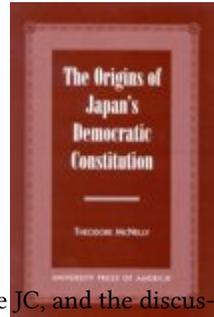


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Theodore H. McNelly. *The Origins of Japan's Democratic Constitution*. New York and Oxford: University Press of America, 2000. xiii + 221 pp. \$61.00 (cloth), ISBN 978-0-7618-1637-9.

Reviewed by Klaus Schlichtmann (Kiel University)
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Professor McNelly is best qualified by his long experience and eminent scholarship to deal with the subject of the Constitution of Japan (JC) with utmost expediency, by presenting a detailed analysis. In the preface the author describes how his grandfather, a missionary to Japan in 1889, had enlightened the boy about the “undemocratic features” of the Meiji Constitution, the predecessor to the 1946 document. Born in 1919, the author served during the Second World War as a civilian with the US Army Security Agency, the predecessor of today’s National Security Agency. In 1946 the Civil Intelligence Section in MacArthur’s General Headquarters employed his services. Having been witness to the celebrations for the promulgation of the new Constitution, McNelly in 1949 began his “doctoral studies in the newly established East Asian Institute at Columbia University”, under the renowned Sir George Samson and professor Hugh Borton, both leading policy makers for the occupation of Japan. Consequently, his dissertation was “on the origins of Japan’s postwar constitution” (p. vii). After completing his studies, he became professor in the Department of Government and Politics at the University of Maryland, until his retirement about a decade ago. The timely publication provides detailed background, and valuable insights for all those interested in the process and circumstances of the making of the JC in 1946.

In Chapter 1 (pp. 1-29) the author gives an elaborate description of the workings of the Government Section of SCAP and its personnel who “authored a model democratic constitution for Japan” (p. xi), and made it palatable to the Japanese government. The second chapter (pp. 31-53) deals with the power struggles among the Japanese political elite on the one side and the allied authorities and rivaling forces within the American government on the other. Chapter 3 (pp. 55-88) describes the ac-

tual process of writing the text of the JC, and the discussions and constellations among MacArthur staff members. Chapter 4 (pp. 89-104) evaluates how the imperial institution was “reinterpreted” and how the forces that were at work on the Japanese side influenced the drafting of the document. The remaining three chapters are devoted to the pacifist stipulation in the JC, i.e., Chapter 5 (pp. 105-128), “General MacArthur and the Constitutional Disarmament of Japan,” Chapter 6 (pp. 129-145), “General MacArthur’s Pacifism,” and Chapter 7 (pp. 147-169), “Japan’s ‘Peace Constitution’ and World Politics”. The text in Chapter 5 is more or less identical with a lecture bearing the same title to the Asiatic Society of Japan in 1981, which was subsequently published in the Society journal and included a discussion by Charles L. Kades, the “leader of the American drafters” of the JC (p. 56) closely involved in the writing of Article IX. Chapters 6 and 7 as well as chapters 1 and 4 also appeared separately in different publications mostly in the 1980s. An “Epilogue” (pp. 171-174) rounds out the volume by giving an account of the 1997 commemorative events on the occasion of the Fiftieth Anniversary of the JC, and describing the persons involved.

Unlike in Germany, where the government was replaced by an Allied military administration, the Japanese government continued to work alongside the occupation. Thus in October 1945 a new Japanese government was installed following the demise of the Higashikuni cabinet, with Shidehara Kijuro as Prime Minister, an old diplomat who as foreign minister had pursued a conciliatory policy toward the powers, including China, between 1924 and 1932. Following General MacArthur’s suggestion to Prime Minister Shidehara on October 11, 1945, that postwar reforms required “unquestionably ... a liberalization of the [Meiji] Constitution”, which had facilitated the ad-

vance of militarism in the 1930s, an “informal committee of experts” on the constitution was appointed under the leadership of Matsumoto Joji, minister of state without portfolio in the Shidehara cabinet, to examine the matter (p. 3). After political parties had been reinstated, in a popular surge to establish the new political foundations for post-war Japan, the Japanese people produced several draft constitutions, of which that by the Kempo Kenkyukai, the Constitution Research Association, published on December 16, 1945, and submitted to the Shidehara cabinet (p. 60), was the most prominent. It was immediately translated into English. The American drafters, especially Milo E. Rowell, a lawyer and member of the steering committee, and Charles Kades, the committee’s chairman “emphasized its [the Kempo Kenkyukai’s draft’s] relevance” to the work of writing the JC (p. 60). Professor McNelly points out that Rowell had the draft “very much on his mind, and very likely reminded other members of the steering committee of it” while Kades “especially valued” the Japanese proposal as it “provided strong evidence” of progressive Japanese opinion (p. 61). McNelly traces the origin of the provisions for popular sovereignty and the designation of the status of the emperor to this indigenous source (pp. 98-99). The fact that “twenty-two Americans wrote the constitution within a week” (p. 8), between February 4 and 12, also suggests that they would have consulted the Japanese draft on several occasions, or even taken it to guide them, just like they consulted the American constitution, and other legal sources (pp. 81ff.). Suffice it to say that the draft produced by the Matsumoto committee “fell short of SWNCC requirements” (p. 5) and was rejected after it had been published prematurely by the *Mainichi Shimbun* on February 1, 1946. This obviously set the Americans, who were already in possession of the Kempo Kenkyukai draft and, almost certainly, the legendary “MacArthur Notes” seriously working.

