (Lords) of Parliament. The latter House is of 'higher' dignity by name and decoration (such as peerage and suitable attire) and of lessor power in practice than the former House, partly by the Parliament Acts 1911-1949, and partly by constitutional convention that the Prime Minister sits in the Commons. As such, the expression suitably describes the medieval office of *Mikado*, who was 'kicked upstairs' by *Shogun* and the ancient prince of *Izumo*, who was in turn 'kicked upstairs' by the prince of *Yamato*. It has been found archaeologically that the Prince of *Izumo* was housed on the top of the tallest building in Japan (*Izumo* Shrine), which was connected to the ground through a soaring staircase (Mitani, 2014), and as such, both literally and graphically 'kicked upstairs'. Similarly, the Constitution of Japan, which is in theory the highest statute, is 'kicked upstairs' by a lower statute, e.g. the Self-Defence Forces Act 1954, in practice.

(2) Misinterpretation

(2) (a) Broad Interpretation and Avoidance of Interpretation

In contrast to the propaganda of 'literal' interpretation of Magna Carta overlooking the underlying historical context of 'estate', and creating the myths of the Great Charter of Liberties, which fueled revolutions across the Atlantic in the seventeenth and eighteenth centuries, the Japanese process of mythologisation and kicking upstairs of the disarmament clause of the Constitution was facilitated by the executive's unduly broad interpretation of statutes which was condoned by the judiciary's avoidance of judicial review, as shown below.

(i) Cabinet Order of 10 August 1950

Against the backdrop of the communists' conquest of China's mainland by October 1949 and attempted conquest of Korea in June 1950, Japan's *de facto* rearmament began in the guise of a counter-communist-insurgency police force following General Wedemeyer's earlier idea of drawing a line between army and police, and his proposed interpretation that

the disarmament clause banned any heavy armament beyond that of 'constabulary', which might be equipped with not more than 105mm Howitzers (Wedemeyer, 1948). Wedemeyer thought such a distinction was necessary to enable Japan to resist communist subversion without infringing the disarmament clause of the new constitution. Wedemeyer believed that an infringement of a part of the new constitution by the occupying power would undermine the Japanese compliance with the other parts of the new constitution, including the Bill of Rights (Wedemeyer, 1948).

On 10 August 1950, such a counter-insurgency police force, namely the 'Police Reserve' was established. Following the Chinese aggression in Korea in late November 1950, the Police Reserve was provided with 105mm Howitzers and 399 light tanks, which fell within 'police' (constabulary) armaments by Wedemeyer's definition. As the risk of Soviet aggression in Hokkaido loomed in early 1951, the USA moved to 'rearm' Japan i.e., to provide the Police Reserve with Howitzers more than 155mm in caliber and medium tanks (Joint Chiefs of Staff, 1951), which no longer fell within 'police' armaments, but clearly within 'military' armaments by Wedemeyer's definition.

The legal basis of the Police Reserve as of 10 August 1950 was a Cabinet Order. At that time, the Police Reserve's firearm was seen by US military experts to be that of police, and as such, there was a margin of appreciation to hold it not necessarily unconstitutional. However, after the arrival in Japan from the USA of 155mm Howitzers and medium tanks, which US military experts regarded as 'military' and earmarked for the use by the Japanese by September 1951, it became increasingly difficult to say that the Police Reserve was not unconstitutional, even though it was not until 7 August 1952 when President Truman signed NSC 125-2 that the rearmament of Japan with such heavy weapons was launched (Underwood, 1952).

(ii) Judicial Review of Police Reserve 1952

The constitutionality of the budgetary spending on the Police Reserve after 1 April 1951 was retrospectively challenged in judicial review proceedings on application of Suzuki Shigejiro, the leader of the Socialist Party Leftists, to the Supreme Court soon after the coming into force of the San Francisco Peace Treaty on 28 April 1952, and the Diet enacted the Police Reserve Order Amendment Act on 27 May 1952 to give the legal bases of the Police Reserve the force of statute. The reasons supporting the Socialists' application were submitted as late as 16 July 1952, a fortnight before the Imperial Assent to the National Safety Agency Act dated 31 July 1952, which Prime Minister Yoshida called 'a cornerstone on which national defence forces are going to be built' (Shibayama, 2010, p. 489). The said Act of Diet made the Police Reserve and the Maritime Guards independent of police and coast guards, respectively, and reorganised

them into the National Safety Force and the Maritime Safety Force, respectively. On 8 October 1952, the Supreme Court dismissed the application without deciding on the merit, on the grounds that Article 81 of the Constitution was a Japanese restatement of the rule of Marbury v Madison 5 US 137 (1803) and as such, the Court could not review the constitutionality of any piece of legislation in the absence of concrete legal dispute between parties (Minshu 6-9-783).

