

## Censoring the past? Suggestions on the German, Italian and Japanese approach to the totalitarian past

by Elisa Bertolini \*

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1. – The 20<sup>th</sup> century could be defined as the century of democratic transitions, some successful, some ended in authoritarian/totalitarian States. Some countries, before turning into democracies, experienced an authoritarian/totalitarian interlude, which abruptly interrupted the “natural” transition from a liberal form of State to a democratic pluralistic one. Once such an interlude ends, the main problem faced by the new regime is related to the transition and the handling of the authoritarian/totalitarian past. More precisely, the key issue becomes whether or not a democracy should, or has to, adopt certain instrument in order to protect the new democratic legal order and values and therefore to prevent authoritarianism. In other words, whether a democracy should become militant or not<sup>1</sup>.

All militant, or protected, democracies face a dilemma, the paradox of a democracy that, in order to defend itself compresses freedoms and liberty that on the contrary should protect. However, there is no typical militant democracy; it is

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1 There is a very vast literature on the issue in the last eighty years, since Löwenstein created the definition in the mid-1930s. Kelsen and Schmitt too debated the issue, despite from two opposite points of view. One for all, see one of the most recent contributions, J.-W. Müller, *Militant Democracy*, in M. Rosenfeld, A. Sajó (eds.), *Comparative Constitutional Law*, Oxford, OUP, pp. 1253-1269.

not possible to identify neither a model nor a general theory on the topic. Moreover, there are different degrees of militancy of a democracy and it is convenient to underline that is a country's past that plays the dominant role in shaping the militancy of a democracy.

Based on these considerations, the article will focus on the analysis of the three former Axis countries and their relationship with the totalitarian past, tracing a connection between the degree of militancy (and more broadly the approach to the past) and the effective compression of some fundamental rights and freedoms – mainly freedom of expression, association, assembly and political participation. Indeed, it is not obvious that a militant provision operates and thus limits a given fundamental right or freedom. The aim is to try to understand whether to a higher degree of militancy automatically corresponds a broader compression of rights and freedoms.

As mentioned above, the analysed countries will be Germany, Italy and Japan that – despite sharing a quite similar past – have modulated differently their degree of militancy and therefore their approach to such a past.

The article structure will consist of two main paths of analysis. The first one relates to the instruments of militant democracy enshrined in the Constitutions – and their implementation laws – outlining the concerns they may create or have created in terms of protection of fundamental rights and freedoms. The second one relates to how the past is taught and therefore to whether or not it is unaccepted and therefore, censored.

The second path with respect to the Japanese experience deserves a close examination. Indeed the approach to the past does not present a threat just to the academic, teaching and educational freedom, but also to the freedom of religion and to the separation between State and religion.

2. – The resumption of democracy, or better, of a sort of primitive democracy, characterises the experience of Germany, Italy and Japan, three countries where the democratic values could not take root in the aftermath of WWI. Despite having an historical, social and traditional background quite different one from another, they have undergone a similar process of progressive authoritarianism since the 20s.

Germany and Italy were both young countries, unified only in the second half of the 19<sup>th</sup> century<sup>2</sup>, characterized by a weak bourgeoisie. Considering Japan, the initial substantial difference with the European cultural tradition – embodied both by Germany and by Italy – was overcome following the quick modernisation, or better, “westernisation” , of the country since 1868, when German scholars started to shape the new Japanese legal system. That surely contributed to make Japan culturally and ideologically very close to Germany.

The shared sense of treason in Germany and Italy, derived from the 1919 Versailles Peace Treaties, created a fertile ground for right wings movements formed by farmer and veterans, who blamed the liberal State (then trying to evolve into democracy) for failing the country<sup>3</sup>. This started a period of social unrest that finally led to the 1922 march on Rome in Italy and the Nazi victory in 1933 elections in Germany.

In Japan, the failure of the so-called “Taishō democracy” – also due to the premature death of Emperor Taishō – and the progressive shift towards an authoritarian regime cannot be ascribed to a political party able to catalyze the social unrest and channelling it into a concrete political alternative to the legal order of the time. On the contrary, the conservative and reactionary interpretation of the imperial system (*kokutai*) and the progressive involvement of the military in the political life were the two elements that found the Japanese fascist State (also

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2 Italy became a unified country in 1861, but Rome was conquered only in 1870. As far as it concerns Germany, the unification of the country followed the Franco-Prussian war of 1870 and the birth of the Second Reich was proclaimed at Versailles Palace in 1871.

3 Despite having won the war, even Italy (where the myth of the mutilated victory nourished nationalistic and right wing propaganda, due to the failed recognition of Italian sovereignty over former Austrian territories on Adriatic coasts which were awarded to the Kingdom of Serbs, Croats, and Slovenes following the enforcement of the ninth of President Wilson’s Fourteenth Points, according to which «A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality») and Japan experienced a period of social unrest that marked a substantial detachment from the previous legal order. Social unrest affected also the victorious countries and it was amplified in Germany by defeat. It was indeed relevant for Germany where the terrible economic situation caused by and following the harsh Treaty of Versailles generated the stab-in-the-back myth (*Dolchstoßlegende*), thus preventing the Weimar Republic to get stronger.

defined as Imperial Fascism, *tennōsei-fashizumu*<sup>4)</sup>).

WWI was therefore the turning point for all three countries. The rise of fascism, generally speaking, with its own declination (Fascism in Italy, Nazism in Germany and Imperial Fascism in Japan<sup>5)</sup>) seemed to be quite natural, being, at least at the beginning, channelled more or less within democratic procedures. That is to say, young and thus inevitably weak democracies and the lack of a solid liberal tradition allowed fascism to take power.

3. – In the aftermath of WWII, the three countries were therefore facing the same challenge: how to build a democracy from a totalitarian experience and how to handle such an uncomfortable past. The answer was to insert in the Constitution safeguard provisions, which should defend the democratic legal order and values from any possible authoritarian comeback.

When considering these protective instruments, the most common choice (made also by other countries other than the ones here considered) is the political party ban. Germany and Italy adopted this instrument, while Japan introduced a more general but at the same time specific ban. Beside this, in Germany, which is considered the emblem of militant democracy, other provisions are as well instruments of militant democracy, such the forfeiture of rights or the so-called eternity clause.

On the contrary, with respect to the second path of analysis, related to the freedom of education (and also academic freedom) and the teaching of the past, the differences among the three countries are more consistent, revealing an opposite attitude between Germany and Italy on the one hand and Japan on the other hand.

This paragraph will focus on the first path of the analysis, namely the safeguard instruments. The party ban is the most common one but not the only one adopted by constitutional documents.

When considering political participation, Germany, Italy and Japan provide for a particular instrument that may affect political participation's rights, as well as the

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4 See M. Maruyama, *Thought and Behaviour in Modern Japanese Politics*, Oxford, Oxford University Press, 1963.

5 For one of the more effective comparison, see P. Brooker, *The Faces of Fraternalism: Nazi Germany, Fascist Italy, and Imperial Japan*, Oxford, Oxford University Press, 1991.

freedom of expression and of assembly.

The instrument is similar but not identical. In Germany and Italy, the Constitution provides for a party ban, whereas in Japan it provides for the exclusion from the executive power of a particular category of citizens. Article 66, paragraph 2 of the Japanese Constitution<sup>6</sup> forbids to appoint any military as members of the executive power.

Moreover, if we consider more closely Germany and Italy, we will see that the party ban is different, being expression of two different approaches. The German is more universal, not being related to a given party (and therefore not even to the past), whereas the Italian is negative, being focused only on a given party, which is strictly linked to the past. The German Constitution enshrines the illegitimacy of any party aiming at overthrowing the democratic State, the so called *Parteiverbot* (Article 21, paragraph 2 of the German Basic Law-GG<sup>7</sup>), while the Italian Constitution provides for the ban of reorganisation of the Fascist Party (XII Transitional and Final Provision, paragraph 1<sup>8</sup>). Both these constitutional provisions have been implemented at a primary level, in Germany through the Political Party Act (*Parteiengesetz-PartG*) at Part VII and more consistently in Italy, through the law no. 645/1952, also known as the Scelba Law (from the name of the then Home Minister).