The “Reform of the Japanese Governmental System” (called SWNCC-228) had been decided by the inter-departmental State-War-Navy Coordinating Committee (SWNCC) in Washington, on January 7, 1946, but no immediate action was taken. When, however, the members of the Far Eastern Advisory Commission (FEAC, later the FEC) on their visit to Tokyo in mid-January displayed “great interest” in the constitutional matter, this, and the impending danger of interference by a committee that would include communist countries, “stimulated SCAP headquarters to concern itself with constitutional revision” (p. 4). On January 24, Shidehara visited General MacArthur, and the two men had a long conversation.

Unless we believe General MacArthur’s and Prime Minister Shidehara’s accounts, the subject of their talk is not clear, as “no one else was present” (p. 107), and Shidehara kept no memo of the event. Subsequently, on February 4, General Courtney Whitney, the chief of SCAP’s Government section “called a meeting of Government Section personnel” saying that MacArthur had “entrusted them with drafting a new Japanese constitution” (p. 5). However, the project was initially “supposed to be kept completely secret,” and “not only from the Japanese but also from personnel in other SCAP sections” (p. 70). The basis for the American draft, apart from the draft of the Kempo Kenkyukai, were the MacArthur Notes already mentioned, which concerned the status of the emperor, the abolition of war, abandoning the feudal system (p. 55), and the budget which curiously was to be patterned after the British system. The MacArthur Notes, according to Charles L. Kades (Whitney chief aide), had either been written by MacArthur himself, or “dictated by MacArthur to Whitney” (p. 5), though its origin is still clouded in mystery—unless, again, one were to believe the chief participants involved. What seems to be clear is, as Professor McNelly points out, that it is “improbable” that the provisions of SWNCC-228 “directly inspired the MacArthur Notes” (pp. 6 and 116). There is no evidence that the American government had any influence or policy to abolish war in the JC. But is there evidence then that the MacArthur Notes were prepared only after February 1, 1946, i.e. after General Whitney had “sent a memorandum to MacArthur (written under Kades direction)” outlining “the scope of MacArthur’s authority in the matter of constitutional reform and the urgent need to take action” (p. 116)? The author appears to think so, but actually no evidence is presented. However, this is crucial for determining the authorship of Article IX.

Professor McNelly next considers the possibility that “the ideas originated with Whitney, who then obtained MacArthur’s assent to them” (p. 5); however, Whitney in his biography of MacArthur (1959) confirmed that—in McNelly words—it was Shidehara who “suggested (on 24 January 1946) to General MacArthur not only a ban on war” but also—inexplicably? —“a ban on arms” (p. 106). The published accounts by other insider participants such as Harry Emerson Wildes (1954) and the historian Justin Williams (1979) also support Shidehara as the originator of Article IX.

In spite of all this evidence, McNelly is not happy with simple conclusions, and apparently favors “the leader of the American drafters”, Kades (p. 56), whom he interviewed personally on several occasions. “Kades had since

his law school days admired the Kellogg-Briand Pact (the Pact of Paris, or the 'General Treaty for the Renunciation of War')", and had in mid-January suggested in a conversation with Whitney—while on the way to a meeting with Shidehara—that the “Emperor could issue an imperial rescript for renouncing war, which might also help remake the Japanese international image and carry out the Potsdam declaration” (pp. 109-10). The author suggests a “genealogy of the constitutional ban on war” from “Kades to Whitney to Shidehara to MacArthur” (p. 110). However, Kades himself favored the Japanese emperor who in his “famous 1 January 1946 rescript mentioned the construction of a new Japan ‘through thoroughly being pacific’” (p. 111) or, alternatively, Shidehara (Kades 1989: 224), suggesting a Japanese origin. As Justin Williams pointed out (1979: 42), Shidehara had been “himself a participant in the discussions that led to the Kellogg-Briand Peace Pact”, like his colleagues in office, Aristide Briand, Frank B. Kellogg and Gustav Stresemann, who as foreign ministers had signed the pact. Professor McNelly concedes that also, “of course, the 1 January rescript was in part a product of Premier Shidehara’s authorship, so that in that sense Shidehara may have supplied inspiration to Kades and through Kades to Whitney”, Kades having himself “said that he got the idea of an imperial rescript renouncing war from the emperor 1 January rescript and the Kellogg-Briand Pact” (p. 111).