(iii) Self-Defence Forces Act 1954

Following the Mutual Security Act (MSA) Defence Agreement between the USA and Japan in March 1954, which obliged the latter to 'develop... and maintain... its defensive strength' (Article 8), Diet enacted the Defence Agency Act 1954 and the Self-Defence Forces Act 1954 in June, which mandated the Ground, Maritime and Air Self-Defence Forces to 'defend Japan against direct and indirect aggression' (Article 3). The Chief of Cabinet Legislative Bureau (comparable to the Attorney-General) interpreted the Self-Defence Forces as 'defensive strength', which did not fall within 'war potential', which was banned by the Constitution. This interpretation is too broad, as distinct from 'literal', because there is no such margin of appreciation in the constitutional ban on 'land, sea, and air forces as well as other war potential'. The insertion of words like 'self-defence' cannot possibly qualify the scope of the constitutional ban.

(iv) Naganuma Case 1982

The constitutionality of the Self-Defence Forces Act 1954 was challenged in a class action in Naganuma, Hokkaido in 1969, seeking to quash a Cabinet Minister's decision to lift the forest reserve designation for the purpose of building surface-to-air missile facilities there. On 7 September 1973, the court of first instance quashed the decision on the grounds of the unconstitutionality of the Self-Defence Forces. On 5 August 1976, the appellate court allowed the appeal by the defendant Minister on the grounds that the unelected members of the judiciary such as themselves ought to defer to the outcome of democratic process, i.e. 'Act of Government' such as the Self-Defence Forces Act, which they held was not necessarily *prima facie* unconstitutional. On 9 September 1982, the Supreme Court dismissed the appeal by the original plaintiffs, due to their lack of *locus standi*, holding that their alleged interests pertaining to the forest reserve's flood-prevention functions were not the direct object of protection of the forest reserve designation (Minshu 36-9-1679). The Chief Justice of Japan, Dr. Dando, wrote a dissenting opinion explaining the difficulties of denying the *locus standi*. The Supreme Court's very lengthy ruling allows an inference to be drawn that the panel of five justices almost unanimously believed that the Self-Defence Forces Act was, by any stretch of imagination, *prima facie* unconstitutional, because otherwise, they could have simply agreed with the appellate court below.

Such a convoluted political play on the part of the Supreme Court in avoiding any pronouncement on the constitutionality of the Self-Defence Forces Act, which runs at risk of causing lengthy delay in the administration of justice and of distorting language, helps the disarmament clause keep surviving 'upstairs'; in other words, in the mythical/spiritual domain, without enforceability in the real/practical domain. In theory, the judiciary can force the legislature to initiate the process of constitutional amendment by making explicit the inevitable conclusion that the Self-Defence Forces Act is *prima facie* unconstitutional. In practice, they are most reluctant to do so. The contrast with Magna Carta is clear: its mythologisation helped efforts, sometimes in the form of wars and revolutions, to ensure the enforceability, while that of the Japanese disarmament clause helps enhance its ambiguity and encourages its non-enforceability.

(2) (b) Identity Crisis

The mythologisation of Magna Carta occurred while the identity of England as a Protestant kingdom was under threat during the course of the seventeenth century. Similary, the mythologisation of Article 9 of the post-war Japanese constitution occurred in the aftermath of the collapse of their imperialist identity as the land of warriors, who were to be immortalised in Yasukuni Shrine as 'martyrs' when they were killed in action in the service of their emperor.

(3) Out of touch

The survival of the disarmament clause without enforceability against a statute in open defiance of it, i.e. the Self-Defence Forces Act, suggests that the clause is out of touch with reality. Such a state of affairs in Japan is qualitatively different from Magna Carta being 'out of touch with reality' in both the United Kingdom and the United States today, because the myths of Magna Carta have been rendered into legally-enforceable positivist norms in both countries for centuries. Rather, Japan's post-war armed forces being established in open defiance of the constitutional ban is reminiscent of the beginning of the end of Imperial Japanese armed forces: '*Defiance in Manchuria*' (Ogata, 1964), which involved the decoration and promotion to disciplinary positions of the General Staff, of those who ought to have been charged with a capital offence under Article 35 of the Army Criminal Law Act 1908 banning the initiation of hostilities against a foreign country without lawful reason (Hatashin, 2016, pp. 186-190).

5. Conclusions

While it is apt to consider the Japanese constitutional pacifism a myth following Jacques Ellul's sociology of propaganda, Ellul's formulation of the transformation of ideology into a myth is likewise applicable to the process of turning into myth the propaganda involving some

misinterpretations of Magna Carta. The iconisation of Magna Carta in the English language and that of the Japanese constitution's disarmament clause in the Japanese language, however, involve 'mythologisation' in different senses. In the former, the myth encouraged the development of the modern concept of constitution guaranteeing the bill of legally-enforceable human rights. In the latter, the myth helps the disarmament clause survive 'upstairs' as an icon of pacifist nationalism without legal enforceability, and as such, tends to undermine rather than help the rule of law.

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