Moreover, the German Basic Law provides for other instruments, as the forfeiture of basic rights when abusing freedom of expression in particular (Article

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6 «The Prime Minister and other Ministers of State must be civilians».

7 «Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be unconstitutional. The Federal Constitutional Court shall rule on the question of unconstitutionality». The procedure is regulated also by § 13 Nr. 2 and § 43 ff. of the *Bundesverfassungsgerichtsgesetz-BVerfGG* (Law on the Federal Constitutional Court).

8 «It shall be forbidden to reorganise, under any form whatsoever, the dissolved Fascist party». The constitutional provision was enforced through the law no. 645 of 1952 (the Scelba Law), also introducing the criminal offense of apology of Fascism. See C. Bernasconi, *Le disposizioni sanzionatorie del divieto di ricostruzione del Partito Fascista a cinquant'anni dalla loro entrata in vigore*, in *Ann. Univ. Ferrara*, vol. XVI, 2002, pp. 177-241.

18 GG<sup>9</sup>), where the word abuse is to be interpreted as fighting and undermining the democratic legal order. The same protective spirit aims the “eternity clause” enshrined by Article 79, paragraph 3<sup>10</sup>. This clause, despite not preventing a revolution, surely renders a legal revolution impossible<sup>11</sup>.

3.1. – The German *Parteiverbot* consists in giving the Federal Constitutional Court, *Bundesverfassungsgericht* (BVerfG), the power to strike down any political party actively fighting to overthrow the democratic regime<sup>12</sup>. The claim against a political party for infringement of Article 21, paragraph 2 GG can be lodge by the Government (*Bundesregierung*) and both Chambers of Parliament (the *Bundestag* and the *Bundesrat*).

In Article 21 the Founding Fathers of the West Germany tried to conceal the need to have a free and fair democratic competition among political parties with a sort of preventative intervention against a possible threat to the Constitution and to

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9 «Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court».

10 «Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible».

11 M. Klamt, *Militant Democracy and the Democratic Dilemma: Different Ways of Protecting Democratic Constitutions*, in F. Bruinsma, D. Nelken (eds.), *Explorations in Legal Cultures*, 2007, Den Haag, Elsevier, pp. 133-158.

12 See on the point the commentaries to the GG; *ex multis*, H. Maurer, *Staatsrecht*, München, C.H. Beck Verlag, 2010. See also V. Epping, *Eine Alternative zum Parteiverbot. Der Ausschluss von der staatlichen Parteienfinanzierung*, Baden-Baden, Nomos, 2013; A. Dennis, A. Schrittwieser, *Parteiverbot in Deutschland*, München, Grin Verlag, 2013; A.-K. Lang, *Demokratieschutz durch Parteiverbot? Die Auseinandersetzung um ein mögliches Verbot der Nationaldemokratischen Partei Deutschlands (NPD)*, Marburg an der Lahn, Tectum Verlag, 2008.

the new democratic order posed by a political party. Whereas paragraph 1<sup>13</sup> affirms the free establishment of a political party – as well as the conformation of its internal organisation to the democratic principles<sup>14</sup> – paragraph 2 affirms that any party seeking to endanger the democratic order has to be deemed unconstitutional.

As far as it concerns the relationship between Article 21 and Article 9, granting the freedom of association<sup>15</sup>, the BVerfG held that there is no contrast, being Article 21 a special provision with respect to Article 9<sup>16</sup>, the last one then being to be applied to all political groups that are not organised as political parties.

Moreover, the Court has always tried to conceal a provision like Article 21, paragraph 2 with the principles of a democratic pluralistic State which protects fundamental rights and freedom of expression of the individual (Article 5 GG<sup>17</sup>), asking whether such a strong limitation of expression is conform to the

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13 «Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds».

14 The same provision is disposed also by Article 49 of the Italian Constitution. See *infra*.

15 «All Germans shall have the right to form corporations and other associations.

Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited.

The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. Measures taken pursuant to Article 12a, to paragraphs (2) and (3) of Article 35, to paragraph (4) of Article 87a, or to Article 91 may not be directed against industrial disputes engaged in by associations within the meaning of the first sentence of this paragraph in order to safeguard and improve working and economic conditions».

16 The same interpretation will be given in Italy when considering Article 49 with respect to Article 18.

17 «Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution».

Constitution. Here again the Court identifies an analogous status between the two articles, following the interpretation of the GG as a single unity (the so-called *Einheit der Verfassung*).

Up to now, only two times – out of five – the Court held the unconstitutionality of a political party, namely the *Sozialistischen Reichspartei* (SRP), inspired to the Nazi Party, in 1952<sup>18</sup> and the *Kommunistischen Partei Deutschland* (KPD) in 1956<sup>19</sup>. In both cases the constitutionality claim was lodged by the *Bundesregierung*.

In the SRP case, the Government claimed that the party was not founded on democratic principles rather than on the so-called *Führerprinzip*, thus being a sort of follower of the Nazi Party. The overthrow of the democratic order was considered to be the main target of the party. The BVerfG held that the SRP was from all the standpoints a follower of the Nazi Party with whom it shared principles and targets, thus violating Article 21, paragraph 2 GG. Moreover, the party structure did not reflected the democratic principle.

An analogous claim was lodged against the KPD. According to the BVerfG, the party founding principles (and targets), namely the proletarian revolution and dictatorship, were absolutely inconsistent and irreconcilable with a democratic regime. Moreover, the Court identified in an armed uprising the only way for the working class to seize the power. Then, the following step, the proletarian dictatorship, would be characterized by the abolition of the majority principle and of the political opposition, and by the limitation of rights and freedoms of all individuals not belonging to the working class. The Adenauer Government was considered by the KPD as an enslavement from which the German people had to be freed through a revolutionary uprising. And that was, according to the Court, the key element to held the party unconstitutional.

More recently, the Government and the two Chambers of Parliament lodged a constitutional claim against the *Nationaldemokratische Partei Deutschlands* (NPD); but in this case, the Court upheld the constitutionality of the party,

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18 BVerfGE 1 BvB 1/51, decision of the 23<sup>rd</sup> of October 1952.

19 BVerfGE 1 BvB 2/51 - KPD-Verbot, decision of 17<sup>th</sup> of August 1956.



denying the violation of Article 21, paragraph 2 GG<sup>20</sup>. According to the Court, in order to be considered unconstitutional, a party has not only not to acknowledge the democratic principles of the legal system, but mainly has to actively fight against them. That is what the Court firmly affirms since the 1956 decision: «Eine Partei ist nicht schon dann verfassungswidrig, wenn sie die obersten Prinzipien einer freiheitlichen demokratischen Grundordnung [...] nicht anerkennt; es muß vielmehr eine aktiv kämpferische, aggressive Haltung gegenüber der bestehenden Ordnung hinzukommen». That's to say that is not enough for a party to be held unconstitutional not to believe in democratic values and principles; on the contrary, it has to engage into an active and aggressive attempt to overthrow the democratic regime.

3.2. – The Italian approach departs from the German one, opting for a broader range of enjoyment of the political participation, trying thus to limit at the minimum the compression of the constitutional freedom of association *tout court* (Article 18<sup>21</sup>) and of association in political parties (Article 49<sup>22</sup>). That approach also derives from the hostility of the Founding Fathers towards any form of control of party ideology and program<sup>23</sup>, being the Fascist ideological and political repression still vivid. However, it has to be said Article 49 letter excludes any general control on the level of democracy of one party, but it is more under debate

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20 BVerfGE 2 BvB 1/01, decision of the 18<sup>th</sup> of March 2003. On this last case, see the study by D. Antonos, A. Schrittwieser, *Parteiverbot in Deutschland*. Case Study – *Bundesverfassungsgericht, 2BvB 1/01 vom 18.03.2003: Parteiverbot (Demokratie)*, München, Grin, 2007.

21 «Citizens have the right to form associations freely and without authorization for those ends that are not forbidden by criminal law.

Secret associations and associations that, even indirectly, pursue political aims by means of organisations having a military character shall be forbidden».