The author further maintains that while it is not known whether Kades’ suggestion to Whitney was made before (the author believes it was before) January 24, or after, “in either case the Kades suggestion seems crucial” (p. 110). But if that were so, what was the reason for Kades to cloud his own authorship? In his 1989 “Discussion of McNelly’s Paper” in the *Political Science Quarterly* (vol. 104, no.2) Kades also stated that besides what seemed to be his first choice, i.e. the emperor and Shidehara, “it could have been MacArthur or Whitney, whoever was the author of the penciled notes” (Kades 1989: 224, emphasis added). Could the handwriting have been Shidehara’s? As the notes have disappeared after Kades returned the original copy to Whitney (p. 115), we may never know.

Of course, if it was Shidehara who suggested the abolition of war and perhaps some part of the other provisions captured in the MacArthur Notes, and if “the notes had been written by MacArthur personally or dictated by MacArthur to Whitney” (Kades: 224), then this would explain why Shidehara did not care to make or keep a memo of the event—a fact that has been criticized and used to support the position that Shidehara did not sug-

gest the contested proviso. In any event, it is most likely that MacArthur either wrote the notes himself in Shidehara’s presence or dictated them to Whitney shortly after the legally trained Shidehara (who had studied law under Hozumi Nobushige) had made his suggestion; however, feeling that he had to “explain” this novel idea to the outside world, MacArthur inserted (perhaps, having questioned Shidehara on that point, also on the latter’s suggestion) the phrase: “It relies upon the higher ideals which are now stirring the world for its defense and its protection”—a sentence that otherwise would have no particular legal function in the document.

When the Far Eastern Commission (FEC) started operating toward the end of February, including new representatives from China, Australia, the Philippines, the Soviet Union (all former enemies of Japan), some of its members expressed doubt “that the draft constitution expressed the free will of the Japanese people”. Their fear, however, “that it would be pushed through the Diet without sufficient deliberation” (p. 14) was unfounded—although the “amendment procedure prescribed by the Meiji constitution” was followed to preserve “legal continuity”, which “required ... the emperor’s formal initiative.” Having succeeded in outwitting the FEC by speedily presenting its own draft constitution, the Americans had also obtained the commission’s approval for retaining the emperor and preserving the throne, “to facilitate democratization of Japan.” Although the language barrier sometimes contributed to some “widely noted” discrepancies “between the published English and Japanese versions” (p. 19), on June 21, 1946, the Japanese government submitted the draft constitution to the Diet (p. 15). A week later it “was referred to a special committee of seventy-two members representing all political parties.” Following submission to another subcommittee, deliberations went on until August 20 (p. 17). After further lengthy deliberations, the new Constitution of Japan was “promulgated in the form of an amendment to the Imperial Constitution on November 5, 1946, to become effective on May 3, 1947” (pp. 24-25).

In spite of the secrecy surrounding the making of the JC (p. 70), for various reasons, SCAP Government Section “published virtually the whole story, amply documented, in its *Political Reorientation of Japan in 1949*” (p. 19) without, however, revealing the origin of the JC’s “war-abolishing clause”. The most controversial issue, more secret than everything else taken together, obviously was Article IX.

Concerning the historical background of the renun-

ciation of war, Professor McNelly correctly refers to the Kellogg-Briand Pact, and the American “outlawry” movement. Constitutional amendments to outlaw or make declaration of war difficult if not impossible were suggested already in the 1920s and ’30s. U.S. Congressman Louis Ludlow had proposed an amendment in the 1930s providing that “except in case of attack on United States territory ... ’the people shall have the sole power by a national referendum to declare war or to engage in warfare overseas.’” Furthermore, philanthropists and pacifists like Andrew Carnegie before the war, and “Salmon [Oliver] Levinson in the early 1920s” advanced the idea of outlawing war “by means of a treaty”, which led eventually to the Pact of Paris (p. 113). Unfortunately, in his evaluation of Article IX, the author neglects and omits its principal feature, limitation of national sovereignty, which is an essential ingredient for creating, in the words of Article IX, “in international peace based on justice and order” based on the international rule of law—or even a world federation, as Takayanagi Kenzo, Yukawa Hideki and Albert Einstein envisioned. It would have contributed to understanding Article IX better, if the author had further made reference to other post-1945 constitutional provisions, e.g. in France, and Germany. The idea is not that “other countries might incorporate similar clauses [like Article IX] into their constitutions” (p. 147), but to take successive steps toward bringing the world under the rule of law. In addition, it might have been useful to mention not only that the United Nations Charter “forbade its members to threaten or use force against any state” (in fact this might make “war bans in constitutions” seem “redundant” p. 134), but also complementary international law, e.g. the majority ruling of the International Military Tribunal of the Far East (IMTFE), which referred to the Kellogg-Briand Pact, stipulating that “the right of self-defense does not confer upon the state resorting to war the authority to make a final determination upon the justification for its action” because “[a]ny other interpretation would nullify” the (still binding) Pact, and also the U.S.-Japan Security Treaty stating in Article X (originally Article V) that the Treaty “shall remain in force until in the opinion of the Governments of Japan and the United States of America there shall have come into force such United Nations arrangements as will satisfactorily provide for the maintenance of international peace and security in the Japan area.” If that comes about, major parties in Japan have in the past agreed even to dismantle the Self-Defense Forces. The inclusion of this article in 1951, apparently, was also brought about by Japanese initiative.