This article belongs to the Title I (Civil relations) of Part I (Rights and duties of citizens).

22 «Any citizen has the right to freely establish parties to contribute to determining national policies through democratic processes».

This article belongs to the Title IV (Political rights and duties) of Part I (Rights and duties of citizens).

23 P. Ridola, voce *Partiti politici*, in *Enc. dir.*, Vol. XXXII, Milano, Giuffrè, 1982, pp. 66-127 (here in particular p. 74) and its vast bibliographical apparatus.

the link between ideological background and political behaviour, that's to say the internal "procedural democracy". On the contrary, no such a doubt concerns XII Transitional and Final Provision.

This provision can be considered as an exception to Article 49, setting a precise ideological limit to the freedom of political parties. Moreover, it has to be interpreted as the real and unique breaking point with the previous regime. Despite the change of the political regime, post-war Italy showed a basic continuity with respect to the economy and the organisation of the State. Therefore it is possible to give to that provision a preventative character which is lacking to Article 49, going far beyond the "procedural democracy" advocated by the same Article 49. The aim is to strike down a new Fascist Party not for being a concrete threat to the democratic order, but just for its founding ideology.

When considering the XII Transitional and Final Provision, paragraph 1 – strictly linked to Article 17 of the Peace Treaty<sup>24</sup> – should be interpreted as a final and not transitional provision, being immediately perceptive and not just programmatic<sup>25</sup>. Despite this, the legislator decided to enforce the ban through several *ad hoc* legislative provisions rather than to relay on the Criminal Code provisions already in force. This new legislative *corpus* is composed by: legislative decree of the Lieutenant General<sup>26</sup> 195/1945, law 1546/1947 and the Scelba Law of 1952 as modified by law 152/1975, all providing the so called sanctions against

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24 See *infra*.

25 A. Di Gregorio, *Epurazione e protezione della democrazia. Esperienze e modelli di "giustizia autoritaria"*, Milano, Franco Angeli, 2012. G. Galipò, *Partiti antisistema e protezione della democrazia nella transizione costituzionale italiana*, in *Rassegna parlamentare*, 2007, n. 3, pp. 543-560; S. Merlini, *Democrazia protetta e democrazia conflittuale: i casi dell' Italia e della Rft*, in *Democrazia e diritto*, 1989, n. 1-2, pp. 365-395. See also the commentary to the Italian Constitution published by Zanichelli, in particular the volumes devoted to Article 21 (freedom of expression), Article 49 (political parties) and to the Transitional and Final Provisions.

26 Already since April 1944, King Victor Emmanuel started to transfer most of his powers to his son and heir Umberto. This status was formalized after the liberation of Rome in June, when Victor Emmanuel – despite retaining the title of king – transferred his remaining constitutional powers to Umberto, naming him Lieutenant General of the Realm. That's the reason why the decrees enacted up to the King's abdication in 1947 are qualified as of the Lieutenant General.

Fascism<sup>27</sup>.

In particular, the Scelba Law, the most organic and detailed, prohibits the reorganisation of the Fascist Party (Article 1), the apology of Fascism (considered since then a criminal offense) (Article 4), the propaganda for groups oriented at Fascist purposes and the participation in Fascist public meetings and demonstrations (Article 5).

These provisions show a different approach towards the criminal offense of neo-Fascism, in particular when considering the reorganisation of the Fascist Party. The 1945 decree only sanctioned people who tried to recreate the Fascist Party, without further specification. The 1947 law was a bit more detailed, sanctioning the formation of any political party or group that for its aims and violent methods recalled the dissolved Fascist Party.

Article 1 of the Scelba law extends the scope, mentioning any association, movement or group (this one composed by at least five people) pursuing goals proper to the Fascist Party, such as using violence as an instrument of political struggle, advocating the suppression of constitutional rights and freedoms, denying the values of the Resistance, performing racist propaganda or exalting the Fascist *élite*. The article is quite detailed in trying to clearly identify the offense, however the wording recalls values which are not legal but on the contrary open to interpretation and therefore excludes an univocal interpretation of the article itself. The same article, together with Article 6, expands the subjects against whom the provisions have to be enforced, taking into account not just the reorganisers and the participants but promoters, organisers, leaders, participants and financial sponsors.

The sanctions provided by the Scelba Law can be divided into two categories: the one addressed to individuals (Article 2) and the ones addressed to the association/organisation/group itself (Article 3). The first ones are criminal and connected to all the activities above. They can be summarized into detention and fine, both for an amount of time and money depending on the role played in such

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27 A. Perduca, voce *Fascismo*, in *Enc. Giur.*, vol. XV, Roma, Treccani, 1989; P. Barile, U. De Siervo, *Sanzioni contro il fascismo e il neofascismo*, in *Nss. D.I.*, vol. XVI Torino, UTET, 1969, p. 541 ff.; S. Vinciguerra, voce *Fascismo (sanzioni contro il)*, in *Enc. dir.*, vol. XVI, Milano, Giuffrè, 1967, p. 902 ff.

groups/organisations; moreover, there is to mention another sanction, namely the deprivation of civil and political rights. The second category consists on the dissolution and the confiscation of all the property of the association. The power of dissolution is vested in the Home Ministry (with the previous advice of the Council of Ministers), following a court ruling stating that the dissolved Fascist party has indeed been reorganised. It is convenient to note that two different branches of power – executive and judiciary – are concurring to sanction the Fascist revival. However, in cases of necessity and urgency, the Government can proceed to dissolve the association and seize its properties just through a law decree, thus without a previous court assessment.

Article 6 provides for an increase of sanctions for all the individuals deemed guilty for having held public offices during the regime<sup>28</sup> or for having been condemned for collaboration with the Germans (even pardoned).

Some interpretative issues have raised in particular on the notion of association/organisation that could fall under the ban of Article 1, upon which the Italian legal scholars have been quite divided. The key points are two: the size and structure of the association/group (well structured or not) and the scale of the danger (national or not). The wording «any form» should led to the conclusion that the structure and the size of the association are not relevant. The same goes for the entity of the threat, upon which the legislator is quite silent, excepting for the specification of five people; therefore, it seems pretty clear that the entity of the threat that the association can pose is irrelevant for the legislator (five people can obviously pose no serious threat to the legal order). Thus, we have to conclude that what really matters to the legislator is to sanction any association or group of at least five people that can be classified as Fascist according to the parameters set in Article 1.

The courts too have discussed the same issues as the legal scholars. A most rigorous approach states that the number of participants is not relevant but all the same, the association has to pose a national threat<sup>29</sup>. Opposite the approach according to which it is fundamental to assess the substance and the entity of the

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28 The offices are listed at Article 1 of law no. 1453/1947.

29 See Court of Cassation, decisions of 2335/1977, 3492/1979 and 1390/1982.

threat that has to be clear and present<sup>30</sup>.

Article 4 of the law is devoted to the criminal offense of apology of Fascism. Here it is convenient to recall the constitutionality issue raised by the article and quashed by the Constitutional Court<sup>31</sup>. The Court has indeed clarified, since the decision 1/1957 that Article 4 has to be read together with the XII Transitional and Final Provision, paragraph 1. In so doing, what is relevant is that the apology, in order to be considered a criminal offense, has not to be a simple appreciative defence of Fascism, but has to be able to lead to the reorganisation of the Fascist Party. Is that connection to be unconstitutional, not the apology itself.

Also Article 5, sanctioning Fascist gatherings and demonstration, has been scrutinized by the Constitutional Court. Here again the letter – as for Article 4 – has to be interpreted broadly, meaning that the ban does not apply only to any attempt of reorganisation but to any act that may endanger the democratic order<sup>32</sup>. The use of the words fascist demonstrations and public gatherings by Article 5 means that, even if it is possible that the unlawful act may be perpetrated by one single individual, it has to take place in a situation making it suitable to create and spread consensus on the reorganisation of the Fascist Party. It is convenient to focus on the qualification of the gathering as public, meaning that a gathering is public not for the number of participants but for the number of people witnessing to it. Moreover, it is to say that the provision qualifies propaganda and demonstrations as «typical of the dissolved Fascist Party», thus creating a strict link between the limitation and the sanctioned behaviour. Concretely, the gathering, the propaganda as well as the expression have to represent a clear and present danger in order to be qualified as a criminal offenses. Therefore, the substance and the presence of the case is a constituent feature of the offense. It is convenient to say the also the Criminal Code used to provide at Article 272 for some restrictions to the freedom of expression, namely when that freedom aims at the establishment of a dictatorship or at violently overthrow the democratic legal order or at destroy

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30 See Court of Cassation, decision 5773/1980.

31 All the decisions of the Constitutional Court are available, only in Italian, on the official site of the Court: <http://www.cortecostituzionale.it>. In English are available only summaries of the main relevant decisions of the last ten years.

32 See Constitutional Court, decision 74/1958.

the national sentiment. Nevertheless, the Constitutional Court has progressively demolished in the last forty years the criminal offenses of Article 272<sup>33</sup>. Strictly linked to Article 5, is the so-called “Roman salute”, which is still quite frequently used in right-wings public gatherings. On the matter, the case law is quite divided. Despite the Court of Cassation has clearly considered the “Roman salute” as in violation of Article 5<sup>34</sup>, not all inferior courts have conformed to this jurisprudence<sup>35</sup>.

The constitutional and legislative provisions analysed above have to be set into a more vast plan of de-fascistization of the Italian State in the aftermath of the downfall of the Fascist regime first (1943) and of the end of the Nazi occupation then (1945), meaning that – besides the preventative measures aimed at hindering a sort of “neo-Fascism” – it was necessary to punish the fascist crimes and the collaboration and intelligence with the enemy (the Germans) and to purge the public administration as well as politics from fascist bureaucrats and politicians.

It is convenient to note that the de-fascistization of the Italian State started immediately after the downfall of Mussolini in July 1943, firstly with the suppression of the authoritarian institutions, but it continued under the strong impulse of the Allies who insert it among the clauses of the 1947 Peace Treaty.

The Peace Treaty recognizes the efforts made by the Italian Government to dismantle the Fascist apparatus and dissolve any Fascist organisation and advocates that these efforts will continue in the future to avoid neo-Fascism (Article 17)<sup>36</sup>. Besides, Article 15<sup>37</sup> affirms that Italy will take actions to secure all citizens, without any distinction as to race and so on; here clearly the reference is to the discriminatory policy following the enactment of the “racial laws” against Italian

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33 See decisions 87/1966, 193/1985 and 243/2001.

34 See decisions 24184/2009 and 37577/2014.

35 Recently the Court of Milan, decision of 11/06/2015.

36 «Italy, which, in accordance with Article 30 of the Armistice Agreement, has taken measures to dissolve the Fascist organizations in Italy, shall not permit the resurgence on Italian territory of such organizations, whether political, military or semi-military, whose purpose it is to deprive the people of their democratic rights».

37 «Italy shall take all measures necessary to secure to all persons under Italian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting».

Jews in 1938. The part III of the Treaty (Article 45<sup>38</sup>) is devoted to the war criminals and their apprehension and surrender for trial.

3.3. – The Japanese provision restricting the enjoyment of an active political life for those related to the totalitarian experience is much more limited with respect to the German and Italian homologous ones. This is due to the peculiarity of the Japanese Fascism which was not built around a mass party led by a charismatic leader but which was created by the military who worshiped the Emperor and his divine nature. Being the military blamed for having led to paroxysm the Imperial ideology, the 1946 Constitution provides for no political role for the military, meaning that only civilians can have access to governmental offices.

When considering the Japanese Constitution and its most distinguishing provision, Article 9 and the renunciation of war<sup>39</sup>, Article 66 seems to be frankly awkward. If Japan is not entitled to maintain any military forces, as disposed by Article 9, paragraph 2, it should be obvious that no other than civilians will ever have access to governmental positions. However, it is to say that the peculiar drafting process of the Constitution in February-March 1946 may be the reason

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38 « 1. Italy shall take all necessary steps to ensure the apprehension and surrender for trial of:  
(a) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity;

(b) Nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war.

2. At the request of the United Nations Government concerned, Italy shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of the persons referred to in paragraph 1 of this Article.

3. Any disagreement concerning the application of the provisions of paragraphs 1 and 2 of this Article shall be referred by any of the Governments concerned to the Ambassadors in Rome of the Soviet Union, of the United Kingdom, of the United States of America, and of France, who will reach agreement with regard to the difficulty».

39 «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».

at the basis of Article 66<sup>40</sup>. The idea that the 1946 Constitution was a *diktat*, a constitutional document imposed on a defeated country by two atomic bombings, something alien to the Japanese tradition<sup>41</sup>, still pervades a high share of the political establishment (despite mainly conservative)<sup>42</sup>. Therefore, perceiving the Japanese feeling about the Constitution, the US since the enactment of the Constitution considered, and accepted, the idea of a constitutional amendment within very few years, in particular of Article 9. *Real politik* considerations following the birth of the Popular Republic of China and the break out of the Korean War led Japan to re-arm and to establish the Self-Defence Forces and, in the last years, even having a Minister of Defence. That is why, in spite of Article 9, Article 66 has still its *raison d'être*. It is convenient to note that the amendment

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40 On the drafting process, see L.W. Beer and J.M. Maki, *From Imperial Myth to Democracy: Japan's Two Constitutions, 1889-2002*, Boulder, University Press of Colorado, 2002; D.M. Hellegers, *We, the Japanese People: World War II and the Origins of the Japanese Constitution*, Stanford, Stanford University Press, 2 vol., 2001; and S. Koseki, *The Birth of Japan's Postwar Constitution*, Boulder, Westview Press, 1997. See also E. Seizelet, *Monarchie et démocratie dans le Japon d'après-guerre*, Paris, Maisonneuve & Larose, 1990. A first-hand account is offered by two drafters: C.L. Kades, *The American Role in Revising Japan's Imperial Constitution*, in *Political Science Quarterly*, vol. 104, n. 2 (Summer 1989), pp. 215-247 and also by C. Whitney, *MacArthur: His Rendez-Vous with History*, New York, Alfred A. Knopf, 1956. For all the relevant preparatory documents, see [www.ndl.go.jp/constitution/e](http://www.ndl.go.jp/constitution/e).

41 On this point, it is very curious to mention that in the following months after the Constitution has entered into force, the Government undertook a "Japanisation" campaign of the Constitution. See D.F. Henderson (ed.), *The Constitution of Japan: Its First Twenty Years, 1947-1967*, Seattle, University of Washington Press, 1968. The same idea of Japanising something alien to Japanese culture was at the basis of the translation of the constitutional text from its original English version, where the Government tried, using precise and particular Japanese words, to slightly modify the meaning of the provisions; see K. Inoue, *MacArthur's Japanese Constitution: A Linguistic and Cultural Study of Its Making*, Chicago, The University of Chicago Press, 1991.

42 The public opinion has always been much more in favour of the present Constitution. That is surely one of the reasons why the Constitution hasn't been amended yet; the second is that the law on the constitutional referendum, last step of the amendment procedure *ex* Article 96, paragraph 1, has entered into force only in 2010.



draft proposal presented by the LDP<sup>43</sup> majority in summer 2013<sup>44</sup> proposes to change the language so to read, instead of «must be civilians», «may not be active-duty military personnel».

Therefore, Article 66 is the only restriction concerning political participation, meaning that there is no constitutional provision sharing the same basis of the German *Parteiverbot* or the Italian XII Transitional and Final Provision. At a first glance, it can be no surprise at all. Indeed Japan did not have a structured right-wind mass party, just a militaristic right-wind ideology that was linked to the traditional *kokutai* ideology and associated to the Emperor. Moreover, the Emperor, the centre of that ideology was still at his place after WWII. If there were no mass party, a constitutional provision aimed at striking down a new fascist party – as the German and the Italian ones – could seem useless. Nevertheless, it is not the case; and for two main reasons. First, the German *Parteiverbot* is a general ban on any subversive party, regardless of its political orientation; therefore, considering it a simple ban on reorganising the Nazi Party or a party based on the Nazi ideology will surely be reductive and misleading (as the case law has demonstrated). Second, not having had a Fascist party during the 30s does not imply that it would be impossible the organisation of a new political party referring to a Fascist ideology; in that case, a sort of preventative constitutional provision cannot be said to be unreasonable.