In fact, while he was prime minister, repeatedly Shidehara “had been suggesting in cabinet meetings ... that in the draft constitution currently being discussed in the cabinet [i.e. the Matsumoto draft] he favored the deletion of all references to the military” (p. 124). However, when the decision was made to adopt either Proposal A (i.e. with reference) or Proposal B (lacking reference to the military) from among the drafts, the one containing the military provisions, i.e. Proposal A, was given preference. It was then that Shidehara went to see MacArthur to put a stop to what by his sincere conviction, and all his diplomatic experience, he opposed. Obviously, an adequate expression had to be found to correspond to “the higher ideals which are now stirring the world for its defense and its protection” (p. 5). It should also be taken into consideration that, naturally not everybody agreed with Shidehara’s views, and many, including Americans, who gave their opinion were not likely to accept that Shidehara could have originated the idea, for any reason. Not only were policymakers opposed, many were ignorant of what those “higher ideals” “stirring the world” were. A comparison with other constitutions would therefore have been helpful.

As to Shidehara, even a great scholar like John Dower in his 1999 *Embracing Defeat* presumed Shidehara to have been ambassador in London (Dower: 218), and not “deeply knowledgeable about the United States” (Dower: 354), when in fact he had been ambassador to Washington from 1920-22, and chief negotiator on the Japanese side at the Washington Naval Disarmament Conference, had many friends in the U.S. administration before the war and was also familiar with the movement for the outlawry of war. Without going into the details of Shidehara’s diplomatic life, it is clear that he opposed the military as foreign minister in the 1920s, and exerted a positive influence on China. When the Chinese did not reciprocate his conciliatory diplomatic overtures, the Japanese military, which he detested, put an end to his efforts. His name then was high on their death list. During his “inner emigration” he participated in a well-known group extending “peace feelers” to bring about an early end to the war (also conspicuously overlooked in Dower’s 1988 *Empire and Aftermath*).

All in all, if Shidehara were ever considered a credible candidate for authorship of Article IX, it would have been necessary also to try and find evidence in Shidehara’s own life. The assertion that Shidehara had shown no interest in and was even opposed to writing a new constitution (pp. 3 and 119) carries little weight if we consider that the limitation of national sovereignty, nec-

essary to constitute an effective international organization may be achieved by other means also. (The constitutions of Germany, and some twenty countries already provide for transferring or limiting sovereign powers, for the organization and defense of peace, by enacting subsequent legislation in parliament.)

Although Professor McNelly mentions that “MacArthur and Shidehara both asserted that Shidehara initiated the inclusion” of the war-abolishing clause (p. xii), and discusses the possibility that Shidehara himself suggested the clause to MacArthur, he concludes that Shidehara was most likely not its author. While the “global abolition of war” is considered a “truly noble cause” (p. 169) (like Wells’ open conspiracy?), it seems most scholars have discarded it. Is it because it is advocated by a non-Western (or non-Christian?) country?

McNelly’s evidence concerning Article IX is inconclusive, to say the least. Shidehara was no doubt a

statesman of great integrity. The logical conclusion and most likely scenario therefore is that the missing MacArthur Notes are a memo of the January 24 Shidehara-MacArthur conference. Shidehara’s proposal contributed to speeding up the constitutional process. From that day the events unfolded with swift precision, as Professor McNelly so aptly described, toward the drafting and final adoption of the new JC. If Shidehara’s many-volume diplomatic memories had survived the fire-bombing of Tokyo, we might know more about his motives and background, but as it is, it seems, we have to believe what he and most of the others who were involved in the making of Japan democratic constitution, including MacArthur, have said, i.e. that its war-abolishing provision is an indigenous, and not a foreign product. Although the reviewer disagrees with the author on the question of the authorship of Article IX, the many interesting and illuminating incidents and information make the book worth reading, and should encourage further research.

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