Despite the constitutional silence on the issue, it would be all the same possible for the legislator to provide for some restrictions on political participation, always within the boundaries set up by the Constitution. That was what the legislator did in 1952, enacting the Subversive Activities Prevention Law (SAPL)<sup>45</sup>. The law, coming just after the end of the occupation and the signature of the San Francisco

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43 The majority party almost since its foundation in 1955.

44 The LDP reform proposal is available, only in Japanese, on the website of the party; see [www.jimin.jp/activity/colum/116667.html](http://www.jimin.jp/activity/colum/116667.html).

45 Law No. 240, 1952. See M. Usaki, *Restrictions on Political Campaigns in Japan*, in *Law and Contemporary Problems*, Vol. 53, No. 2, *The Constitution of Japan: The Fifth Decade* [Part 2] (Spring, 1990), pp. 133-156 (in particular pp. 145-150); J.M. Maki, *Japan's Subversive Activities Prevention Law*, in *The Western Political Quarterly*, Vol. 6, No. 3 (Sep., 1953), pp. 489-511; C.H. Uyehara, *The Subversive Activities Prevention Law of Japan: Its Creation, 1951-52*, Leiden, Brill, 2010.

Peace Treaty, answered the need of the Japanese Government to have an internal security legislation, being deprived of the military backing of the US troops, set punitive measures against organisations engaged in violent and subversive activities, thus preserving «the public safety» (Article 1). Despite it was aimed at replacing all the previous laws regulating subversive organisations<sup>46</sup> – with a particular consideration for nationalistic and militaristic ones – it was a typical Cold War law, showing as its main intent, despite not clearly stated, to control communism. Therefore the *ratio* at the basis of this legislative provision was quite different from the Italian ones, being more focused on protecting internal security against possible communist threats rather than to repress right wings ideology. In so doing, the SAPL is more similar to the German approach, where the punishable political groups are not punished according to their ideology only, but also to their methods. The SAPL aims at striking down any terroristic activity; such activities are divided into two categories: subversive activities properly speaking and ordinary crimes carried out for political motives. Moreover, it is worth to stress four features of the law that may raise some concerns on the approach adopted: first, the law is directed only against organizations, not against individuals, meaning that anyone without organizational ties found guilty of such activities will be dealt with the Criminal Code; secondly, the law is enforced against an organization only after the terroristic subversive activity has been performed; thirdly, there is to be a clear danger that the organization will carry out another terroristic activity in the future; fourth, the law has to be applied within the limits necessary to preserve the public safety.

The law was enforced only few times – eight against individuals and in all cases Articles 38-40 were declared constitutional – and always against left wing organisations<sup>47</sup>. This was not the approach adopted by the SCAP in the first occupation's years, characterised by two provisions: the Imperial Ordinance of February 1946, aimed at the activities of nationalistic and militaristic organizations

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46 For an overview on the repressive apparatus, see R.H. Mitchell, *Censorship in Imperial Japan*, Princeton, Princeton University Press, 1983.

47 See M. Usaki, *Restrictions on Political Campaigns in Japan*, *supra* at n. 48, pp. 147-149 and C.H. Uyehara, *The Subversive Activities Prevention Law of Japan: It's Creation, 1951-52*, *supra* at n. 48, pp. 381-384.

– and thus implementing the Potsdam Declaration (mainly point 10 of the Annex II<sup>48</sup>)<sup>49</sup> – and the following Cabinet Order of 1949, which expanded its regulations to left wing organizations and required such organizations to report the names of their members<sup>50</sup>. However, the Cabinet Ordinance 325 (SCAPIN 548 and 550) was aimed at purging ultra-nationalists. It is convenient to note that – as stated immediately in the aftermath of the enactment of the law by John M. Maki – the SAPL could be interpreted «either [as] a step backward to the totalitarian past or [as] a step forward to a democratic future»<sup>51</sup>. The lack of clarity in the wording and in the definition of such a category of laws as well as the possibility of abuses is of course a source of major concerns. And this despite the tentative countermeasures of the Government, as Article 12<sup>52</sup> and 13<sup>53</sup> that, according to the Government, should prevent any constitutionality issue and any illiberal abuse.

Quite some decades have elapsed since the enactment of the SAPL, the domestic and international context have changed, the communist threat faded away and therefore a new law was passed by the Diet in 1999. Here the target is

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48 «We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established».

49 Also the Surrender Rescript of the 2<sup>nd</sup> of September by the Emperor urged at Article 1 to «adopt all provisions of the Potsdam Declaration».

50 For a broader picture of the post-war context, see again C.H. Uyehara, *The Subversive Activities Prevention Law of Japan: It's Creation, 1951-52*, *supra* at n. 48, pp. 1-20.

51 J.M. Maki, *Japan's Subversive Activities Prevention Law*, *supra* at n. 48, p. 489. Maki was not the only legal scholar not in favour; see the account of the experts hearings at the Diet in C.H. Uyehara, *The Subversive Activities Prevention Law of Japan: It's Creation, 1951-52*, *supra* at n. 48, pp. 297-306 and 339-344.

52 «[the freedoms and rights guaranteed in the Constitution] shall be maintained by the constant endeavour of the people who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public good».

53 «[people's] right to life, liberty and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affair».

the control of organisations who have committed mass murder<sup>54</sup>.

Surely, what emerges and strikes most the attention, in comparison with the Italian case, is the lack of an organic *corpus* of laws/decrees aimed at purging the bureaucracy of all the public servants compromised with the previous regime. This is due to a various number of factors, and not all dependent on the Japanese establishment, mainly the Allies needed to maintain an already formed and capable ruling class, but it remains that it did not helped Japan to recognize the need of a purge and a sort of turnover in its bureaucracy. This is clear in particular at Article 11 of the San Francisco 1951 Peace Treaty, stating that the power to grant clemency, to reduce sentences and to parole with respect to the Japanese nationals sentenced by the International Military Tribunal for the Far East and of other Allied War Crimes Courts cannot be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on recommendation of Japan<sup>55</sup>. That's to say that the US wanted to avoid the coming back in relevant offices of compromised public servants.

4. – Besides the safeguard instruments, another relevant key element in understanding the degree of protection of a democracy and of the influence of the past on the limitation of fundamental rights and freedoms, is the way the past is taught to younger generations. The acceptance expands the academic and teaching freedom and fortifies the democratic values of the nation. The same cannot be said when the past is hidden and contested.

Different models regulates the preparation, approval, selection and adoption of a textbook mechanism. Just to simplify, we can identify two main models based on

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54 In particular, the Aum Shinrikyō was put under surveillance. C.H. Uyehara, *The Subversive Activities Prevention Law of Japan: It's Creation, 1951-52*, *supra* at n. 48, pp. 384-404.

55 «Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the Government or Governments which imposed the sentence in each instance, and on recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan».

the level of intervention of the State: the first one provides for no State control on the preparation of textbooks; that means that there is no need of a governmental approval in order to commercialise them. Whereas the second one provides for a governmental approval, meaning that all textbooks have to conform to given guidelines.

Italy belongs to the first model, whereas Germany and Japan to the second one. Nevertheless, despite belonging to the same model, Japan rises concerns that Germany does not share. Following this consideration, Germany and Italy will be examined together, very briefly in comparison with the more interesting Japanese case.

4.1. – In Italy, there is no control, neither formal nor informal, on the preparation of textbooks. This means that the approval of the Government is not needed in order for publishers to commercialise a textbook. Textbooks are usually written by school professors and published by private publishers. The unique requirement that the Italian Government enforces is the one related to the cost of the textbook, which has to respect official guidelines. The textbook published, is the legislative decree no. 297/1994 that provides for the selection and adoption mechanism. It is the Collegio docenti, a sort of school council, composed by teachers and parents representatives, which selects the textbooks to be adopted in each class. This mechanism grants the maximum teaching freedom, because there is a total freedom of choice of the teacher. Moreover, it also grants to publish textbooks showing slightly different points of view on the past.

Germany, on the contrary, provides for a governmental approval by the School Book Committee of each *Land* because any textbook has to conform the Constitution and the Education Act. Moreover, the control is strict also on the syllabus. For what concerns us most, the totalitarian past, the holocaust is a mandatory subject. Therefore, German textbooks are forced to face the past. Therefore no possibility of revisionism whatsoever. However, textbooks are not produced by the State but as in Italy by commercial publishers.

4.2. – The Japanese experience departs from the one of its counterparts, not sharing the idea of the acceptance of the past. The Japanese establishment

is still incapable of earnestly confronting the past as Germany did, in particular thanks to Adenauer and Brandt; on the contrary, each attempt has been fraught and counterproductive, having polarized the feelings rather than appease them<sup>56</sup>. The different management of the post-war occupation is surely the main reason of such a different approach<sup>57</sup>. The starting point of the Japanese democracy is something more than a mere non acceptance of the Imperial Fascism, being a twisted interpretation of what the Fascist regime was. This process of rewriting the past has become more evident in the last decades, long after the end of the US occupation of the country in 1952. In particular, two basic rights and freedoms are at stake when considering the revisionist approach of the Japanese Government: the academic/teaching freedom and the freedom of religion.

The academic freedom (Article 23 of the Constitution<sup>58</sup>) – but also freedom of expression (Article 21 of the Constitution<sup>59</sup>) – is deeply affected by the textbook screening procedure, in force since 1947, whose constitutionality has been questioned by constitutional scholars and challenged several times before the courts. The famous Ienaga suits (1965-1997) have been one of the landmark constitutional controversies of the contemporary Japanese constitutional history. This mechanism has also a fallout when considering teaching freedom, namely the freedom of teachers in the selection of textbooks.

The freedom of religion – with respect to the separation between the State and religion (Article 20, paragraph 3 of the Constitution<sup>60</sup>) – is undermined by the frequent visits (with an highly symbolic and propagandistic value) paid throughout

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56 On the different ways to face war atrocities between Germany and Japan, see J. Lind, *The Perils of Apology. What Japan Shouldn't Learn From Germany*, in *88 Foreign Aff. 132* 2009, pp. 132-146.

57 See L. Hein, M. Selden (eds.), *Censoring History: Citizenship and Memory in Japan, Germany, and the United States*, Armonk, M.E. Sharpe, 2000.

58 «Academic freedom is guaranteed».

59 «Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

No censorship shall be maintained, nor shall the secrecy of any means of communication be violated».

60 «The State and its organs shall refrain from religious education or any other religious activity».

the decades by prime ministers<sup>61</sup>, ministers of State and high ranking governmental officials to the Yasukuni Shintō Shrine in Tokyō. These visits are controversial because here are commemorated individuals who had died in service of the Empire but where are also enshrined class A war criminals<sup>62</sup>, including former Prime Minister Admiral Tōjō Hideki<sup>63</sup>.

4.2.1. – As mentioned above, when dealing with the approach to the past and the way it is taught to the younger generations, the gap between Japan and Germany and Italy is consistent. Just on paper, Japan belongs to the same model as Germany, sharing both a State approval on school textbooks. However, it is the depth of the State control that makes the difference.

In Japan, textbooks are used to convey historical revisionism. In addition, is the strong connection between conservative historical revisionism and the textbook

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61 Notably, after the 1978 *gōshi*, Fukuda Takeo (1976-1978; once, the very day after the *gōshi*), Ōhira Masayoshi (1978-1980; three times), Suzuki Zenkō (1980-1982; nine times), Nakasone Yasuhiro (1982-1987; ten times), Hashimoto Ryūtarō (1996-1998; once), Koizumi Jun'ichirō (2001-2006; six times) and Abe Shinzō (2006-2007 and 2012-; twice during his second term of office). For a complete overview of all the prime minister's visits to the shrine, even before 1978, see [www.nippon.com/en/simpleview/?post\\_id=19650](http://www.nippon.com/en/simpleview/?post_id=19650).

62 The amount of class A war criminal is 14 out of the 2.466.000 individuals who died in conflicts spanning from the Boshin War of 1868-1869 to the end of WWII. However, the war criminals were enshrined only in 1978. Emperor Shōwa went to the shrine eight times after the war ended: in 1945, four times in the 1950s, twice in the 1960s, and for the final time in 1975. The reason there have been no visits since then is generally held to be Emperor Shōwa's displeasure at the *gōshi* rites for the class A war criminals. The same reason goes for the choice of present Emperor Akihito never to visit the shrine. On Emperor Shōwa's reluctance to visit the Shrine even the recently released (September 2014 the first volume) 61-volume record of his life are not helpful, not addressing the issue; the country inability to face its past hinders to give credit to the complex and troubled figure of Emperor Shōwa (see E. Hotta, *The ghost of Emperor Hirohito*, in *The Japan Times*, 16<sup>th</sup> of September 2014, [www.japantimes.co.jp](http://www.japantimes.co.jp)).

63 On the Tōkyō trial and the issue of Japanese *élite* responsibility, see R.H. Minear, *Victor's Justice: The Tōkyō War Crimes Trial*, Princeton, Princeton University Press, 1971.

screening mechanism<sup>64</sup> that has heated the debate on the constitutionality of such a mechanism<sup>65</sup>.

In 1947, under the impulse of the SCAP<sup>66</sup>, the Government passed a global reform of education, enacting the Fundamental Law of Education<sup>67</sup>, which grants academic freedom, the Act on Temporal Measures Concerning the Publication of School Textbooks<sup>68</sup> and the School Education Act<sup>69</sup>.

It is the last one providing for the textbook screening mechanism, allowing elementary, junior high and high schools to use textbooks compiled by nongovernmental publishers. This marked a shift from the previous regime of government-designated textbooks. However, the law stipulates at Article 34 that

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64 Textbooks are crucial instruments in the process of constructing legitimated ideologies. Young people, it is widely known, are a blank slates both for truth and propaganda. In the official ideology there is a very little room for troublesome war episodes which in most cases are rewritten or completely erased (for some examples, see W. Tan, *The forgotten history: textbook controversy and Sino-Japanese relations*, 2009, in <https://d-scholarship.pitt.edu/7824>; see also, for particular reference to the use of the language as manipulative instrument, C. Barnard, *Language, Ideology and Japanese History Textbooks*, Routledge, London, 2003). The most sensitive episodes are the Nanjing massacre and the issue of the euphemistically called “comfort women”. The issue is particularly sensitive when talking of international relations with South Korea, the nation who “gave” the highest number of “comfort women”. In 1993 the Japanese Government issued an apology statement by the then-Chief Cabinet Secretary Kōno Yōhei, acknowledging for the first time that the military played a role in coercing mostly Asian girls and women into providing sex to Japanese soldiers and sailors at organized military brothels. The statement is available at [www.mofa.go.jp/policy/women/fund/state9308.html](http://www.mofa.go.jp/policy/women/fund/state9308.html). There is a huge, and heated, debated nowadays on the possibility for Prime Minister Abe to issue another statement that should scale down the 1993 statement; however, Abe himself has recently denied such a possibility.

65 S. Saaler, *Politics, Memory and Historical Consciousness in Japan*, in *2010 Special Issue Int'l J. Educ. L. & Pol'y* 64 2010, pp. 64-76.

66 General Douglas MacArthur aka Supreme Commander for Allied Powers (SCAP).

67 Or Basic Act on Education, Act no. 120/2006. The law was recently revised in 2006. This law, even in its original 1947 version, is surely the one showing most the American influence and thus enforcing the new founding values enshrined in the coeval Constitution. For the official English provisional translation, see the MEXT website at [www.mext.go.jp/english/lawandplan/1303462.htm](http://www.mext.go.jp/english/lawandplan/1303462.htm).

68 Act no. 132/1947.

69 Act no. 26/1947.



all textbooks for primary schools have to be authorised by the Education, Culture, Sports, Science and Technology Ministry (MEXT) in order to maintain academic standards. What Article 34 provides for primary schools has to be applied, *mutatis mutandis*, to junior-high schools (Article 49), senior-high schools (Article 62), secondary schools (Article 70) and schools for SNE (Special Needs Education) (Article 82).

The obligation to use screened textbooks should be interpreted as an obligation only towards schools or teachers having decided to use school textbooks, on the assumption that schools can choose whether to use school textbooks or not<sup>70</sup>. The very same Article 34, indeed, provides for the possibility to use both textbooks and other additional materials. Nevertheless, it is obvious that when choosing to use textbooks. Teachers cannot select them freely, being the choice limited only to the authorised ones.

The MEXT competence to screen school textbooks, besides the School Education Act, derives also from the Act on the Establishment of the Ministry of Education, including the screening among its competences (Article 4). The core problem of such mechanism is that law does not define it. That means that everything related to procedures and contents of the textbook screening are entirely entrusted to administrative regulation.

As previously said the MEXT has to ensure that school textbooks are instructive and appropriate and conform to the purpose and policy of education as specified by the law. In order to do so, it is up to the MEXT to provide for Compulsory Education Textbook Examination Standards and Senior High School Textbook Examination Standards as screening criteria for textbook examination. These standards include General Rules, which outline the basic policy for screening, common conditions applicable to all subjects and subject-specific conditions. These conditions are arranged from the following three viewpoints: scope and degree of difficulty, selection/treatment and organization/amount and accuracy, orthography and expression. Considering the scope and the degree of difficulty of the contents, each textbook must include all items specified in the courses of study in a way that has to be appropriate to the mental and physical developmental stage of the

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70 K. Namimoto, *The Current Issues of School Textbook Screening System in Japan*, 2009, paper available at <http://hdl.handle.net/11266/5029>, p. 63.

students for whom they are intended.

The ministerial authorization concludes a screening process, which is composed by different steps.

Publishers first submit a draft version of their textbooks to the MEXT for a double screening. It is indeed the MEXT, better, its textbooks experts<sup>71</sup>, that examines textbooks in accordance with textbook examination standards – meaning that it has to ensure the books meet government-set standards, related, in particular, to the accuracy and fairness of content of political or religious issues –, following the deliberation of the Textbook Approval and Research Council. Therefore, the first screening is not performed by the MEXT itself but by the Textbook Approval and Research Council<sup>72</sup>.

On the report submitted by the Council, the MEXT performs its screening of the textbooks. Following the Council findings on erroneous, unbalanced or inappropriate contents, the MEXT orders publishers to amend their textbooks. Therefore, Council's approval is needed in order to have the textbook authorised. The amended textbooks have to be sent again to the Council to undergo a new screening.

Then textbooks can be adopted by schools. Concerning who has the competence to adopt school textbooks, no explicit provision can be found. However, Article 23, paragraph 6 of the Act concerning the Organization and Management of the Local Education Administration<sup>73</sup>, when providing for the competences of the Boards of Education, explicitly lists all the matters on the management of school textbooks. The MEXT has interpreted the provision in the sense that adoption is a matter on the management of textbooks. Therefore, on that basis, each Board of Education, at the local level (with the assistance of the respective prefectural Boards), selects textbooks – for each educational area established

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71 Textbook experts are full-time MEXT officials appointed based on university teaching experience and other relevant experience.

72 The Council can be defined as an affiliation with MEXT, whose regular and non-regular members are chosen from university professors and teachers of elementary, junior high and senior high schools and other educational institutions. Its composition may vary, because when necessary for the examination of specialized issues, further specialist members are appointed to serve on the Council.

73 Act no. 162/1956.

by the prefectural Board of Education – for municipal elementary, junior high and high schools in the districts they oversee; whereas for national and private elementary, junior high and high schools, it is the principal who is authorized to select the textbook to be used at those schools. The adoption procedures of primary and junior-high schools are provided by the Free School Textbook Act whereas there are no legal provisions for senior-high schools. According to Article 14 of the Enforcement Regulations of the Act, the adopted textbooks must be used for four years (textbooks are screened every four years). Following the provisions of Article 5 of the Act on Temporal Measures Concerning the Publication of School Textbooks, prefectural Boards of Education shall exhibit authorized school textbooks during the period indicated by the MEXT (for 14 days from mid-July) to allow teachers to study the authorized school textbooks to decide the more fit to be adopted. Then a report outlining the required number of textbooks adopted is submitted to the MEXT, in order to allow the Ministry to issue instructions to the publishers indicating which textbooks to be published and how many. On such basis, publishers produce textbooks and supply them to schools through distributors, meaning that students receive the textbooks directly from their schools.

The neutrality and the fairness of the screening mechanism has been questioned several times. The most recent controversy focused on the approval of a history textbook published by the Japanese Society for History Textbook Reform<sup>74</sup>, which placed emphasis on the achievements of pre-war Imperial Japan, as well as a reference to the Greater East Asia Co-Prosperity Sphere with fewer critical comments compared to the other Japanese history textbooks.

The screening issue is critical from several points of view. Besides the one related to the revisionist message it conveys, it is the censorship of the academic and teaching freedoms it may realise to be really controversial from a constitutional standpoint. Furthermore, the constitutionality of the mechanism with respect to academic and teaching freedom has to be questioned at two different levels, corresponding to two different steps of the screening procedure. The first one is at the beginning, affecting the freedom of textbooks' authors, who have to comply

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74 Founded in December 1996, the group promotes a nationalistic view of Japanese history ([www.tsukurukai.com](http://www.tsukurukai.com)).

to ministerial guidelines in order to have their book authorised. The second one is at the end of the process and affects the freedom of teachers in choosing the textbooks to adopt. Their freedom of choice is doubly narrowed, first by the MEXT, performing a first selection, and then by the Boards of Education to whom belongs the competence to draw an adoption list, thus performing a further selection.

It is convenient to point out that the constitutionality issue is not automatically related to the content. Whether the mechanism realises a form of censorship is a problem that has to be faced *a priori*, regardless of the content expressed in the textbooks. Of course, the critical side of the issue has become more relevant because the mechanism's aim prevents a fair look at the wartime experience. What is worth underlining is that according to the Government, the screening mechanism was mainly introduced in order to guarantee the universal right to education. Surely, the fact that all the procedures of the screening phases are behind closed doors does not help to convey such a message; on the contrary, it strengthens the idea that screening equals censorship. Furthermore, the critical core point is that through content selection is not the right to education to be granted but the right to a particular education.

Moreover, the lack of a legislative provision setting up the screening mechanism in detail and providing for clear competences on the adoption of textbooks represents a further bias. The MEXT interpretation based on the aforementioned Article 23, paragraph 6 of the Act concerning the Organization and Management of the Local Education Administration gives the competence to the Boards of Education. However, this interpretation is not consistent with logic and with two other legislative provisions, namely Article 16, paragraph 1 of the Fundamental Law of Education and Article 37, paragraph 11 of the School Education Act according to which the competence should belong to the teachers.

Only the courts can strike down this mechanism and clearly draw the competences corresponding to each step of the screening procedure. Judicial control in Japan is peculiar, following the different approach of the lower courts and the Supreme Court who usually refuses to address the most problematic issues, basically almost never striking down a law. As far as it concerns the textbook screening issue, academic Ienaga Saburō forced the Court to intervene, filing three different civil lawsuits against the MEXT.

There is no need to review here in detail the “Ienaga saga” . It is quite enough to say that professor Ienaga filed three lawsuits against the mechanism: in 1965, in 1966 (while the first one was still pending) and in 1984. In the first case, the mechanism was upheld both by the Tōkyō District and High Court while the appeal was dismissed by the Supreme Court. The second case had a different outcome, since the two Tōkyō Courts ruled against the mechanism, considering it to be a form of censorship, but nothing was clearly said on the constitutionality of the mechanism. The third lawsuit ended with a Supreme Court decision upholding the constitutionality of the mechanism; however, the Court concluded that the Government should avoid, to the extent possible, involving itself with educational content.

On this issue, despite the attempts, both of the Government and the Supreme Court itself could not avoid to address the issue. Nonetheless, the Court confirmed its cautious approach, in particular with respect to the one of the Tōkyō District Court who, on the contrary, expressly faced in several occasions the constitutionality issue.

4.2.2. – Article 20 provides for the freedom of religion, thus departing from the Shintō prominence of the past decades, affirming at paragraph 3 that public servants shall refrain from any religious activity<sup>75</sup>.

Therefore, the visits paid to the Yasukuni Shintō Shrine by cabinet members and prime ministers are a highly controversial issue from a double perspective: first because they can be included in the notion of religious activity and second for the political message they convey (usually taking place on the day commemorating the end of WWII, namely August 15). The issue is sensitive regardless the *gōshi* of the war criminals. The enshrinement of the war criminals just makes the issue more sensitive because it adds the “revisionist” element.

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75 See S. Morimura, *Freedom of Religion and the Separation of State and Religion: A Japanese Case Study*, in *Hitotsubashi Journal of Law and Politics*, vol. 31 (February 2003), pp. 23-30; D.M. O'Brien, *To Dream of Dreams: Religious Freedom and Constitutional Politics in Postwar Japan*, Honolulu, University of Hawaii Press, 1996; and H. Hardacre, *Shintō and the State, 1868-1988*, Princeton, Princeton University Press, 1989. See also S. Richter, *Wo böse Geister spuken – der Yasukuni-Schrein in Tokyo*, in *Japan Aktuell*, 4/2007, pp. 25-49.

Concerning the first perspective, it is convenient to note that it is still controversial whether the visits are unconstitutional or not. The silence of the Supreme Court on the issue is really deafening, here again confirming its attitude of judicial passivity<sup>76</sup>, refusing to address the issue. On the contrary, again the lower courts confirmed their more active attitude in upholding fundamental rights. Both the Fukuoka District Court in April 2005 and the Ōsaka High Court in September of the same year held the visits of the years 2001-2004 of the then Prime Minister Koizumi Jun'ichirō unconstitutional. The decision of the Ōsaka High Court in particular is relevant because it quashed the judgment of the Ōsaka District Court who ruled in favour of the constitutionality of the visits, affirming that Koizumi visited the shrine as a private citizen and not as prime minister, thus not violating the separation between State and religion. The Ōsaka High Court grounded her decision on the political nature of the visits, thus making possible to set up a violation of the State-religion separation. In the following days, Koizumi himself claimed the complete private nature of the said visits, as if he wanted to challenge the Court decision. In the same month of September 2005, also the Tōkyō High Court delivered a decision on the same issue, but with a different outcome than one of the Ōsaka High Court. According to the Tōkyō High Court, the visits were not a violation of Article 20, paragraph 3<sup>77</sup>.

The different attitude of Japanese courts confirmed the definition of *passivisme judiciaire boîteaux* of the Japanese judicial system<sup>78</sup>.

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76 The expression is taken from H. Tomatsu, *Judicial Review in Japan: An Overview of Efforts to Introduce U.S. Theories*, in Y. Higuchi (ed.), *Five Decades of Constitutionalism in Japanese Society*, Tōkyō, University of Tōkyō Press, 2001, pp. 251-277. See also Y. Higuchi, *Evolution récente du contrôle de la constitutionnalité sous la Constitution japonaise de 1946*, in *Revue internationale de droit comparé*, vol. 31, n. 1 (Janvier-Mars 1979), p. 22; H. Itō, *The Japanese Supreme Court: Constitutional Policies*, New York, Markus Weiner Publishing Inc., 1989, pp. 159-220 and J. Satō, *Judicial Review In Japan: An Overview Of The Case Law And An Examination Of Trends In The Japanese Supreme Court's Constitutional Oversight*, in *Loyola of Los Angeles Law Review*, vol. 41, n. 2 (Winter 2008), pp. 603-628.

77 C.H. Uyehara, *The Subversive Activities Prevention Law of Japan: It's Creation, 1951-52*, *supra* at n. 48

78 Y. Higuchi, *Evolution récente du contrôle de la constitutionnalité sous la Constitution japonaise de 1946*, *supra* at n. 63, p. 23.

Alongside the constitutional issue that these visits raise – undermining both the freedom of religion and the separation between the secular and the religious sphere – there is to mention also the moral one, symbolizing, once more, the inability of the country to address some fundamental questions about its past and to come to terms with it.

5. – The model of militant democracy chosen by each country is strictly related to its historical experience and therefore none is alike to another. Despite this, it is possible to identify a common pattern, better, shared instruments of safeguard.

From the comparative analysis the first point to outline is that Italian and Japanese provisions are more intertwined with the totalitarian past with respect to the German one. They directly derive from their experience and therefore their scope is limited with respect to the more general and universal character of the German one. But even so, in comparison with the Italian XII Disposition, Japan's Article 66 is very limited in its scope, aiming just to forbid access to the executive power to a particular category on citizens and not its political participation.

However, what is common to all the three experiences is that none of these safeguard instruments has played a significant role in the country's politics and social life. But despite this, did the safeguard instruments have really compressed fundamental rights and freedoms? The answer should be negative. Surely the fact that they have been scarcely enforced contributes to this answer, but it is not really relevant. What is relevant is whether or not their enforcement may constitute an excessive infringement of fundamental rights and freedom. Again, the answer should be negative. And for various reasons.

First of all, both the Constitutions and the legislative provisions are written in a quite clear language, with then a very narrow space for interpretation. Second, the compression they cause to other fundamental rights and freedoms is limited to the minimum, following the principle of proportionality. Therefore the compression of the fundamental freedoms is performed in compliance with very strict criteria set by the Constitutions themselves. Third, all three legal systems provide for a Constitutional/Supreme Court, meaning that, when concerning legislative provisions, there is always the guarantee by the review of the legislation

carried out by the Constitutional/Supreme Court. The Italian Constitutional Court was addressed several times with respect to the Scelba Law – in particular for the crime offense of apology of Fascism – and also to the provisions of the Criminal Code which were limiting the freedom of expression and that the Court stroke down. The same goes for the German BVerG, which delivered a handful of decisions on the constitutionality of extremist political parties. On this point Japan cannot properly be compared to Germany and Italy, lacking analogous provisions; however, when considering the sensitive issue of the textbook screening mechanism, jeopardizing the academic/education freedom, the Supreme Court showed a quite timid approach, preferring to side with the official (revisionist) ideology; and that was surely not a surprise.

Moreover, the Japanese experience presents considerable disparities with respect to the German and Italian ones particularly when considering the normalization period and the textbook issue. In Japan the textbook mechanism, strictly linked to the difficult acceptance of the past, is not an instrument of militant democracy but an instrument of censorship and revisionism. Therefore, with respect to the totalitarian past, the less militant democracy among the three here examined shows the highest degree of censorship towards it and of compression of fundamental rights and freedoms.

The systemic roots of these disparities can be traced to the settlement of the post-war period and in particular to the occupation years. This did not concern Italy, not formally occupied by the Allied Troops due to the particular evolution of the Italian alignment in the last two war years. The Resistance Fighting of the years 1943-1945 against the Nazi-Fascist troops was the founding moment of the new democratic order, at that time still *in fieri* and the de-fascistization started in these very years. On the contrary, when considering Germany and Japan, the core difference was the survival of the Japanese bureaucracy, and even of many political leaders, from the pre-war era, who continued to be the ruling class of the country. The SCAP was well aware, despite the objections of the Soviet Union, of the need to preserve the imperial institution, thus depriving Emperor Hirohito of his war responsibilities. On the other hand, German political leaders and institutions were more systematically purged after the war. The main consequence is that the nationalist rhetoric in Japan could survive the war, becoming one of the pillars of



the LDP ideology.

To conclude, with respect to the initial question on whether or not to a higher degree of militancy corresponds automatically to a broader compression of rights and freedoms, the comparative analysis leads answer that it is not possible to trace a proportional relation between militancy and compression. In fact, it is Japan, the less militant democracy among the three, that shows the highest degree of censorship towards its past and therefore, of compression of fundamental rights and freedoms.

